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# MARYLAND DIGEST

## ANNOTATED

COVERING ALL REPORTED AND MANY UNREPORTED  
DECISIONS

FROM

1 HARRIS AND McHENRY TO 121 MARYLAND  
(122 and 123 Md. in part—see Preface, Vol. 1.)

UNDER THE AMERICAN DIGEST CLASSIFICATION

A KEY-NUMBERED INDEX TO ALL  
OF THE CASE LAW OF THE APPELLATE  
COURTS OF THE UNITED STATES

J. MERCER GARNETT and SAMUEL WANT,  
Editors.

D. LIST WARNER,  
Associate Editor.

VOLUME 4.

DRAINS—FALSE PLEADING

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## ABBREVIATIONS USED IN THIS DIGEST.

### MARYLAND REPORTS.

H. & McH.....	Harris & McHenry.
H. & J.....	Harris & Johnson.
H. & G.....	Harris & Gill.
G. & J.....	Gill & Johnson.
Gill.....	Gill.
Bland.....	Bland's Chancery Decisions.
Md. Ch.....	Maryland Chancery Decisions.
Md.....	Maryland Reports.

### OTHER ABBREVIATIONS.

Am. Dec.....	American Decisions.
Am. Rep.....	American Reports.
Am. St. Rep.....	American State Reports.
Ann. Cas. ....	American, or American and English, Annotated Cases.
Atl.....	Atlantic Reporter.
B. R. C.....	British Ruling Cases.
L. R. A.....	Lawyers Reports Annotated.
L. R. A. (N. S.).....	Lawyers Reports Annotated, New Series.

## LIST OF TITLES IN THIS VOLUME.

(Main titles are in large type; cross-reference titles in italics.)

<b>DRAINS.</b>	<b>ELECTION OF REME-</b>	<i>Entire Contracts.</i>
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<i>Driver.</i>	<i>Electric Wires.</i>	<i>Equality.</i>
<i>Driving Wheels.</i>	<i>Electrocution.</i>	<i>Equalization.</i>
<i>Drover's Pass.</i>	<i>Electrolysis.</i>	<i>Equal Protection of the Laws.</i>
<b>DRUGGISTS.</b>	<i>Eleemosynary Corporation.</i>	<i>Equipment.</i>
<i>Drugs.</i>	<i>Elegit.</i>	<i>Equitable Assets.</i>
<i>Drummers.</i>	<i>Elevated Railroads.</i>	<i>Equitable Assignments.</i>
<i>Drums.</i>	<i>Elevators.</i>	<i>Equitable Attachments.</i>
<b>DRUNKARDS.</b>	<i>Eligibility.</i>	<i>Equitable Bail.</i>
<i>Drunkenness.</i>	<i>Elisors.</i>	<i>Equitable Conversion.</i>
<i>Dry Docks.</i>	<i>Elopement.</i>	<i>Equitable Defenses.</i>
<i>Dry Trust.</i>	<i>Emancipation.</i>	<i>Equitable Ejectment.</i>
<i>Ducks.</i>	<i>Embankments.</i>	<i>Equitable Estates.</i>
<i>Duebills.</i>	<i>Embargo.</i>	<i>Equitable Estoppel.</i>
<i>Due Course of Business.</i>	<b>EMBEZZLEMENT.</b>	<i>Equitable Execution.</i>
<i>Due Course of Law.</i>	<i>Emblems.</i>	<i>Equitable Garnishment.</i>
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<i>Dwelling House.</i>	<i>Employees.</i>	<i>Erosion.</i>
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<i>Dying Declarations.</i>	<i>Employment Agencies.</i>	<i>Errors in Extremis.</i>
<i>Dying Without Issue.</i>	<i>Enactment.</i>	<i>Error, Writ of.</i>
<i>Dynamite.</i>	<i>Encroachment.</i>	<b>ESCAPE.</b>
<i>Earmarking.</i>	<i>En Declaration de Simula-</i>	<b>ESCHEAT.</b>
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<i>Eavesdropping.</i>	<i>English Language.</i>	<b>ESTOPPEL.</b>
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<b>EJECTMENT.</b>	<i>Entail.</i>	<i>Examiners.</i>
<i>Ejusdem Generis.</i>	<i>Entertainment.</i>	<i>Excavations.</i>
<i>Election.</i>	<i>Enticement.</i>	<i>Exceptions.</i>



**EXCEPTIONS, BILL OF.***Excessive Bail.**Excessive Damages.**Excessive Fines.**Excessive Force.**Excessive Punishment.**Excessive Taxation.**Exchange.**Exchange Brokers.***EXCHANGE OF PROPERTY.****EXCHANGES.***Excise.**Excise Commissioners.**Excitement.**Exclamations.**Exclusion.**Exclusion Acts.**Exclusive Franchises.**Exclusive Jurisdiction.**Exclusive Privileges.**Exclusive Remedies.**Exculpatory Statements.**Excursions.**Excursion Tickets.**Excusable Homicide.**Excuse.**Executed Remainders.**Executed Trusts.***EXECUTION.***Executive Department.**Executive Power.***EXECUTORS AND ADMINISTRATORS.***Executors De Son Tort.**Executory Contracts.**Executory Devises.**Executory Estates.**Executory Process.**Executory Remainders.**Executory Trusts.**Exemplary Damages.**Exemplifications.***EXEMPTIONS.***Exercitor Maris.**Exhaust Fans.**Exhibitions.**Exhibits.**Exhumation.**Ex Officio.**Exoneration.**Ex Parte Proceedings.**Expatriation.**Expectancy.**Expenditures.**Expenses.**Experiments.**Experts.**Expert Testimony.**Expiration.***EXPLOSIVES.***Exports.**Expositions.**Ex Post Facto Laws.**Exposure.**Exposure for Sale.**Express Companies.**Express Conditions.**Express Consideration.**Express Contracts.**Express Covenants.**Expressio Unius Est Exclusio Alterius.**Express Malice.**Expressmen.**Express Messengers.**Express Trusts.**Express Wagons.**Express Warranty.**Expropriation.**Expulsion.**Extended Insurance.**Extension.**Extent.**External Injuries.**External, Violent, and Accidental Means.**Extinguishment.***EXTORTION.***Extra Allowance.**Extra Compensation.***EXTRADITION.***Extra Dotal Property.**Extra Hazardous.**Extra Judicial.**Extralateral Rights.**Extraordinary Care and Diligence.**Extraordinary Motions.**Extraordinary Remedies.**Extraordinary Risks.**Extraterritorial.**Extra Work.**Extreme Cruelty.**Extrinsic Evidence.**Fabricated Evidence.**Fabrics.**Face.**Facilities.**Fac Simile.**Fact.**Factories.**Factorizing Process.***FACTORS.***Faculty.**Failure.**Failure of Consideration.**Failure of Evidence.**Failure of Issue.**Failure of Title.**Fair Criticism.**Fair Grounds.**Fairs.**Fair Use.**Faith and Credit.**False Certificate.***FALSE IMPRISONMENT.***False Issue.***FALSE PERSONATION.***False Pleading.*

## DRAINS.\*

*Scope-Note.*

[INCLUDES channels and other works constructed by public authority for drainage of swamp or low lands; nature and scope of power to establish and maintain such works; constitutional and statutory provisions relating thereto; creation of drainage districts, and appointment, rights, powers, duties, and liabilities of drainage boards, officers, etc.; and construction and maintenance of such works, and taxes and local assessments therefor.

[EXCLUDES drains, sewers, etc., in incorporated cities, etc. (see "*Municipal Corporations*") ; rights and liabilities of owners of land in respect of surface or subterranean waters in general (see "*Waters and Water Courses*") ; and private rights of drainage through others' lands (see "*Waters and Water Courses*") ; and exercise of power of eminent domain (see "*Eminent Domain*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Establishment and Maintenance.**

- § 1. Right to establish and maintain in general.
- § 2. Constitutional and statutory provisions.
- § 3. Purposes for which drains may be established.
- § 4. — In general.
- § 5. — Improvement of land.
- § 6. — Promotion of public health or welfare.
- § 7. Establishment by public authorities.
- § 8. — By state.
- § 9. — By counties or other local authorities.
- § 10. — Contribution to expenses.
- § 11. — Appropriation of money.
- § 12. Drainage and reclamation districts and commissions.
- § 13. — Nature, creation, and incidents in general.
- § 14. — Proceedings for organization.
- § 15. — Territorial extent, and annexation or inclusion of land.
- § 16. — Dissolution or other termination.
- § 17. — Commissioners and other officers.
- § 18. — Powers and proceedings in general.
- § 19. — Rights and liabilities in general.
- § 20. — Actions.
- § 21. Drainage companies.
- § 22. Establishment by landowners over lands of others.
- § 23. Establishment by agreement of landowners.
- § 24. Proceedings for establishment.
- § 25. — In general.
- § 26. — Jurisdiction.
- § 27. — Parties.
- § 28. — Petition for drain.

\*Annotation: Words and Phrases, same title.

**I. Establishment and Maintenance—Continued.**

- § 29. — Bond.
- § 30. — Notice.
- § 31. — Remonstrances or answers to petition.
- § 32. — Appointment, proceedings, and report of commissioners, or viewers.
- § 33. — Remonstrances or objections to report of commissioners or viewers.
- § 34. — Hearing and determination of questions.
- § 35. — Decisions and record.
- § 36. — Appeal.
- § 37. — Review on certiorari.
- § 38. — Costs and expenses of proceedings.
- § 38½. Actions to set aside proceedings.
- § 39. Collateral attack on proceedings.
- § 40. Restraining construction.
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- § 45. Right of way and other interests in land.
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- § 47. — In general.
- § 48. — Allotment of work among landowners.
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- § 50. Improvement, extension, or alteration.
- § 51. Maintenance, cleaning, and repair.
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- § 54. — Contracts.
- § 55. Construction and maintenance of bridges and crossings.
- § 56. Damages from construction or maintenance.
- § 57. — In general.
- § 58. — Deduction or set-off of benefits.
- § 59. Liabilities of district or landowners for expenses or damages.
- § 60. — In general.
- § 61. — Apportionment.
- § 62. Use of drain.
- § 63. Injuries from defects or obstructions.
- § 64. Offenses incident to construction, maintenance, or use.
- § 65. Vacation or abandonment of drains.

**II. Assessments and Special Taxes.**

- § 66. Power to levy in general.
- § 67. Constitutional and statutory provisions.
- § 68. Purposes of levy or assessment.
- § 69. Amount of tax or assessment.
- § 70. Property liable.
- § 71. Benefit to property.

**II. Assessments and Special Taxes—Continued.**

- § 72. Classification of property.
- § 73. Grounds of objection.
- § 74. Estoppel or waiver as to objections.
- § 75. Levy of tax.
- § 76. Proceedings for assessment.
- § 77. Mode of assessment.
- § 78. — In general.
- § 79. — Apportionment of benefits and expenses.
- § 80. Certificate for work done against specific property.
- § 81. Proceedings to confirm or establish validity.
- § 82. Review, correction, or setting aside of assessment.
- § 83. Reassessment or additional assessment.
- § 84. Lien.
- § 85. Payment, and recovery of assessment paid.
- § 86. Penalties for nonpayment.
- § 87. Collection and enforcement.
- § 88. — In general.
- § 89. — Summary remedies.
- § 90. — Actions.
- § 91. — Remedies for wrongful enforcement.

*Cross-References.*

- |   |  |
|---|--|
| <p>Abatement of drain as nuisance, see "Nuisance," § 19.</p> <p>Appellate jurisdiction of order annexing land to drainage district, see "Courts," § 219.</p> <p>Condemnation of property for drainage purposes, as taking for public use, see "Eminent Domain," § 31.</p> <p>Constitutionality of statutes, delegation of legislative power, see "Constitutional Law," § 61.</p> <p>Constitutionality of statutes, due process of law, see "Constitutional Law," §§ 289, 290.</p> <p>Constitutionality of statute imposing on court duty of making assessment, see "Constitutional Law," § 74.</p> <p>Constitutionality of statute providing for review of order confirming report of commissioners, see "Constitutional Law," § 190.</p> <p>Constitutionality of statute requiring county surveyors to reallocate county drains, imposing judicial functions, see "Constitutional Law," § 80.</p> <p>Constitutionality of statutes, subjects and titles of acts, see "Statutes," §§ 115, 119, 120, 123.</p> <p>Construction and validity of statutory provisions in general, see "Statutes," §§ 42, 61, 64, 74, 115, 119, 120, 123, 159.</p> <p>Construction of drainage canal to improve Chicago river, see "Navigable Waters," § 7.</p> <p>Delegation of power to tax, see "Taxation," § 28.</p> <p>Drainage bonds as obligation of county, see "Counties," § 133.</p> | <p>Drainage improvements as taking private property for public use without just compensation, see "Eminent Domain," § 2.</p> <p>Drainage of highways, see "Highways," § 120.</p> <p>Draining mill ponds, see "Waters and Water Courses," § 169.</p> <p>Exemption of drainage commissioners from requirement of security on appeal, see "Appeal and Error," § 374.</p> <p>Exemption of drainage district from taxation, see "Taxation," § 213.</p> <p>Improvement of drain as within constitutional prohibition against internal improvement by state, see "States," § 86.</p> <p>In cities, assessments for improvements, see "Municipal Corporations," § 417.</p> <p>In cities, damages to abutting owners from improvements, see "Municipal Corporations," § 388.</p> <p>In cities, department of, see "Municipal Corporations," § 204.</p> <p>In cities, injuries from defects or obstructions, see "Municipal Corporations," §§ 827-846.</p> <p>In cities, power of municipality to make improvements, see "Municipal Corporations," § 270.</p> <p>In cities, use and regulation, see "Municipal Corporations," §§ 708-715.</p> <p>Issue of bonds by counties for establishment of, see "Counties," § 174.</p> <p>Legislative control of municipal acts, see "Municipal Corporations," § 70.</p> |
|---|--|

Liability of Chicago sanitary district for damages resulting from improvement of Chicago river, see "Navigable Waters," § 8.  
 Liability of township for torts of drain commissioners, see "Towns," § 45.  
 Limitation of actions on county warrants on "ditch fund," see "Limitation of Actions," § 48.  
 Mandamus to compel hearing of appeal from classification of lands for drainage purposes, see "Mandamus," § 96.  
 Mandamus to compel removal of bridge for purposes of drain, see "Mandamus," § 90.

Mandamus to drainage trustees, see "Mandamus," § 81.

Private rights as to drainage of surface waters, see "Waters and Water Courses," §§ 119, 150.

Qualification of voters on proposition for establishment of drainage district, see "Elections," § 18.

Right to trial by jury in drainage proceedings, see "Jury," §§ 28, 31, 33.

Sanitary district for improvement of Chicago river, see "Navigable Waters," § 7.

#### NOTE.

No cases touching this subject are to be found in the Maryland Reports. Nevertheless, the titles and sub-titles are given as they appear in the American Digest Key Number classification, so that the investigator may ascertain the particular place in the American Digest System where all state and federal cases upon his point will be found collected.

References to valuable notes in the L. R. A. and cross-references will also be found throughout the title.

### I. ESTABLISHMENT AND MAINTENANCE.

#### § 1. Right to establish and maintain in general.

##### *Cross-Reference.*

See "Canals," § 3.

#### § 2. Constitutional and statutory provisions.

##### *Cross-References.*

Delegation of legislative power to judiciary to establish ditches, see "Constitutional Law," § 61.

Effect of partial invalidity of statute, see "Statutes," § 64.

Implied repeal of act by inconsistent act, see "Statutes," § 159.

Persons entitled to question constitutionality of drainage act, see "Constitutional Law," § 42.

Setting forth provisions of act as amended, see "Statutes," § 141.

Statute providing for finding of Superior Court that system of drainage is practicable as delegation of legislative authority, see "Constitutional Law," § 61.

Statute requiring jury to ascertain damages and benefits, as imposing on the court and jury the duty of making assessment, see "Constitutional Law," § 74.

Subject and title of act, see "Statutes," §§ 115, 119, 120, 123.

##### *Annotation.*

Constitutionality of statute prescribing property qualification on right to vote on establishment of drainage district.—44 L. R. A. (N. S.) 539, note.

#### §§ 3-6. Purposes for which drains may be established.

#### §§ 7-11. Establishment by public authorities.

##### *Annotation.*

Municipality's right and duty to provide drain or sewer.—61 L. R. A. 673, note.

#### §§ 12-20. Drainage and reclamation districts and commissions.

##### *Cross-References.*

Constitution of jury as denial or infringement of right to jury trial, see "Jury," § 33.

Limitation of actions, see "Limitation of Actions," §§ 48, 145.

Mandamus of county authorities to compel removal of bridges, see "Mandamus," § 90.

Mandamus to compel hearing of appeal from classification of lands to drainage district, see "Mandamus," § 96.

Procedure as denial or infringement of right to jury trial, see "Jury," § 31.

Restraining commissioners of district from exercising jurisdiction over certain land claimed to have been illegally annexed to district, see "Injunction," § 74.

##### *Annotation.*

Institution of drainage proceedings by organization of drainage district.—60 L. R. A. 169, note.

Proceedings for incorporation of drainage district as a civil suit within statute allowing change of venue.—12 L. R. A. (N. S.) 900, note.

Right of woman to be commissioner of sewers.—38 L. R. A. 211, note.

#### § 21. Drainage companies.

#### § 22. Establishment by landowners over lands of others.

**§ 23. Establishment by agreement of landowners.**

**§§ 24-38. Proceedings for establishment.**

*Cross-References.*

- Conclusiveness of allegations, see "Pleading," § 36.  
 Deprivation of property without due process of law, see "Constitutional Law," §§ 289, 290.  
 Pleading in proceedings for equitable relief, see "Judgment," § 460.  
 Right to trial by jury, see "Jury," §§ 19, 28.  
 Validity of retrospective laws providing for review of order confirming report of commissioners, see "Constitutional law," § 190.

*Appeal.*

- Appealability of order certifying proceedings back to county board dependent on finality of decision, see "Appeal and Error," § 83.  
 Courts invested with appellate jurisdiction, see "Courts," § 220.  
 Review of decision in drainage proceedings as dependent on finality, see "Appeal and Error," § 77.  
 Right to jury trial on appeal, see "Jury," § 17.  
 Under statutes authorizing appeals from orders affecting substantial rights, see "Appeal and Error," § 91.

*Annotation.*

- Procedure for establishment of drains and sewers.—60 L. R. A. 161, note.  
 Jurisdiction over proceedings to establish drains and sewers.—60 L. R. A. 172, note.

**§§ 38½-41. (See Analysis.)**

**§§ 42-44. Mode and plan of construction.**

*Annotation.*

- Plans and specifications for drains and sewers.—60 L. R. A. 176, note.

**§ 45. Right of way and other interests in lands.**

*Annotation.*

- Acquisition of right of way for drains.—60 L. R. A. 195, note.

**§§ 46-49. Construction.**

*Cross-Reference.*

- Mandamus by bidder to compel letting, see "Mandamus," § 3.

**§ 50. Improvement, extension, or alteration.**

**§§ 51-54. Maintenance, cleaning, and repair.**

*Cross-Reference.*

- Statute requiring county surveyors to re-allot county drains as imposing judicial

functions, see "Constitutional Law," § 80.

*Annotation.*

- Maintenance of drainage ditches.—69 L. R. A. 806, note.

**§ 55. Construction and maintenance of bridges and crossings.**

*Annotation.*

- Duty as to highway crossed by ditch constructed by drainage district.—43 L. R. A. (N. S.) 695, note.  
 Duty of railroad to construct bridges at its own expense over public drainage ditches.—31 L. R. A. (N. S.) 1118, note.

**§§ 56-58. Damages from construction or maintenance.**

**§§ 59-61. Liabilities of district or landowners for expenses or damages.**

*Annotation.*

- Liability of drainage district for flooding land.—19 L. R. A. (N. S.) 991, note.  
 Liability of drainage district for expenses of drainage.—58 L. R. A. 372, note.

**§ 62. Use of drain.**

**§ 63. Injuries from defects or obstructions.**

*Cross-References.*

- Negating contributory negligence, see "Negligence," § 113.  
 Reduction of loss, see "Damages," § 62.

**§ 64. Offenses incident to construction, maintenance, or use.**

**§ 65. Vacation or abandonment of drains.**

*Annotation.*

- Abandonment of drain.—60 L. R. A. 249, note.

**II. ASSESSMENTS AND SPECIAL TAXES.**

*Cross-References.*

- Appellate jurisdiction of cases involving revenue, see "Courts," §§ 219, 231.  
 Constitutionality of statute, taking property, without just compensation, see "Eminent Domain," § 2.  
 Interest on judgment for assessment, see "Interest," § 22.  
 Liabilities as between parties to sale of land, see "Vendor and Purchaser," § 198.  
 Purchase of land by state at tax sale, see "Taxation," § 679.  
 - Right of mortgagee paying assessment to protect his security, see "Mortgages," § 200.

**§ 66. Power to levy in general.**



## § 67. Constitutional and statutory provisions.

### *Cross-References.*

Constitutionality of statute, equal protection of laws, see "Constitutional Law," § 233.

Repeal of act relating to power of drainage districts to incur liability, see "Statutes," § 153.

## § 68. Purposes of levy or assessment.

## § 69. Amount of tax or assessment.

## § 70. Property liable.

### *Annotation.*

Property liable for assessment for construction of drains.—26 L. R. A. (N. S.) 973, note.

Liability of railroad property to assessment for drains.—L. R. A. 1915A, 129, note.

Persons and property liable for assessments for drains and sewers.—58 L. R. A. 353, note.

## §§ 71-76. (See Analysis.)

## §§ 77-79. Mode of assessment.

### *Annotation.*

The rule that assessment depends on benefit.—58 L. R. A. 358, note.

## § 80. Certificate for work done against specific property.

## § 81. Proceedings to confirm or establish validity.

### *Cross-Reference.*

Pleading consular privilege in proceedings to establish validity of drain assessment, see "Ambassadors and Consuls," § 3.

## § 82. Review, correction, or setting aside of assessment.

### *Cross-References.*

Appellate jurisdiction in general, see "Courts," §§ 219, 220.

Effect to be given to part of statute included in brackets, see "Statutes," § 188.

Jurisdiction of equity to relieve landowner from fraudulent conduct of drain commissioner, see "Equity," § 12.

### *Annotation.*

Contesting assessment for drains and sewers.—60 L. R. A. 241, note.

## § 83. Reassessment or additional assessment.

## § 84. Lien.

## § 85. Payment, and recovery of assessment paid.

## § 86. Penalties for nonpayment.

## §§ 87-91. Collection and enforcement.

### *Cross-References.*

Limitation of actions, see "Limitation of Actions," § 58.

Purchase of land by state at tax sale, see "Taxation," § 679.

## DRAMA.\*

### *Cross-Reference.*

See "Theaters and Shows."

## DRAMATIC COMPOSITIONS.\*

### *Cross-References.*

As literary property in general, see "Literary Property."

Infringement of copyright, see "Copyrights," § 65.

Subjects of copyright, see "Copyrights," § 7.

## DRAMSHOP.\*

### *Cross-Reference.*

See "Intoxicating Liquors."

## DRAWBACK.\*

### *Cross-Reference.*

See "Customs Duties," § 100.

## DRAWBAR.

### *Cross-References.*

Defective drawbar as cause of injury to servant, see "Master and Servant," § 111.

Equipment of railroad trains, see "Railroads," § 229.

## DRAWBRIDGES.\*

### *Cross-References.*

Construction and operation in general, see "Navigable Waters," § 20.

Injuries from construction or operation, see "Bridges," §§ 34-46; "Navigable Waters," § 20.

## DRAWHEAD.

### *Cross-Reference.*

Defective equipment of railroad cars causing injury to servant, see "Master and Servant," § 111.

## DRAWING JURORS.

### *Cross-Reference.*

See "Jury," §§ 79-81.

## DRAWINGS.\*

### *Cross-References.*

Accompanying application for patent, see "Patents," §§ 100, 167.

Of invention as reduction to practice, see "Patents," § 90.

## DREDGES.\*

### *Cross-References.*

As vessel subject to maritime liens, see "Maritime Liens," § 3.

As vessel within act giving lien to seamen, see "Seamen," § 2.

\*Annotation: Words and Phrases, same title.

As vessels within acts giving liens for supplies and advances, see "Maritime Liens," § 19.

### DRIVER.\*

#### *Cross-Reference.*

Of imputation of driver's negligence to other persons in vehicle, see "Negligence," §§ 92, 93.

### DRIVING WHEELS.

#### *Cross-Reference.*

Equipment of railroad trains, see "Railroads," § 229.

### DROVER'S PASS.\*

#### *Cross-Reference.*

Holder as passenger, see "Carriers," § 242.

## DRUGGISTS.\*

### *Scope-Note.*

[INCLUDES regulation of the manufacture, dispensing, and sale of medicines and other drugs by apothecaries or others, and liability for injuries from negligence therein.

[EXCLUDES regulation of manufacture and sale of intoxicants (see "Intoxicating Liquors") or poisons (see "Poisons"), and offense of adulterating drugs (see "Adulteration").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

- § 1. Power to regulate.
- § 2. Statutory and municipal regulation.
- § 3. Registration, certificate, or license.
- § 4. Privilege or occupation taxes.
- § 5. Conduct of business.
- § 6. Validity of contracts.
- § 7. Liabilities to persons purchasing or using articles sold or dispensed.
- § 8. — In general.
- § 9. — Negligence.
- § 10. Actions for damages.
- § 11. Penalties and actions therefor.
- § 12. Criminal prosecutions.

### *Cross-References.*

Adulteration of drugs as public offense, see "Adulteration."

Appointment of state board of pharmacy, see "States," § 46.

Conversion of prescriptions, see "Trover and Conversion," § 23.

License taxes, constitutionality and validity of acts and ordinances, see "Licenses," § 7.

License taxes, injunction to compel rejection of application, see "Injunction," § 75.

Limitation on right to engage in business as grant of special or exclusive privileges, see "Constitutional Law," § 205.

Privileged communications, see "Witnesses," § 208.

Prohibition of intoxicating ingredients in medicinal preparations, see "Intoxicating Liquors," § 136.

Regulations as denial of equal protection of law, see "Constitutional Law," § 238.

Regulations as deprivation of property without due process of law, see "Constitutional Law," § 296.

Regulations as interfering with freedom of contract, see "Constitutional Law," § 89.

Regulations as to liquor traffic, see "Intoxicating Liquors," § 126.

Regulations as to liquor traffic, breach of bond as liquor dealer, see "Intoxicating Liquors," § 86.

Regulations as to liquor traffic, discretion in granting permit to sell liquors, see "Intoxicating Liquors," § 69.

Regulations as to liquor traffic, effect of adoption of local option, see "Intoxicating Liquors," § 40.

Regulations as to liquor traffic, eligibility for license to sell liquor, see "Intoxicating Liquors," § 58.

\*Annotation: Words and Phrases, same title.

Regulations as to liquor traffic, liability for penalty for violations of liquor laws, see "Intoxicating Liquors," § 182.  
 Regulations as to liquor traffic, sales without license, see "Intoxicating Liquors," § 152.  
 Regulations of manufacture and sale of explosive, see "Explosives."  
 Regulations of manufacture and sale of poisons, see "Poisons."  
 Stamp tax on proprietary preparations, see "Internal Revenue," § 20.

Statutory provisions relating to druggists, partial invalidity, see "Statutes," § 64.  
 Statutory provisions relating to druggists, subjects and titles, see "Statutes," § 114.  
 Statutory provisions relating to druggists, time of taking effect, see "Statutes," § 257.  
 Treasurer of commission of pharmacy as public officer, see "Officers," § 1.  
 Violation of Sunday laws, see "Sunday," § 5.

## NOTE.

No cases touching this subject are to be found in the Maryland Reports. Nevertheless, the titles and sub-titles are given as they appear in the American Digest Key Number classification, so that the investigator may ascertain the particular place in the American Digest System where all state and federal cases upon his point will be found collected.

References to valuable notes in the L. R. A. and cross-references will also be found throughout the title.

## § 1. Power to regulate.

*Cross-Reference.*

Delegation of legislative power to board of pharmacy, see "Constitutional Law," § 62.

## § 2. Statutory and municipal regulation.

*Cross-References.*

As denial of equal protection of law, see "Constitutional Law," § 238.  
 As deprivation of property without due process of law, see "Constitutional Law," § 296.  
 As grant of special or exclusive privileges, see "Constitutional Law," § 205.  
 As interfering with freedom of contract, see "Constitutional Law," § 89.  
 Constitutionality and validity of license laws, see "Licenses," § 7.  
 Construction of statute as to time of taking effect, see "Statutes," § 257.  
 Effect of partial invalidity of statute, see "Statutes," § 64.  
 Subject and title of acts, see "Statutes," § 114.

*Annotation.*

Validity of classification in Sunday law, as to keeping drug store open.—14 L. R. A. (N. S.) 1259, note.  
 Private action for violation of statutes regulating sales of drugs.—9 L. R. A. (N. S.) 382, note.  
 What are medicines, drugs, or poisons within the meaning of statutes regulating pharmacists.—26 L. R. A. (N. S.) 1013, note.  
 Construction and effect of statute prohibiting or regulating sale of poisons.—30 L. R. A. (N. S.) 519, note.

## § 3. Registration, certificate, or license.

*Cross-References.*

Constitutionality and validity of acts and ordinances imposing license taxes, see "Licenses," § 7.

Injunction to compel rejection of application, see "Injunction," § 75.  
 Treasurer of commission of pharmacy as public officer, see "Officers," § 1.

*Annotation.*

Right of physician to sell drugs without a prescription.—46 L. R. A. (N. S.) 1, note.  
 Right of unlicensed druggists to recover for services rendered by licensed one.—2 L. R. A. (N. S.) 392, note.

## § 4. Privilege or occupation taxes.

## § 5. Conduct of business.

## § 6. Validity of contracts.

## §§ 7-9. Liabilities to persons purchasing or using articles sold or dispensed.

*Cross-References.*

Negligence of medical student recommending certain drug in not examining same imputable to purchaser, see "Negligence," § 89.  
 Statutory actions for causing death, see "Death," §§ 16, 17.

*Annotation.*

Duty of druggist or apothecary in the sale or compounding of drugs or medicines.—29 L. R. A. (N. S.) 900; 47 L. R. A. (N. S.) 693, notes.  
 Liability of druggist for injury to stranger from drug or poison sold by him.—1 L. R. A. (N. S.) 1178; 13 L. R. A. (N. S.) 646, notes.  
 Liability of vendor of drugs for negligence.—21 L. R. A. 139, note.  
 Does fact that a drug clerk is a licensed pharmacist relieve his employer from liability for his negligence or lack of skill.—39 L. R. A. (N. S.) 275, note.  
 Wife's right of action at common law against one selling drugs to husband.—40 L. R. A. (N. S.) 360, note.

**§ 10. Actions for damages.***Cross-References.*

For sale of poisons, see "Poisons," § 6.  
Jurisdiction of municipal courts, see "Courts," § 188.

**§ 11. Penalties and actions therefor.***Cross-Reference.*

Right to jury trial, see "Jury," § 18.

**§ 12. Criminal prosecutions.***Cross-References.*

Acts constituting assault and battery, see "Assault and Battery," § 48.  
Appellate jurisdiction, see "Criminal Law," § 1018.  
Best and secondary evidence, see "Criminal Law," § 400.  
Evidence of venue, see "Criminal Law," § 564.  
Harmless error, see "Criminal Law," § 1169.  
Indictment, negating exceptions in statutes, see "Indictment and Information," § 111.

Review of discretion of court, see "Criminal Law," § 1156.  
Right of prosecution to review, see "Criminal Law," § 1024.

**DRUGS.\****Cross-References.*

See "Druggists."  
Use of as affecting testamentary capacity, see "Wills," § 43.

**DRUMMERS.\****Cross-References.*

See "Hawkers and Peddlers"; "Principal and Agent."  
Employment of, see "Master and Servant," §§ 1-84.  
Liability of traveling salesman for illegal sale of food, see "Food," §§ 14, 21.  
License taxes, see "Licenses," § 15.

**DRUMS.***Cross-Reference.*

Beating in streets, see "Municipal Corporations," § 703.

**DRUNKARDS.\****Scope-Note.*

[INCLUDES persons affected by intoxication not merely temporary in its effects; their rights and disabilities in general; custody and protection of their persons and property, and legal proceedings affecting them; and the offense of drunkenness, either habitual or occasional.

[EXCLUDES disability from temporary intoxication (see "Contracts"; "Deeds"; "Criminal Law"; and other specific heads); testamentary capacity (see "Wills"); sale, etc., of liquors to drunkards or intoxicated persons (see "Intoxicating Liquors"); asylums for inebriates (see "Asylums"); and divorce for drunkenness (see "Divorce").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Jurisdiction of courts.
- § 2. Inquisitions.
- § 3. Guardians or committees.
- § 4. Custody, treatment, and support.
- § 5. Property and conveyances.
- § 6. Contracts.
- § 7. Torts.
- § 8. Actions.
- § 9. Criminal drunkenness.
- § 10. — Offenses.
- § 11. — Prosecution and punishment.

*Cross-References.*

Act providing for the sending of inebriates to an institution for treatment on petition of freeholders as delegation of legislative power, see "Constitutional Law," § 60.

Act relating to dipsomania as providing for unlawful restraint on liberty, see "Constitutional Law," § 83.  
Burden of proof of incapacity to commit crime, see "Criminal Law," § 330.

\*Annotation: Words and Phrases, same title.

Care required of carrier as to intoxicated passenger, see "Carriers," §§ 281, 326.  
 Care required of intoxicated person on highway, see "Highways," § 197.  
 Civil liability for sale of liquor to drunkards, see "Intoxicating Liquors," §§ 282-324.  
 Concurrent and conflicting regulation by state and municipality, see "Municipal Corporations," § 592.  
 Constitutionality of statute requiring county to pay expense of treatment of indigent drunkards, see "Paupers," § 2.  
 Construction of statutes with reference to other laws relating to same subject, see "Statutes," § 225.  
 Criminal liability for sale or gift of liquor to drunkards, see "Intoxicating Liquors," § 161.  
 Discharge of jury for intoxication of juror as former jeopardy, see "Criminal Law," § 184.  
 Ejection from trains, see "Carriers," §§ 360, 366.  
 Evidence of condition of drunkenness, see "Evidence," §§ 106, 132.  
 Habitual drunkenness ground for divorce, see "Divorce," § 22.  
 Imputation of crime as slanderous, see "Libel and Slander," § 7.  
 Intoxication as affecting competency of witness, see "Witnesses," § 42.  
 Intoxication as affecting validity of compromise, see "Compromise and Settlement," § 8.  
 Intoxication as affecting validity of contract, see "Contracts," § 92.  
 Intoxication as affecting validity of deed, see "Deeds," § 68.  
 Intoxication as affecting validity of marriage, see "Marriage," § 18.  
 Intoxication as cause of death of insured, see "Insurance," §§ 442, 460.

Intoxication as contributory negligence, see "Negligence," § 88.  
 Intoxication as defense in criminal prosecutions in general, see "Criminal Law," §§ 53-57, 332, 355, 774; "Homicide," §§ 23, 81, 86, 94, 180, 238, 270, 294; "Larceny," § 3; "Robbery," § 14.  
 Intoxication as defense to action for divorce, see "Divorce," § 44.  
 Intoxication as ground for continuance, see "Criminal Law," § 593.  
 Intoxication as ground for removal from office, see "Officers," § 66.  
 Intoxication of arbitrators, see "Arbitration and Award," § 64.  
 Intoxication of attorney ground for new trial, see "Criminal Law," § 920.  
 Intoxication of officers, see "Officers," §§ 120-122.  
 Intoxication of witness, as affecting credibility, see "Witnesses," § 327.  
 Intoxication of witness ground for new trial, see "Criminal Law," § 918.  
 Liability of physician for negligently signing certificate as to inebriety of inebriates, see "Physicians and Surgeons," § 19.  
 Opinion evidence as to, drunkenness, see "Criminal Law," §§ 457, 465, 485; "Evidence," § 478.  
 Power of city to make regulations respecting drunkenness, see "Municipal Corporations," § 605.  
 Power of city to punish for drunkenness, see "Municipal Corporations," §§ 594, 596.  
 Power of county to incur indebtedness for treatment of inebriates, see "Counties," § 153½.  
 Power to tax for benefit of, see "Taxation," § 38.  
 Ratification of contract, see "Contracts," § 97.  
 Testamentary capacity, see "Wills," § 44.

## § 1. Jurisdiction of courts.

### § 2. Inquisitions.

(a) In proceedings to have a person declared an habitual drunkard, where he appears and dispenses with legal proceedings to establish the facts, and, with the approval of the court, appoints his own committee, as authorized by act 1894, c. 474 (Suppm't Code 1888, art. 16, § 47), his election to dispense with legal proceedings, etc., need not be in writing, signed, and filed as part of the cause, but it is sufficient if his appearance in court and nominating a committee is recited in the decree authorizing the committee to sell his real estate.—*Tome v. Stump*, 89 Md. 264, 42 Atl. 902. (See Code 1911, art. 16, § 51.)

### § 3. Guardians or committees.

### § 4. Custody, treatment, and support.

(a) The provisions of act 1894, c. 274

(Suppm't Code 1888, art. 16, § 47), relating to the treatment of habitual drunkards, that they may be sent, at the expense of the city of Baltimore, to a state institution for treatment in an ex parte proceeding similar to that provided for in the case of insane paupers, is not unconstitutional on the ground that the Legislature has no power to compel the city, without its consent, to tax its citizens for the treatment of habitual drunkards. The subject is one properly within the power of the Legislature to regulate.—*City of Baltimore v. Keeley Institute*, 81 Md. 106, 31 Atl. 437, 27 L. R. A. 646. (See Code 1911, art. 16, § 51.) [Cited and annotated in 7 L. R. A. (N. S.) 1198, on validity of provision for assisting members of certain classes of unfortunate or afflicted persons.]

## § 5. Property and conveyances.

### *Cross-Reference.*

See *ante*, § 2.

(a) Act 1894, c. 474 (Suppm't Code 1888, art. 16, § 47), provides that the proceedings in case of habitual drunkards "shall be like those now authorized by law in cases of persons alleged to be lunatics or insane; and the rules of law and proceedings now applicable to the property of lunatics shall apply to cases of persons 'declared' to be habitual drunkards under the provisions of this section except when herein otherwise directed; and any person who may be alleged to be a habitual drunkard may dispense with the legal proceedings to establish the same, and may, with the approbation of the court wherein said petition may be filed, appoint his own committee." *Held*, to give the court power to decree the sale of lands of an habitual drunkard who has dispensed with legal proceedings and appointed his own committee, as well as where such condition has been "declared."—*Tome v. Stump*, 89 Md. 264, 42 Atl. 902. (See Code 1911, art. 16, § 51.)

(b) A decree ordering the sale, by the committee, of lands belonging to one declared an habitual drunkard, to a certain person, on the terms and conditions set forth in a written verified petition filed by the committee and admitted in a written answer by the intending purchaser, is valid and regular, though not directing any report of the sale or subsequent ratification after notice, as required in sales of property to lunatics, since the petition itself performs the office of a report of sale, and the petition and answer may be taken as a consent to ratification without an order nisi, within Rule 21 of the Circuit Court for Cecil County.—*Tome v. Stump*, 89 Md. 264, 42 Atl. 902. (See Code, art. 16, § 51.)

(c) The better practice, however, would be to embody in the petition a prayer for leave to have the petition filed and accepted as a report of sale, and to incorporate such leave in the order of court, with direction for the usual order nisi.—*Tome v. Stump*, 89 Md. 264, 42 Atl. 902.

## § 6. Contracts.

### *Annotation.*

Validity of contract made with intoxicated person.—54 L. R. A. 440; 25 L. R. A. (N. S.) 596, notes.

How far is contract invalidated by intoxication.—2 L. R. A. (N. S.) 666, note.

## § 7. Torts.

### *Annotation.*

Intoxication as affecting negligence or contributory negligence.—40 L. R. A. 131; 47 L. R. A. (N. S.) 731, notes.

## § 8. Actions.

### *Cross-References.*

Disability affecting limitations, see "Limitation of Actions," § 74.

Sufficiency of proposed defense on motion to vacate judgment, see "Judgment," § 379.

## §§ 9-11. Criminal drunkenness.

### *Cross-References.*

Complaint in summary trials, see "Criminal Law," § 252.

Limitations, see "Criminal Law," § 157.

Materiality of false testimony as affecting liability for perjury, see "Perjury," § 11.

Warrant, see "Criminal Law," § 216.

## DRUNKENNESS.\*

### *Cross-Reference.*

See "Drunkards."

## DRY DOCKS.\*

### *Cross-Reference.*

Taxation of, see "Taxation," § 71.

## DRY TRUST.\*

### *Cross-Reference.*

See "Trusts," § 136.

## DUCKS.\*

### *Cross-Reference.*

As game, see "Game."

## DUEBILLS.

### *Cross-Reference.*

In general, see "Bills and Notes."

## DUE COURSE OF BUSINESS.\*

### *Cross-Reference.*

Negotiation of commercial paper, see "Bills and Notes," § 338.

## DUE COURSE OF LAW.\*

### *Cross-Reference.*

Due process of law, see "Constitutional Law," §§ 251-320.

\*Annotation: Words and Phrases, same title.



## DUELING.\*

*Scope-Note.*

[INCLUDES fighting with weapons by previous agreement or on a previous quarrel; advising or aiding therein; sending, carrying, delivering, or accepting a challenge so to fight; provoking or inducing another to give or accept such challenge, and posting or advertising another for not fighting, or for not sending or accepting a challenge to fight such a duel; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES fighting by agreement without weapons (see "*Prize Fighting*") ; fighting without previous agreement therefor or quarrel (see "*Affray*") ; and killing another in a duel (see "*Homicide*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature and elements of offenses.
- § 2. Defenses.
- § 3. Indictment or information.
- § 4. Evidence.
- § 5. Trial.

*Cross-References.*

Conviction of affray under indictment for challenging, see "Indictment and Information," § 191.

Extent of punishment in general, see "Criminal Law," § 1208.  
Homicide in duel, see "Homicide," § 19.  
Jurisdiction, see "Criminal Law," § 100.

## NOTE.

No cases touching this subject are to be found in the Maryland Reports. Nevertheless, the titles and sub-titles are given as they appear in the American Digest Key Number classification, so that the investigator may ascertain the particular place in the American Digest System where all state and federal cases upon his point will be found collected.

§§ 1-5. (See Analysis.)

*Annotation.*

Cruel or unusual punishment for dueling.—35 L. R. A. 571, note.

Degree of homicide in case of killing in duel.—5 L. R. A. (N. S.) 821, note.

Homicide in the commission of dueling.—63 L. R. A. 377, note.

Solicitation to dueling.—25 L. R. A. 437, note.

**DUE PROCESS OF LAW.\****Cross-Reference.*

See "Constitutional Law," §§ 251-320.

**DUES.\****Cross-References.*

Of members of beneficial association, see "Beneficial Associations," § 13.

Of members of club, see "Clubs," § 7.

Of members of corporations in general, see "Corporations," § 176.

On building and loan association stock, see "Building and Loan Associations," §§ 17-22.

**DUMB PERSONS.***Cross-References.*

Competency as witnesses, see "Witnesses," § 43.

Mode of testifying, see "Witnesses," § 229.

**DUPLICITY.\****Cross-References.*

In indictment as ground for arrest of judgment, see "Criminal Law," § 970.

In indictment or information, see "Indictment and Information," § 125.

In pleading, see "Pleading," §§ 64, 99, 173.

In plea in equity, see "Equity," § 166.

\*Annotation: Words and Phrases, same title.

**DURATION.\****Cross-References.*

- Of contracts, see "Contracts," §§ 215-217.  
 Of customs and usages, see "Customs and Usages," § 4.  
 Of easement, see "Easements," § 25.

**DURESS.\****Cross-References.*

- Admissions made under duress, see "Evidence," § 203.  
 Affecting validity of assignment, see "Assignments," § 64.  
 Affecting validity of bill or note, see "Bills and Notes," § 104.  
 Affecting validity of compromise, see "Compromise and Settlement," § 8.  
 Affecting validity of contract in general, see "Contracts," § 95.  
 Affecting validity of contract limiting liability of carrier, see "Carriers," § 218.  
 Affecting validity of contract of suretyship, see "Principal and Surety," § 43.  
 Affecting validity of deed, see "Deeds," § 71.  
 Affecting validity of deed or mortgage of homestead, see "Homestead," § 118.  
 Affecting validity of guaranty, see "Guaranty," § 20.  
 Affecting validity of lease, see "Landlord and Tenant," § 27.  
 Affecting validity of marriage, see "Marriage," § 35.  
 Affecting validity of mortgage, see "Chatel Mortgages," § 72; "Mortgages," § 79.  
 Affecting validity of release, see "Release," § 18.  
 Affecting validity of release of insurance policy, see "Insurance," § 603.  
 Affecting validity of trust, see "Trusts," § 50.  
 Confessions procured by, see "Criminal Law," § 322.  
 Consent obtained by duress as affecting tortious act, see "Torts," § 17.  
 Consent to sexual intercourse obtained by duress, see "Rape," § 11.  
 Criminal duress, see "Threats."  
 Defense as against bona fide purchaser of bill or note, see "Bills and Notes," § 374.  
 Evidence of in action to collect rent, see "Landlord and Tenant," § 231.  
 Ground for divorce, see "Divorce," § 18.  
 Inducing cancellation of note, see "Bills and Notes," § 438.  
 In securing removal of municipal officer, see "Municipal Corporations," § 159.  
 Limitation of actions for relief on ground of duress, see "Limitation of Actions," § 97.  
 Payment of judgment under duress as waiving right of review, see "Appeal and Error," § 158.  
 Pleading duress as ground for cancellation of instruments, see "Cancellation of Instruments," § 37.  
 Pleading facts or conclusions as to duress, see "Pleading," § 8.

- Recovery of fine extorted by duress, see "Fines," § 19.  
 Recovery of payments made under duress in general, see "Payment," § 87.  
 Urging jury to agree, see "Criminal Law," § 865; "Trial," § 314.

**DUTIES.\****Cross-References.*

- Customs duties, see "Customs Duties."  
 Excise duties, see "Internal Revenue."  
 Imposition of as regulation of commerce, see "Commerce," §§ 76-78.  
 Pleading facts or conclusions, see "Pleading," § 8.

**DUTY IMPOSED BY LAW.\****Cross-Reference.*

- Defined, see "Infants," § 13.

**DWELLING HOUSE.\****Cross-References.*

- Carrying weapons in person's own home, see "Weapons," § 9.  
 Defense of habitation, see "Homicide," §§ 98, 123.  
 Restrictions in deeds, as to character of buildings, see "Deeds," § 171.  
 Shooting into, see "Weapons," § 15.  
 Subject of replevin, see "Replevin," § 4.

**DWELLING PLACE.***Cross-Reference.*

- See "Domicile."

**DYING DECLARATIONS.\****Cross-References.*

- See "Abortion," § 20; "Death," § 62; "Homicide," §§ 200-221.  
 As res gestæ, see "Criminal Law," § 366.  
 Best and secondary evidence of, see "Criminal Law," § 400.  
 Violation of constitutional right, see "Witnesses," § 2.

**DYING WITHOUT ISSUE.\****Cross-Reference.*

- See "Wills," § 545.

**DYNAMITE.\****Cross-References.*

- See "Explosives."  
 Keeping of, prohibited in insurance policy, see "Insurance," § 326.  
 Master's liability for injuries to servant, see "Master and Servant," § 107.  
 Violation of fish laws, see "Fish," § 15.

**EARMARKING.***Cross-References.*

- Deposit of money of another as indemnity, see "Principal and Surety," § 190½.  
 Trust property or its proceeds, see "Trusts," § 358.

\*Annotation: Words and Phrases, same title.

**EARNEST.\****Cross-Reference.*

Payment or tender to bind bargain, see "Frauds, Statute of," §§ 92-96.

**EARNINGS.\****Cross-References.*

Assignment as affected by discharge in bankruptcy, see "Bankruptcy," § 433.

Assignment of future profits or earnings, see "Assignments," §§ 11-15.

Damages for loss, see "Damages," §§ 37, 38, 99, 133, 134.

Exemption from legal process, see "Exemptions," § 48.

Of child, see "Parent and Child," § 5.

Of corporations in general, determination of amount for taxation, see "Taxation," §§ 382, 393.

Of corporations in general, dividends on stock, see "Corporations," §§ 150-160.

Of corporations in general, liability to taxation, see "Taxation," §§ 121, 140, 148, 153, 168.

Of corporations in general, statement for taxation, see "Taxation," § 368.

Of married woman, see "Husband and Wife," §§ 5, 126.

Of railroad companies, application to debts, see "Railroads," § 173.

Of ward, see "Guardian and Ward," § 31.

Supplementary proceedings to reach earnings of debtor, see "Execution," §§ 367, 368.

**EASEMENTS.\****Scope-Note.*

[INCLUDES nature and incidents of privileges of proprietors of real property in lands of others, independent of ownership of the soil; creation thereof by reservation, grant, express or implied, or prescription, and use, transfer, and extinguishment thereof; rights, powers, and liabilities of proprietors of dominant and servient estates; and remedies relating thereto.

[EXCLUDES mutual rights, duties, and liabilities of proprietors of adjoining lands in general (see "Adjoining Landowners"); public easements (see "Dedication"; "Highways"; "Navigable Waters"); easements affecting particular species of property (see "Mines and Minerals"; "Party Walls"; "Waters and Water Courses"; and other specific heads).

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Creation, Existence, and Termination.**

- § 1. Nature and elements of right.
- § 2. Subject-matter and parties in general.
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**II. Extent of Right, Use, and Obstruction.**

- § 38. Relation between owners of dominant and servient tenements in general.
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- § 64. — Rights of action and defenses.
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### *Cross-References.*

Acquiring easement by railroad as taking property without just compensation, see "Eminent Domain," § 2.

Acquisition by co-tenant, see "Tenancy in Common," § 17.

Acquisition by guardian in property of ward, see "Guardian and Ward," § 69.

Acquisition by husband in property of wife, see "Husband and Wife," § 16.

Appellate jurisdiction of suits relating to easements as dependent on whether case involves title to land, see "Courts," §§ 219, 231.

As incumbrance of title of vendor defeating contract of sale, see "Vendor and Purchaser," §§ 130, 135.

Authority of agent to grant easement, see "Principal and Agent," § 100.

Claim of easement as constituting cloud on title, see "Quieting Title," § 7.

Compensation for easements taken for public use, see "Eminent Domain," § 85.

Complete relief in action to compel opening passway, see "Equity," § 39.

Condemnation for public use, see "Eminent Domain," § 50.

Conveyance of easements as champertous, see "Champerty and Maintenance," § 7.

Conveyance of right of way for sewer, see "Municipal Corporations," § 708.

Determination of adverse claims, see "Quieting Title," § 22.

Easement as definition of appurtenance, see "Deeds," § 117.

Easement passing as appurtenance on sale under mortgage foreclosure, see "Mortgages," § 533.

Easements as incumbrances, see "Covenants," §§ 42, 96.

Effect of notice of easement on subsequent purchaser of servient tenement, see "Vendor and Purchaser," § 228.

Exceeding privilege as trespass, see "Trespass," § 13.

Existence of easement as defense to action for purchase price of servient tenement, see "Vendor and Purchaser," § 308.

Filling up drain as defeating claim of easement by adverse user, see "Drains," § 22.

Grant of right of way to railroad, see "Railroads," §§ 61-82.

Licenses in respect to real property, see "Licenses," §§ 43-64.

Nature as property, see "Property," § 4.

Possession of easement as notice to purchaser of servient tenement, see "Vendor and Purchaser," § 232.

Private ways as boundaries, see "Boundaries," § 21.

Record of grant of easement as notice to subsequent purchaser of servient tenement, see "Vendor and Purchaser," § 231.

Right of way, see "Telegraphs and Telephones," § 8.

Taxation of easement, see "Taxation," §§ 62, 80.

### *In particular species of property.*

See "Cemeteries," § 15; "Mines and Minerals," §§ 88-90; "Party Walls"; "Waters and Water Courses," §§ 153-158½.

Grant of right to use streets or roads to Right of way, see "Telegraphs and Telephones and Telephones," § 10.

Highway acquisition by plank road company, see "Turnpikes and Toll Roads," § 14.

### *Public easements.*

See "Dedication"; "Drains," § 45; "Highways"; "Navigable Waters," §§ 16-18.

Allowance of right of way on partition of property, see "Partition," § 78.

Application of statute of frauds to creation of easements, see "Frauds, Statute of," § 60.

Construction of findings of court relating to, see "Trial," § 404.

Creation by co-tenant in favor of third person, see "Tenancy in Common," § 41.

Streets, see "Municipal Corporations," §§ 646-707.

## I. CREATION, EXISTENCE, AND TERMINATION.

### Cross-References.

Fraud as ground for equitable relief against judgment fixing rights, see "Judgment," § 443.

License distinguished from easement, see "Licenses," § 44.

Notice to purchaser of servient tenement of existence of easement, see "Vendor and Purchaser," § 229.

Right of husband to grant easement as to wife's separate property, see "Husband and Wife," § 137.

### § 1. Nature and elements of right.

(a) An easement is a restriction upon the rights of property of the owner of the servient estate.—*West Arlington Land Co. v. Flannery*, 115 Md. 274, 80 Atl. 965; *Same v. Garrison Lumber & Supply Co., Id.*; *Same v. West Arlington Imp. Co., Id.*

(b) A deed for a stated consideration, conveying "all that right of way and parcel of ground," and describing the right of way as beginning at a specified point, extending thence along an avenue named, with a width of 3 feet and a depth below the grade of the avenue of at least 2½ feet, to the intersection of the avenue with a proposed avenue, thence along the proposed avenue with the same width and depth to an intersection with a lot specifically described, "to have and to hold the above granted right of way and lot of ground" to the grantee, his heirs and assigns, "in fee simple forever," subject to the terms of an agreement set out, and warranting specially "the lot of ground and right of way hereby intended to be conveyed," held, to convey the fee to the lot of land only, and but an easement from the lot through land described for a sewer system in accordance with the agreement set out.—*Callaway v. Forest Park Highlands Co.*, 113 Md. 1, 77 Atl. 141.

(c) A "private easement" imposes, as an essential quality thereof, two distinct tenements: The dominant, to which the right belongs, and the servient, on which the obligation rests.—*Maryland & P. R. Co. v. Silver*, 110 Md. 510, 73 Atl. 297.

(d) Where a deed of land reserves a road through the land conveyed, in order to be able to reach a highway from other land owned by the grantor, it will be presumed, in the absence of a clear indication in the

deed to the contrary, that he reserved merely the use of the road, and not the fee therein.—*Redemptorists v. Wenig*, 79 Md. 348, 29 Atl. 667.

(e) A right of way can, of necessity, only be raised out of the land granted or reserved by the grantor, and never out of the land of a stranger.—*Oliver v. Hook*, 47 Md. 301. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 26 L. R. A. (N. S.) 345, 349, 350, 352, on easements created by severance of tract with apparent benefit existing.]

(f) While two adjoining estates are both owned by the same person, no easement can be created in one of them for the benefit of the other.—*McTavish v. Carroll*, 7 Md. 352. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way; in 8 L. R. A. (N. S.) 329, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 352, 361, on easements created by severance of tract with apparent benefit existing.]

### § 2. Subject-matter and parties in general.

(a) A party cannot have an easement in his own land.—*Stewart v. May*, 119 Md. 10, 85 Atl. 957.

### § 3. Easements appurtenant or in gross.

#### Cross-Reference.

Severance of easements appurtenant, see post, § 23.

#### Annotation.

Right of way on shore as appurtenant to fishery right.—4 L. R. A. (N. S.) 879, note.

Way appurtenant to close from which it is separated by intervening lands.—2 L. R. A. (N. S.) 983, note.

(a) Where the owner of two adjoining lots makes a well on one lot, near the boundary line, for the use of the houses on each lot, and sells the lot on which the well is not situated, and subsequently sells the other lot, and the well is openly used for more than 30 years by the owners of both lots, and it is necessary for the reasonable enjoyment of the lot first sold, it constitutes a servitude on the second lot.—*Eliason v. Grove*, 85 Md. 215, 36 Atl. 844. [Cited and annotated in 8 L. R. A. (N. S.) 348, on implication from necessity of easement other than of way; in

26 L. R. A. (N. S.) 316, 317, 339, on easements created by severance of tract with apparent benefit existing.]

(b) Where a tenant in common of a tract of land has leased to his co-tenant for a term of years a portion of the tract on condition that a building contemplated by the lessee shall not be reared above the third floor of a hotel on the other portion of the tract, and afterwards conveys to a third person his interest in the demised premises subject to the lease, the condition creates a right or interest in the nature of an incorporeal hereditament or easement appurtenant to the contiguous hotel property, and arising out of the parcel of land demised by the lease.—*Thruston v. Minke*, 32 Md. 487. [Cited and annotated in 22 L. R. A. 542, on easements of light, air and prospect.]

#### § 4. Prescription.

##### Cross-References.

Estoppel by pleading prescription by use for 20 years from claiming that use for a shorter term would establish easement, see post, § 35.

Extent of right, see post, § 41.

User as proof of necessity of way, see post, § 18.

As bar to recovery for property taken for public use, see "Eminent Domain," § 288.

#### § 5.— In general.

##### Annotation.

Acquisition of easement by prescription where original use was under license.—44 L. R. A. (N. S.) 89, note.

Right of way on shore by custom or prescription.—4 L. R. A. (N. S.) 880, note.

Prescriptive right by use of underground water pipes.—2 L. R. A. (N. S.) 976, note.

Prescriptive right to lateral support of buildings.—20 L. R. A. 730, note.

(a) The owner of land, the eaves of whose house extend over the adjoining lot without objection for 20 years, acquires an easement in such lot.—*Cherry v. Stein*, 11 Md. 1. [Cited and annotated in 22 L. R. A. 536, 539, on easements of light, air and prospect.]

#### § 6.— Mode and extent of use.

##### Cross-Reference.

See post, § 7.

(a) An easement in an alley would not be recoverable in ejectment.—*Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590; *Same v. Hane*, Id.

(b) By the word "exclusive" use is not

meant that the right of way must be used by one person only, but simply that the right should not depend for its enjoyment upon a similar right in others, and that the party claiming it exercises it under some claim existing in his favor, independent of all others.—*Cox v. Forrest*, 60 Md. 74. [Cited and annotated in 22 L. R. A. (N. S.) 881, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use; in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 8 L. R. A. (N. S.) 151, on burden of showing permissiveness of use on which prescriptive easement is claimed.]

(c) The presumption of a grant of an easement must be founded on proof of an adverse, exclusive, and uninterrupted enjoyment for 20 years.—*Day v. Allender*, 22 Md. 511.

#### § 7.— Duration and continuity of use.

##### Cross-References.

See ante, § 6.

Continuous and exclusive, see post, § 8.

Duration as one element, see ante, § 5.

Duration of use under claim of right, see post, § 9.

Way of necessity used for more than 15 years, see post, § 18.

(a) An instruction that the jury should find in favor of one claiming a private way over the land of another if the evidence showed he and those under whom he claimed had used the way for 20 years uninterruptedly is proper.—*Waters v. Snouffer*, 88 Md. 391, 41 Atl. 785.

(b) To establish a way by prescription, it is necessary to prove an adverse, exclusive, and uninterrupted enjoyment of the right of way for 20 years.—*Cox v. Forrest*, 60 Md. 74. [Cited and annotated in 22 L. R. A. (N. S.) 881, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use; in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 8 L. R. A. (N. S.) 151, on burden of showing permissiveness of use on which prescriptive easement is claimed.]

(c) By "an uninterrupted and continuous enjoyment" of a way is not meant that the person claiming it shall use the way every day for 20 years, but simply that he exercises the right more or less frequently, ac-

ording to the nature of the use to which it may be applied, and without objection by the owner of the land.—*Cox v. Forrest*, 60 Md. 74. [Cited and annotated, see supra.]

### § 8.— Adverse character of use.

#### Cross-References.

Adverse character of user continuing through period of limitation, see ante, § 7.

Adverse use as evidence of claim of right, see post, § 9.

#### Annotation.

Prescription or adverse possession of grave or burial lot.—40 L. R. A. (N. S.) 752, note.

(a) On an issue as to the existence of an easement of way to a spring, claimed by the owner of the dominant estate under adverse user, there was evidence that the owner of the servient estate indicated to the former a particular path, saying that was her way. *Held*, that it was error to refuse a requested instruction that, if the use of the way commenced by permission or license of the owner of the servient estate, the user could never ripen into an absolute title by prescription in the absence of a claim under adverse user or title.—*Ross v. McGee*, 98 Md. 389, 56 Atl. 1128. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed.]

(b) It is not error to refuse a requested instruction, where one claimed a private way over the land of another, that if the jury should find that the former used the land when he saw fit, without the leave of the owner, such use would constitute an adverse use; since, to constitute such adverse use, it must be exclusive and continuous.—*Waters v. Snouffer*, 88 Md. 391, 41 Atl. 785.

(c) Use of an alley under a claim of right to the mutual use of the whole alley is adverse to a separate and exclusive right to a part of it by either of the owners of the adjoining property.—*Clark v. Henckel*, 77 Md. xv, memorandum case, 26 Atl. 1039, full report.

(d) A presumption of a grant of a private way cannot be established by proof of a user by the claimant in common with others for more than 20 years.—*Day v. Allender*, 22 Md. 511.

### § 9.— Claim or color of right.

#### Cross-Reference.

Adverse character of use or claim of right, see ante, § 8.

### § 10.— Acquisition of rights of way.

#### Cross-References.

See ante, § 8; post, § 12.

Extent of right, see post, § 44.

Distinguished from license, see "Licenses," § 44.

#### Annotation.

Acquisition of prescriptive right of way across railroad tracks.—35 L. R. A. (N. S.) 190; 48 L. R. A. (N. S.) 903, notes.

(a) A railroad corporation has no power or right to grant an easement of a footway for persons to walk on or by the side of their tracks. There can be no prescriptive right or presumption of such a grant, though parties owning houses along the line of the railroad for 25 years have used a private footway over the lands of the company from the houses to a public highway.—*Sapp v. Northern Cent. Ry. Co.*, 51 Md. 115.

### § 11.— Acquisition of rights as to light, air, and view.

#### Cross-References.

By express grant, see post, § 17.

Continuity of use, see ante, § 7.

Establishment by implication, see post, § 19.

Extent of right, see post, § 45.

Adoption of English statutes, see "Common Law," § 12.

(a) The English doctrine that, by an uninterrupted enjoyment for 20 years, the owner acquires a right against his neighbor for stopping ancient windows by the erection of buildings upon his own land, forms no part of the law of this country.—*Cherry v. Stein*, 11 Md. 1. [Cited and annotated in 22 L. R. A. 536, 539, on easements of light, air and prospect.]

### § 12. Express grant.

#### Cross-References.

Abandonment, see post, § 30.

Deed as conveying easement or fee, see ante, § 1.

Deed of way after grantor has parted with servient estate as affecting termination of easement by cessation of necessity, see post, § 26.

Extent of right, see post, § 42.

Use by permission or agreement as affecting right by prescription, see ante, § 8.

Application of statute of frauds, see "Frauds, Statute of," § 60.



Conformity of description of easement in contract of sale and deed of land, see "Vendor and Purchaser," § 160.

Failure to convey easement appurtenant to land sold as breach of contract of sale, see "Vendor and Purchaser," § 162.

Specific performance of agreement to open streets shown on plat, see "Specific Performance," § 64.

*Annotation.*

Validity of contract by public service corporation for exclusive right of way across private property.—36 L. R. A. (N. S.) 456, note.

Power of husband to create easements in homestead without wife's consent.—27 L. R. A. (N. S.) 963, note.

Grant of right of way on shore.—4 L. R. A. (N. S.) 881, note.

(a) Under the deed of U., the owner of the east half of a block, of the southern half of his land, the northern boundary line of the land conveyed being described as binding on a 10-foot alley "here laid out," and the grant including the use of this alley in common, "together with the use of any alley 10 feet wide to be laid out by U., extending northerly parallel to P. street from the northwest corner of" the land conveyed "to H. street," while the words "laid out," in reference to the latter alley, are used in the sense of constructed or improved, and not in their ordinary meaning of the adoption of outlines or location, the alley being laid out in such sense by the deed, which clearly defines its location, the grantee's easement in the alley is not dependent on the grantor improving it, and is not lost by nonperformance of his personal covenant to do so.—*Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590; *Same v. Hane*, Id.

(b) Where a grantee, by accepting a deed, at most impliedly contracted that the grantor should have an easement in the land conveyed, but the deed was not signed by the grantee, and the grantor conveyed all his interest in the land, there was no grant of an easement in favor of the grantor.—*Dawson v. Western Maryland R. Co.*, 107 Md. 70, 68 Atl. 301. [Cited and annotated in 44 L. R. A. (N. S.) 563, on compensation upon revocation of license respecting realty; in 14 L. R. A. (N. S.) 189, on necessity for word "assigns" to make covenant as to thing not in esse run with land; in 19 L. R. A. (N. S.) 702, on revocability of license to maintain

burden on land after licensee has incurred expense.]

(c) The statute requiring deeds conveying an estate of inheritance or freehold or any declaration or limitation of use, or any estate above seven years, to be executed, acknowledged, and recorded as therein provided, is applicable to grants of or covenants for easements in land.—*Dawson v. Western Maryland R. Co.*, 107 Md. 70, 68 Atl. 301. [Cited and annotated, see supra.]

(d) The owner of a lot conveyed part of it, and, in accordance with an oral agreement with his grantee that an alley should be left between their properties for their mutual benefit, one was laid out, half on the property of each, and used continuously by the owners of the property for 35 years. Held, that both parties had an easement in the alley by reason of the full performance of the contract on both sides, and that neither party could obstruct the alley or inclose that part of it which had been taken from his property.—*Clark v. Henckel*, 77 Md. xv, memorandum case, 26 Atl. 1039, full report.

(e) In a conveyance of part of a tract of land, the words, "all and every the rights, privileges, appurtenances, and advantages to the land belonging, or in any wise appertaining," will not create a new easement, nor give a right to use a way which has been used with one part of the land over another part, while both parts belonged to the same owner, and constituted an entire estate.—*Oliver v. Hook*, 47 Md. 301. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 26 L. R. A. (N. S.) 345, 349, 350, 352, on easements created by severance of tract with apparent benefit existing.]

(f) A transfer of a way de novo may be made by grant or lease, but cannot be effected by deed of bargain and sale.—*Hays v. Richardson*, 1 G. & J. 366. [Cited and annotated in 44 L. R. A. (N. S.) 566, on compensation upon revocation of license respecting realty.]

(g) An instrument of the following tenor: "I hereby authorize R. to open, and continue to open, a road through my field, beginning at," etc., "as also to build, keep in repair, and use, a bridge over the branch, in the

field on which the said road will pass; said road and bridge being intended as well for the public use as the use of R., and to continue until R. and myself shall agree it shall be shut up and altered," executed under the hand and seal of the owner of the land, is a grant of an incorporeal hereditament, a right of way de novo, which will endure until both parties agree upon its discontinuance.—*Hays v. Richardson*, 1 G. & J. 366. [Cited and annotated, see supra.]

### § 13. Covenant operating as grant.

#### Cross-References.

See ante, § 12.

Covenants creating easements as covenants running with the land, see "Covenants," § 70.

#### Annotation.

Restrictive covenants as to use of property as easements.—37 L. R. A. (N. S.) 36, note.

### § 14. Exception or reservation.

#### Cross-References.

Extent of right, see post, § 42.

Implied reservation, see post, § 17.

Reservation of way to third person in grantor's deed as affected by cessation of necessity for easement, see post, § 26.

Reservation of easement or fee, see "Deeds," § 143.

#### Annotation.

Exception and reservation of easements.—20 L. R. A. 631, note.

Effect of provision as to crossing in deed to railroad right of way.—48 L. R. A. (N. S.) 378, note.

(a) Code 1888, art. 21, § 11, providing that no words of inheritance shall be necessary to create an estate in fee simple, but every conveyance shall be construed to pass a fee simple estate unless a contrary intention appears by express terms or necessary implication, does not apply to the creation of an easement by reservation in a grantor's deed.—*Ross v. McGee*, 98 Md. 389, 56 Atl. 1128. (See Code 1911, art. 21, § 11.) [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed.]

(b) Where a tenant in common of a tract of land has leased to his co-tenant for a term of years a portion of the tract on condition that a building contemplated by the lessee shall not be reared above the third floor of a hotel on the other portion of the tract, and afterwards conveys the demised premises to a third person subject to the lease, the con-

dition creates an easement, the due enjoyment of which will be protected against encroachments, by injunction.—*Thruston v. Minke*, 32 Md. 487. [Cited and annotated in 22 L. R. A. 542, on easements of light, air and prospect.]

### § 15. Implication.

#### Cross-Reference.

Rights of municipality, see "Municipal Corporations," § 646.

### § 16.—Severance of ownership of dominant and servient tenements.

#### Annotation.

Easements created by severance of tract of land with apparent benefit existing.—26 L. R. A. (N. S.) 316, note.

Effect of division of tract with visible servitude in favor of one parcel upon another.—6 L. R. A. (N. S.) 410, note.

(a) Where, when complainant purchased a lot by a description, including half of an abutting highway, the road was not only an open and visible easement, but was reasonably necessary as a means of access to an inn, the owners of other property served by the road, having previously owned complainant's lot, were entitled to an easement for the road, under the rule that if, during the unity of ownership, the owners of two properties used one for the benefit of the other so as to warrant a presumption that an easement existed, had the tenements been separately owned, then on a conveyance of the property so used an easement would be granted to the purchaser, provided the use had been such that the easement resulting from it would be of the class known as continuous and apparent and necessary for the reasonable enjoyment of the property.—*Dinneen v. Corporation for Relief of Widows and Children of Clergy of P. E. Church*, 114 Md. 589, 79 Atl. 1021.

(b) When a landowner, after creating and annexing peculiar qualities and incidents to different parts of his estate, so that one portion of the land becomes visibly dependent upon another for the supply or escape of water, for the supply of light and air, for means of access, or for beneficial use and occupation, grants the part to which such incidents are annexed, the incidents, thus plainly attached to the part granted and to which another part is made subservient, pass to the grantee, without any special

terms in the conveyance, as accessory to the beneficial use and enjoyment of the land.—*Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300. [Cited and annotated in 22 L. R. A. 542, on easements of light, air and prospect; in 4 L. R. A. (N. S.) 315, on effect of covenantee's knowledge of encumbrance; in 26 L. R. A. (N. S.) 319, 337, 373, on easements created by severance of tract with apparent benefit existing.]

### § 17.— Ways in general.

#### Cross-References.

Extent of right, see post, § 44.

Distinguished from license, see "Licenses," § 44.

#### Annotation.

Implied easement by exhibiting unfiled plat to intending purchaser.—35 L. R. A. (N. S.) 938, note.

Right of purchaser of property according to plat to easements in streets or ways indicated thereon, other than those on which his property abuts.—28 L. R. A. (N. S.) 1024, note.

Effect of bounding grant on private way to carry title thereto.—24 L. R. A. (N. S.) 539, note.

Right of grantee to claim an easement, implied covenant, or estoppel, as against the grantor, by a call in the deed for a street or alley in which the grantor owns the fee.—14 L. R. A. (N. S.) 878, note.

Bounding land on alley as covenant that alley exists, where grantor does not own the fee thereof.—10 L. R. A. (N. S.) 964, note.

Implied grant of easement in partition deed.—3 L. R. A. (N. S.) 1082, note.

(a) Where an owner of an industrial building leased a wareroom on the first floor and part of the basement containing a doorway, the lessee knowing that the employees of the owner in charge of the heating plant were daily depending on the doorway, and that the system of ventilation could not be effective if the door were kept closed, and for several years the lessee made no objection to the use by the employees of such doorway, a reservation to the owner of the right to the use of the doorway by employees and for ventilation was intended by both parties, and equity would enjoin the lessee from asserting exclusive control.—*Mancuso v. Riddlemoser Co.*, 117 Md. 53, 82 Atl. 1051.

(b) Where, after complainant had purchased a lot under a description, including half of an adjoining roadway, an agreement was entered into providing for the opening

of a roadway about 50 feet wide along the course of and including the platted road, the additional ground being taken from the abutting land of defendants, a provision in the agreement that it was to be subject to the right of the complainant under her deed from the defendants, which conveyed the land to the center of the road, was simply intended to protect plaintiff's right to the use of the road in common with the opposite abutting proprietor, and did not recognize any right in her to close her half of the road, under the rule that when the owner of land intersected by an established private way of his own, conveys a lot described as extending to the center of the road the grantee takes a fee to the center with a right of way over the half retained by the grantor subject to a like right in the latter over the half conveyed.—*Dinneen v. Corporation for Relief of Widows and Children of Clergy of P. E. Church*, 114 Md. 589, 79 Atl. 1021.

(c) A father owned a life estate in two tracts of land, one of which surrounded the other, except at two points where it was bounded by water. The sons, who were the remaindermen, conveyed their interest in the surrounding tract to the father, who conveyed to defendant's grantor. Held, that though the implied reservation of a right of way to the surrounded tract, in favor of the life tenant, expired with his life, there was a like implied reservation in the grant by the sons to the father, which inured to them independently of the reservation in his deed.—*Jay v. Michael*, 92 Md. 198, 48 Atl. 61. [Cited and annotated in 7 L. R. A. (N. S.) 83, on injunctive relief as to fences or gates; in 26 L. R. A. (N. S.) 350, 355, on easements created by severance of tract with apparent benefit existing.]

(d) Where the owner of a life estate in one piece of land, which was surrounded by another tract, except at two points, where it was bounded by water, conveyed the surrounding tract, there was an implied reservation of a right of way over the tract conveyed to the piece surrounded, though the deed contained full covenants of warranty.—*Jay v. Michael*, 92 Md. 198, 48 Atl. 61. [Cited and annotated, see supra.]

(e) A purchaser of a lot bounded by a street not yet open is entitled to a way over

it, if it be in the hands of the vendor, until it reaches some other street or public way.—*Hawley v. City of Baltimore*, 33 Md. 270. [Cited and annotated in 14 L. R. A. (N. S.) 881, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee.] *Hall v. City of Baltimore*, 56 Md. 187. [Cited and annotated in 26 L. R. A. 664, on effect of abandonment of highway.]

(f) Where an owner of land sells a lot described as bounding on a certain street or way, the purchaser acquires the right of the use of the way in front of his lot.—*White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668; *Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated in 26 L. R. A. 664, on effect of abandonment of highway; in 14 L. R. A. (N. S.) 878, 881, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee; in 22 L. R. A. (N. S.) 9, on judicial power over eminent domain; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

(g) A lot of land was described in a deed to a private individual as "thence north, bounding on P. street, 150 feet to G. street continued, which street bounds on the south the square intended for public uses; thence east, bounding on said street, and fronting the said square to the beginning." Nothing was mentioned in the granting part of the deed but a lot of ground, "part of Lann's lot." Held, that the words, "which street bounds on the south the square intended for public uses," were words of description merely, inserted to render the description more certain, and conveyed no interest or privilege in the square.—*Howard v. Rogers*, 4 H. & J. 278.

### § 13.—Ways of necessity.

#### Cross-References.

See post, §§ 24, 26.

Implied reservation of way of necessity, see ante, § 17.

Reservation of way of necessity, see ante, § 14.

#### Annotation.

Use of way by necessity as affecting creation of easement by prescription.—44 L. R. A. (N. S.) 101, note.

Way of necessity where other possible modes of access exist.—17 L. R. A. (N. S.) 1019; 32 L. R. A. (N. S.) 1075, notes.

Does fact that the sale of part of a tract is involuntary prevent the implication of a way of necessity over the remainder.—12 L. R. A. (N. S.) 482, note.

Implication from necessity of easement other than right of way.—8 L. R. A. (N. S.) 328, note.

(a) Where land conveyed is entirely inclosed by lands of the grantor and others, the grantee is entitled by implication to a right of way over the lands of the grantor as a way of necessity.—*Zimmerman v. Cockey*, 118 Md. 491, 84 Atl. 743.

(b) The test of whether one is entitled by implication to a right of way over the lands of another as a way of necessity involves the question of reasonable access to the land of the person claiming to be entitled to a way of necessity.—*Zimmerman v. Cockey*, 118 Md. 491, 84 Atl. 743.

(c) A grantee held entitled to a way as a way of necessity.—*Zimmerman v. Cockey*, 118 Md. 491, 84 Atl. 743.

(d) A right of way by necessity through an alley over another's land does not exist where the party claiming it has an outlet over his own land.—*Burns v. Gallagher*, 62 Md. 462. [Cited and annotated in 8 L. R. A. (N. S.) 340, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 317, 333, 334, 349, on easements created by severance of tract with apparent benefit existing.]

(e) The owner of two houses separated by an alley sold one of them, and the purchaser built a stable so as to obstruct the exit to the lot except by the alley. Held, that such act gave him no right to the use of the alley, nor did it make such alley a way of necessity.—*Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404. [Cited and annotated in 26 L. R. A. (N. S.) 338, on easements created by severance of tract with apparent benefit existing.]

(f) The owner of a tract of land upon which was a mill, and a milldam and a race necessary to the mill, and a road by the side of the race used for repairing it and the dam, conveyed by deed of gift the portion on which the dam, race, and road were situated, without reservation, and then conveyed by a like deed to another party the portion on which the mill was situated. Held, the grantee of the portion on which the mill was situated was entitled to the use of the dam,

race, and road, in the manner in which they had been used by the grantor, for the reason that they were necessary to the enjoyment of the premises granted.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way; in 8 L. R. A. (N. S.) 329, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 352, 361, on easements created by severance of tract with apparent benefit existing.]

(g) It does not follow necessarily from the fact that a party is without a right of way except over the defendant's land that he thereby acquires a right of way from necessity, according to the principles of the common law.—*Brice v. Randall*, 7 G. & J. 349.

#### § 19.—Light, air, and view.

##### Cross-References.

See ante, § 11.

Extent of right, see post, § 45.

##### Annotation.

Creation of easements of light and air by severance of tract of land with apparent benefit existing.—26 L. R. A. (N. S.) 369, note.

Implied easement of light, air, and prospect.—22 L. R. A. 536, note.

(a) Where one sells a messuage having windows or doors opening into a vacant lot adjoining, and belonging to the vendor, without reserving the right to build on such lot or to stop the doors and windows, neither he nor his grantee can lawfully stop them.—*Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300. [Cited and annotated in 22 L. R. A. 542, on easements of light, air and prospect; in 4 L. R. A. (N. S.) 315, on effect of covenantee's knowledge of encumbrance; in 26 L. R. A. (N. S.) 319, 337, 373, on easements created by severance of tract with apparent benefit existing.]

(b) The owner of two adjoining lots leased one of them, and in leasing covenanted that the lessee should have the right to make openings and place lights in the wall, which he contemplated erecting on the line between the two lots. The wall was erected, and windows placed therein overlooking the lessor's premises, and subsequently the lessor conveyed the reversion to the lessee. Held, that the conveyance passed to the grantee, as incident and appurtenant to the land

conveyed, the right to the free use and enjoyment of the lots as they then existed.—*Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300.

(c) The doctrine that if the owner of two adjoining lots, one vacant, and the other having on it a building, with lights opening over the former, sells the latter without reserving a right to build on the vacant lot or to stop such lights, then he cannot afterwards obstruct them, does not apply where, there being several owners to each lot, some but not all of them are part owners of both lots.—*Cherry v. Stein*, 11 Md. 1. [Cited and annotated in 22 L. R. A. 536, 539, on easements of light, air and prospect.]

#### § 20. Right as against purchasers of servient tenement.

##### Cross-References.

Severance of ownership of dominant and servient tenements as creating easement by implication, see ante, § 16.

Grant of right of way to telephone company, see "Telegraphs and Telephones," § 8.

Specific enforcement of agreement for right of way, see "Specific Performance," § 22.

#### § 21.—In general.

(a) Where a grantee was entitled to a right of way as a way of necessity as against his grantor, the grantor could not, by a subsequent grant, deprive him of the way, whether specified in the subsequent deed or not.—*Zimmerman v. Cockey*, 118 Md. 491, 84 Atl. 743.

#### § 22.—Continuous and apparent easements, and notice.

(a) Where the owner of land conveys a part of it, the grantee takes the part conveyed subject to easements in favor of the grantor which are apparent at the time of the conveyance.—*Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300. [Cited and annotated in 22 L. R. A. 542, on easements of light, air and prospect; in 4 L. R. A. (N. S.) 315, on effect of covenantee's knowledge of encumbrance; in 26 L. R. A. (N. S.) 319, 337, 373, on easements created by severance of tract with apparent benefit existing.]

#### § 23. Severance of right.

##### Annotation.

Effect of attempt to sever appurtenant easement from the premises for the benefit of which it exists.—14 L. R. A. 300, note.

## § 24. Transfer of right.

### Cross-References.

See ante, § 18.

Transfer of interests created by easements, as within statute of frauds, see "Frauds, Statute of," § 68.

### Annotation.

Right of remote grantee to claim easement by way of necessity not opened by immediate grantee.—46 L. R. A. (N. S.) 156, note.

Right of owner of dominant estate to grant rights in easement to one having no title to or interest in the tract to which it is appurtenant.—41 L. R. A. (N. S.) 1107, note.

Applicability to easements of rule against conveyance of land held adversely.—35 L. R. A. (N. S.) 744, note.

Transferability of right to take advantage of breach of condition on which easement granted.—60 L. R. A. 764, note.

(a) Where a deed to land contains no reservation of an existing easement in adjoining land of the grantor, none will be implied as against the subsequent owner of such adjoining land, unless the necessity therefor is such as to leave no doubt that the parties intended that the right to such easement should pass by the deed.—*Burns v. Gallagher*, 62 Md. 462. [Cited and annotated in 8 L. R. A. (N. S.) 340, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 317, 333, 334, 349, on easements created by severance of tract with apparent benefit existing.]

(b) At a public sale of lots a certain person purchased two lots, divided by an alley and situated at the upper end thereof, and received a conveyance for the same, including that part of the alley lying between them. Several years afterwards a purchaser at the same sale of lots further down the alley, and divided by it, questioned the right of the owner of the upper lots, and this difference was compromised by a deed in which the owner of the upper lots released to the owner of the lower lots all his right to the alley below his lots, and the lower owner relinquished to him all his right to the part of the alley between the upper lots. The owner of the upper lots subsequently conveyed them to plaintiff, subject to this deed of compromise, and after this conveyance the lower owner obstructed that part of the alley below the upper lots, and the plaintiff filed his bill to have these ob-

structions removed and himself quieted in the use of the alley. *Held*, that, though the deed of compromise did not operate to transfer the right of the parties thereto to the use of the alley, it being a right of way appendant, which could not pass without a transfer of the land to which it was appendant, yet in equity it might operate efficiently to carry into effect the intention of the parties; and hence the complainant had no evidence to support his bill.—*Bosley v. McKim*, 7 H. & J. 468.

(c) A right of way in esse may pass by deed of bargain and sale, duly acknowledged and recorded.—*Hays v. Richardson*, 1 G. & J. 366. [Cited and annotated in 44 L. R. A. (N. S.) 566, on compensation upon revocation of license respecting realty; in 29 L. R. A. 815, on protection against self-crimination in civil case.]

## § 25. Commencement and duration.

### Annotation.

Duration of right created by provision as to crossing in deed to railroad right of way.—48 L. R. A. (N. S.) 380, note.

Right of abutting owner to continue enjoyment of pathway across highway.—12 L. R. A. (N. S.) 918, note.

Duration of easements appurtenant.—20 L. R. A. 635, note.

## § 26. Termination in general.

### Cross-References.

Presumption as to extinguishment, see post, § 36.

Revocation of licenses in general, see "Licenses," §§ 58-63.

### Annotation.

Effect of destruction of building to terminate adjoining owner's easement of support.—19 L. R. A. (N. S.) 833; 46 L. R. A. (N. S.) 1021, notes.

(a) A party will not be estopped from claiming an easement for a right of way by the fact that he has himself encroached thereon.—*Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669. [Cited and annotated in 20 L. R. A. 634, on exception and reservation of easements; in 7 L. R. A. (N. S.) 73, 77, on injunctive relief as to fences or gates; in 22 L. R. A. (N. S.) 885, 886, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(b) A way of necessity terminates as soon as the owner of the dominant estate can pass without interruption over his own land to a highway.—*Oliver v. Hook*, 47 Md. 301.

[Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 26 L. R. A. (N. S.) 345, 349, 350, 352, on easement created by severance of tract with apparent benefit existing.]

### § 27. Merger.

#### Annotation.

Extinguishment of easement for private way by its incorporation into a public way.—21 L. R. A. (N. S.) 1002, note.

(a) Where the mortgagor of a dominant tenement becomes the owner in fee of the servient tenement, the unity of the two estates does not extinguish the easement, so as to affect the rights of one claiming an interest in the easement under a foreclosure of the mortgage on the dominant tenement, in which the easement was expressly included.—*Duval v. Becker*, 81 Md. 537, 32 Atl. 308. [Cited and annotated in 22 L. R. A. (N. S.) 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(b) Where the deed granting one corner of a tract grants also a right of way for the length of one side of the lot between it and the next lot for the benefit of both, and the owner of the first lot afterwards acquires both, the easement is extinguished, and the owner of the balance of the tract, which is not contiguous to such way, has no right to require the way to be kept open.—*Capron v. Greenway*, 74 Md. 289, 22 Atl. 269.

(c) Where a road existed from plaintiff's land over the land of defendant to the public road more than 20 years before, the fact that there was a unity of possession in the grandfather of plaintiff and defendant of the lands owned by them within 20 years does not necessarily show that the right of way was lost by merger, since it might have been one of necessity.—*Du Val v. Du Val*, 21 Md. 149.

### § 28. Release.

(a) A party who has consented to forego the use of a right of way or other easement, either temporarily or permanently, and suffered other persons to act upon the faith of that consent, and to incur expense in doing the very act to which his consent was given, cannot retract such consent, or throw on

those relying upon his good faith the burden of restoring things to their former state and condition.—*Vogler v. Geiss*, 51 Md. 407.

[Cited and annotated in 18 L. R. A. 539, on effect of nonuser of easement; in 49 L. R. A. 506, on revocability of license to maintain burden on land, after expense is incurred; in 2 L. R. A. (N. S.) 832, on presumption of abandonment from failure to maintain easement; in 22 L. R. A. (N. S.) 882, 887, 888, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(b) An agreement by a lessee for years to abandon an easement cannot bind the reversioner, unless he be a party to it, or it be made with his acquiescence.—*Glenn v. Davis*, 35 Md. 208, 6 Am. Rep. 389. [Cited and annotated in 18 L. R. A. 539, on effect of nonuser of easement; in 2 L. R. A. (N. S.) 832, on presumption of abandonment from failure to maintain easement.]

### § 29. Extinguishment by agreement or license.

#### Cross-References.

Agreement to abandon as abandonment,

see post, § 30.

Release, see ante, § 28.

### § 30. Abandonment or nonuser.

#### Cross-References.

Necessity for decisive and unequivocal evidence of forfeiture by abandonment or nonuser, see post, § 36.

Validity of parol agreement for abandonment of an easement, see "Frauds, Statute of," § 129.

#### Annotation.

Abandonment of private way by nonuser or improvements inconsistent with its use.—22 L. R. A. (N. S.) 880; 42 L. R. A. (N. S.) 741, notes.

Abandonment of crossing created by provision in deed to railroad right of way by severance of ownership.—48 L. R. A. (N. S.) 886, note.

Will failure to maintain easement raise presumption of its abandonment.—2 L. R. A. (N. S.) 832, note.

Effect of nonuser of an easement.—18 L. R. A. 535, note.

(a) Where a right of way is established by 20 years' adverse user, it requires the same length of time to lose the right by abandonment or nonuser.—*Cox v. Forrest*, 60 Md. 74. [Cited and annotated in 22 L. R. A. (N. S.) 881, 889, on abandonment or loss of private way by nonuser or improvements inconsistent

ent with use; in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 8 L. R. A. (N. S.) 151, on burden of showing permissiveness of use of which prescriptive easement is claimed.]

(b) If a party consents to forego the use of an easement, either temporarily or permanently, and suffers third persons to act upon the faith of that agreement or consent, and to incur expense in doing the act to which his consent is given, it is too late for him to retract.—*Vogler v. Geiss*, 51 Md. 407. [Cited and annotated in 18 L. R. A. 539, on effect of nonuser of easement; in 49 L. R. A. 506, on revocability of license to maintain burden on land, after expense is incurred; in 2 L. R. A. (N. S.) 832, on presumption of abandonment from failure to maintain easement; in 22 L. R. A. (N. S.) 882, 887, 888, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(c) The release of a right of way acquired by long use and enjoyment, may be inferred from its continued abandonment or nonuser.—*Browne v. Trustees of M. E. Church*, 37 Md. 108. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 22 L. R. A. (N. S.) 882, 883, 888, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(d) Where a road existed from plaintiff's land over the land of defendant to the public road more than 20 years before, the fact that there was a unity of possession in the grandfather of the plaintiff and defendant of the lands owned by them within 20 years does not necessarily show that the right of way was lost by nonuser, since it might have been one of necessity.—*Du Val v. Du Val*, 21 Md. 149.

### § 31. Forfeiture for misuser.

#### Annotation.

Loss of private way by improvements inconsistent with its use.—22 L. R. A. (N. S.) 880, note.

(a) Where a right of way exists for the purpose of repairing a milldam, an alteration in the race, by which it was made capable of holding and conducting a larger quantity of water, does not destroy the ease-

ment.—*McTavish v. Carroll*, 13 Md. 429. [Cited and annotated in 53 L. R. A. 627, on extent of trespasser's liability for consequential injuries.]

### § 32. Adverse possession.

#### Annotation.

Inclosure of right of way as adverse possession.—1 L. R. A. (N. S.) 565, note.

(a) Though mere nonuser of an easement, even for more than 20 years, will not afford conclusive evidence of abandonment, such nonuser for a prescriptive period, united with an adverse use of the servient estate, inconsistent with the existence of the easement, will extinguish it.—*Canton Co. v. City of Baltimore*, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129. [Cited and annotated in 14 L. R. A. (N. S.) 1068, on effect of conveyance of lots laid down on plats, to prevent change in use or form; in 25 L. R. A. (N. S.) 514, on injunction or ejectment as proper remedy where highway illegally opened.]

(b) Adverse possession and exclusive use of the land over which a party claims the right of way, though for more than 20 years, will not bar an action on the case for obstructing such way.—*Wright v. Freeman*, 5 H. & J. 467. [Cited and annotated in 22 L. R. A. 536, on easements of light, air and prospect; in 26 L. R. A. 449, on abandonment of highway by nonuser, or otherwise than by act of authorities; in 22 L. R. A. (N. S.) 882, 884, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

### § 33. Dedication or appropriation to public use.

### § 34. Revival of lost right.

### § 35. Pleading as defense.

### § 36. Evidence.

#### Cross-References.

See ante, § 30.

Evidence in actions to establish and protect, see post, § 61.

Testimony as to transactions with persons since deceased, see "Witnesses," § 159.

#### Annotation.

Burden of showing that use upon which an easement by prescription is claimed was permissive, and not under claim of right.—8 L. R. A. (N. S.) 149; 44 L. R. A. (N. S.) 98, notes.

(a) Against one claiming a right of way in



a private alley by adverse user of himself and his predecessors in title, his grantor may testify that he never used the alley with a claim of right, but only by permission of its owner.—*Vandegrift v. Burke*, 98 Md. 230, 56 Atl. 602. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed.]

(b) Evidence in an action involving the question of right of way, held insufficient to show a right of way by prescription in a private alley.—*Vandegrift v. Burke*, 98 Md. 230, 56 Atl. 602. [Cited and annotated, see supra.]

(c) Plaintiff and defendant owned adjoining farms, and defendant fenced up a road across his farm to a public road. Plaintiff claimed an easement in the road for marketing the products of his farm. The road was formerly used by neighbors, including prior grantors of plaintiff, in reaching a mill on defendant's farm, but after the destruction of the mill gates had been maintained across it for a number of years; and one of plaintiff's grantors admitted that he had no right to the road, and advised defendant to close it, and one of the persons on whose use plaintiff relied to prove adverse user was not shown to have ever held the legal title to plaintiff's farm, and the testimony of adverse user by other grantors of plaintiff was vague and indefinite. Held, that the proof of plaintiff's right to an easement was not sufficiently clear to warrant relief by injunction.—*Gulick v. Fisher*, 92 Md. 353, 48 Atl. 375. [Cited and annotated in 7 L. R. A. (N. S.) 81, on injunctive relief as to fences or gates.]

(d) Where one has used a right of way for 20 years unexplained, it is fair to presume the user is under a claim of right, unless it appears to have been by permission, and the burden is upon the owner of the land to show that the use was by license or contract inconsistent with a claim of right.—*Cox v. Forrest*, 60 Md. 74. [Cited and annotated in 22 L. R. A. (N. S.) 881, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use; in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 8 L. R. A. (N. S.) 151, on burden of showing

permissiveness of use on which prescriptive easement is claimed.]

### § 37. Questions for jury.

#### Cross-Reference.

Abandonment as question for jury, see ante, § 30.

(a) The evidence to support a presumptive grant of a right of way from its long use and enjoyment, or a presumptive release from its continued abandonment or nonuser, is to be submitted to the jury, from which they may infer a grant or release as the case may be.—*Browne v. Trustees of M. E. Church*, 37 Md. 108. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 22 L. R. A. (N. S.) 882, 883, 888, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

## II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

#### Cross-References.

Extent of right of grant to telephone company for right of way, see "Telegraphs and Telephones," § 8.

Lease of property covered by easement, see "Landlord and Tenant," § 50.

Title to support ejectment, see "Ejectment," § 9.

### § 38. Relation between owners of dominant and servient tenements in general.

#### Cross-Reference.

Persons entitled to use, see post, § 52.

(a) A conveyance of land with a right of way across other land of grantor does not give the right to use the way to haul material to build a barn on adjoining land, though within the same inclosure.—*Albert v. Thomas*, 73 Md. 181, 20 Atl. 912. [Cited and annotated in 24 L. R. A. (N. S.) 542, on effect of bounding grant on private way to carry title thereto.]

(b) Whenever the owner of land has by any artificial arrangement created an advantage or incident for the benefit of one portion, to the burdening of another, the several grantees of the two portions take them, the one charged with the servitude, and the other entitled to the benefit, openly and visibly attached at the time of the conveyance of the portion first granted.—*Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300. [Cited

and annotated in 22 L. R. A. 542, on easements of light, air and prospect; in 4 L. R. A. (N. S.) 315, on effect of covenantee's knowledge of encumbrance; in 26 L. R. A. (N. S.) 319, 337, 373, on easements created by severance of tract with apparent benefit existing.]

(c) Where a proprietor conveyed one portion of his estate, whereon was an ancient mill, to A., and another portion, containing the dam and race of said mill, to B., without reservation, it was held that the grant to A. carried with it a special way of necessity over the land of B. for the purpose of repairing said dam and race.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way; in 8 L. R. A. (N. S.) 329, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 352, 361, on easements created by severance of tract with apparent benefit existing.]

#### §§ 39-45. Extent of right.

##### Cross-Reference.

Licenses, see "Licenses," § 52.

##### Annotation.

Rights conferred by grant or unrestricted easement as limited to a reasonable use.—15 L. R. A. (N. S.) 292, note.

Extent of indefinite easement as affected by the extent to which it has been used.—5 L. R. A. (N. S.) 851, note.

Right to maintain gates or bars across right of way.—48 L. R. A. (N. S.) 87, note.

Enlarged use of crossing provided for in deed to railroad right of way.—48 L. R. A. (N. S.) 391, note.

(a) A clause in a deed, "Reserving, however, the privilege of using the water from the spring on the lot of ground hereby conveyed," merely reserves as a personal privilege to the grantor a right of way to the spring over the land conveyed, which the grantor cannot assign in connection with a conveyance of her remaining property.—*Ross v. McGee*, 98 Md. 389, 56 Atl. 1128. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed.]

(b) A grant of the use of a four-foot alley, which had been laid off for the common use of four lots, held to include the right of entrance to or exit from the north as well as

the south end, if not obstructed by the adjoining proprietor.—*Bump v. Sanner*, 37 Md. 621.

#### §§ 46-49. Location.

(a) Where the owner of a large tract of land grants a portion of the soil which is surrounded by his own land, the right of way incidental to the grantee's land is a convenient way over some part of the grantor's surrounding land, not in every part of it.—*Brice v. Randall*, 7 G. & J. 349.

#### § 50. Mode of use.

(a) The owner of a tract of land on which was a mill, and a milldam and race necessary to the mill, and a road by the side of the race used for repairing it and the dam, conveyed by deed of gift the portion on which the dam, race, and road were situated without reservation, and then conveyed by a like deed to another party the portion on which the mill was situated. Held, that the grantee of the portion on which the mill was situated was entitled to the use of the road in the manner in which it had been used by the grantor, but that he was not entitled to its use for ordinary purposes, but only as occasion required to repair the race and dam.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way; in 8 L. R. A. (N. S.) 329, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 352, 361, on easements created by severance of tract with apparent benefit existing.]

#### § 51. Purposes of use.

##### Cross-Reference.

See ante, § 50.

(a) A conveyance of land with a right of way across other land of grantor does not give the right to use the way to haul material to build a barn on adjoining land, though within the same inclosure.—*Albert v. Thomas*, 73 Md. 181, 20 Atl. 912. [Cited and annotated in 24 L. R. A. (N. S.) 542, on effect of bounding grant on private way to carry title thereto.]

#### § 52. Persons entitled to use.

##### Cross-Reference.

Relation between owners of dominant and servient tenements in general, see ante, § 38.

(a) In 1839, the owner of a lot built two houses on it, one 15 feet front, the other 12½ feet front in the first story, and 15 feet in the upper stories, leaving an alley of 2½ feet in width between them open to the street, 30 feet deep, and communicating at the inner end by gates with the rear yards of both houses, the timbers of the latter house extending across the alley from the upper stories, and resting in the wall of the first house. The alley was used as a common passageway by the occupants of both houses. At the inner end of the alley, a fence at right angles with the street, extending to the rear of the lot, divided it into equal parts of 15 feet each. Access could be had to the yard through the house, or from a lane in the rear of the premises. The builder and his widow owned both houses until 1865, when the property was sold under decree to W., who, in that year, sold the second house to C. by a deed including the alley, without reservation of any right in it to the occupants of the other house. In 1868, W. sold the first house to S. by a deed embracing no part of the alley, nor any right in it. *Held*, that the owners of the first house got no right to the use of the alley.—*Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404. [Cited and annotated in 26 L. R. A. (N. S.) 338, on easements created by severance of tract with apparent benefit existing.]

### § 53. Maintenance and repair.

#### Cross-Reference.

Failure to keep in repair as showing abandonment, see ante, § 30.

#### Annotation.

Right to use public funds to maintain or improve private ways, or ways dedicated to public but never accepted.—35 L. R. A. (N. S.) 524, note.

Duty of owner of servient tenement to maintain and protect easement.—15 L. R. A. (N. S.) 992, note.

Negligence in care of private way.—6 L. R. A. (N. S.) 310, note.

Right of owner of upper floor to compel maintenance of walls.—3 L. R. A. (N. S.) 510, note.

(a) Where a grantor gives his grantee a right to tap an existing sewer extending through the property granted and other property of the grantor, but reserves to himself the title to the sewer pipe as located, together with the right and privilege of maintaining such line as a sewer for adja-

cent lands, together with the right to enlarge it by means of a larger pipe or by the addition of another parallel pipe line, should it be required in the future, and the right of ingress and egress over the property along the line of pipe for the purpose of construction and repairs, the grantor not only has the title to the pipe, but has a reserved easement over the line to make all necessary repairs and the rights necessarily appurtenant to it, and the entry upon the granted property and the relaying of larger pipe for the benefit of assignees of the grantor, who were owners of lands beyond the grantor's land, is within the reservation.—*West Arlington Land Co. v. Flannery*, 115 Md. 274, 80 Atl. 965; *Same v. Garrison Lumber & Supply Co.*, Id.; *Same v. West Arlington Imp. Co.*, Id.

### § 54. Alteration.

#### Cross-References.

Alteration of width of way, see ante, § 44.

Change of location of way, see ante, § 48.

#### Annotation.

Right to change easement.—15 L. R. A. 93, note.

(a) The owner of a dominant estate can make no alteration which will increase the restrictions on the use of the servient estate.—*West Arlington Land Co. v. Flannery*, 115 Md. 274, 80 Atl. 965; *Same v. Garrison Lumber & Supply Co.*, Id.; *Same v. West Arlington Imp. Co.*, Id.

### § 55. Misuser.

### § 56. Obstruction or disturbance.

#### Cross-Reference.

Estoppel, see "Estoppel," § 93.

#### Annotation.

Grant of "free" right of way; right to obstruct.—3 L. R. A. (N. S.) 461, note.

### § 57.—In general.

### § 58.—Ways.

#### Cross-Reference.

Obstruction of way to leased premises, see "Landlord and Tenant," § 142.

#### Annotation.

Right to maintain gates or bar across right of way.—48 L. R. A. (N. S.) 87, note.

Building over right of way.—15 L. R. A. 487, note.

(a) The mere fact that plaintiff owns land on both sides of a strip of land which defendant owns and uses as a roadway to a highway from land having no frontage

thereon gives plaintiff no right to maintain or have defendant maintain, a gate at the terminus thereof at the highway.—*Rowe v. Nally*, 81 Md. 367, 32 Atl. 198. [Cited and annotated in 48 L. R. A. (N. S.) 91, on gates or bars across right of way; in 15 L. R. A. (N. S.) 993, on servient owner's duty to maintain and protect easement.]

(b) The owner of a right of way over an alley, the fee to which belongs to the owner of the adjacent lot, cannot complain of the mere change of the position of a gate in the alley, the erection of a platform at its entrance, and the wainscoting of the walls narrowing the width of the alley about an inch and a half by the owner of the fee, unless these acts interfere with the reasonable and convenient use and enjoyment of the alleyway, which is a question of fact for the jury.—*Frank v. Benesch*, 74 Md. 58, 21 Atl. 550, 28 Am. St. Rep. 237. [Cited and annotated in 48 L. R. A. (N. S.) 88, 89, on gates or bars across right of way.]

(c) The owners of land mutually agreed to open a way through their land, of a certain width, the cost of making the same to be paid by the parties jointly, and that, when it should be graded so as to make a continuous connection between certain roads, the owners of all property fronting thereon should be entitled to use the same in either direction, as a common right of way, provided they pay their respective proportions of the expense of making and keeping the same in good repair. Held, that the agreement does not deprive one of the parties from erecting gates on the road at its terminus.—*Baker v. Frick*, 45 Md. 337, 24 Am. Dec. 506. [Cited and annotated in 4 L. R. A. (N. S.) 89, on gates or bars across right of way.]

(d) The plaintiff had a right of way to repair his mill race. The defendant put a fence across with bars easily removed, and informed the plaintiff that he might remove them himself whenever he had occasion to pass, or that upon notice the defendant would cause them to be taken down. Held, that the plaintiff was not entitled to recover damages for the obstruction of the way.—*McTavish v. Carroll*, 17 Md. 1. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way.]

(e) Plaintiff was entitled to an easement over another's land for the purpose of entering thereon with teams and carts for the purpose of repairing an adjoining mill race. Defendant constructed a fence across the way, which was easily removable, and informed plaintiff that he would take down the fence whenever occasion should require for the repair of the race. Held, not an obstruction for which the plaintiff can recover damages.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way; in 8 L. R. A. (N. S.) 329, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 352, 361, on easements created by severance of tract with apparent benefit existing.]

(f) A proprietor of land conveyed part thereof on which was an ancient mill to A., and another part on which the dam and race of said mill were situated to B., without reservation, and B. thereafter plowed up the road between his land and that of A., and cultivated the land. Held, that such act was not necessarily an obstruction of the right of way in A. implied from necessity for the purpose of repairing the dam and race.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated, see supra.]

(g) Where a proprietor conveyed one portion of his estate whereon was an ancient mill to A., and another portion containing the dam and race of said mill to B., without reservation, the erection of a common rail fence by B., who professed to be ready to remove the same whenever there should be occasion to repair the dam, is not such an obstruction of the private right of way which arose of necessity in favor of A. for the purpose of repairing the dam and race as would support a claim for damages.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated, see supra.]

#### § 59.—Light, air, or view.

##### Cross-Reference.

Obstruction of light on leased property, see "Landlord and Tenant," § 142.

##### Annotation.

Right to interfere with light and air by building over right of way.—16 L. R. A. (N. S.) 193, note.

Injunction against interference with view from street.—5 L. R. A. (N. S.) 486, note.

Liability of landlord to tenant for obstruction of light.—23 L. R. A. 158, note.

Liability of landlord to third person for obstruction of light.—26 L. R. A. 201, note.

Bad motive as affecting liability for obstructing light and air.—62 L. R. A. 683, note.

## § 60. Removal of obstruction.

### Cross-Reference.

In streets on ground of interference with easement of light and air of adjoining owner, see "Municipal Corporations," § 671.

## § 61. Actions for establishment and protection of easements.

### Cross-References.

Restraining use of easement, see ante, § 55.

Purchasers pending suit, see "Lis Pendens," § 24.

### Annotation.

Right of owner of right of way over another's land to compensation when the land is taken for a public highway.—2 L. R. A. (N. S.) 598, note.

(a) A lessor failing to comply with all the terms of his lease held not prevented from obtaining an injunction to restrain a lessee from assuming full control over a doorway essential for the lessor and his employees in the performance of their work to supply the tenants with heat and electricity.—*Mancuso v. Riddlemoser Co.*, 117 Md. 53, 82 Atl. 1051, Ann. Cas. 1914A, 84.

(b) Ejectment cannot be maintained for an easement alone; but an easement may be recovered in an action of ejectment for land to which it is appurtenant, and the delivery by the sheriff of the possession of the land carries with it the possession of the easement.—*Callaway v. Forest Park Highlands Co.*, 113 Md. 1, 77 Atl. 141.

(c) Where an easement is conveyed to a grantee, his heirs and assigns, but was never intended to be used except in connection with a lot of land conveyed to the grantee, and is necessary in order that the land may be used for the purposes for which it is granted, and the easement is made subject to the terms of an agreement which expressly provides that, if the easement and lot of land cease to be used for the purpose of operating a system of sewerage, they shall revert to

the grantors, and the land was purchased with the view of constructing thereon the necessary buildings and tanks for the proposed sewerage system, all of which would be useless without the easement, the easement is appurtenant to the land and as such may be recovered in an action of ejectment for the land.—*Callaway v. Forest Park Highlands Co.*, 113 Md. 1, 77 Atl. 141.

(d) Where a way alleged to exist in plaintiffs' favor had been completely closed for 50 years, and during that time had been in the uninterrupted and exclusive control of defendants and their predecessors in title, and plaintiffs had allowed defendants to make valuable improvements which obstructed the way without making any objection thereto, an injunction would not be granted to restrain the making of further improvements obstructing the way, which were practically completed before any protest was made by plaintiffs.—*Bernei v. Sappington*, 102 Md. 185, 62 Atl. 365.

(e) Where the evidence in a suit to enjoin the obstruction of a way discloses a real dispute as to plaintiffs' title to the easement claimed by them, and tends strongly to support the grounds of defense asserted by defendants, so that the question of title to the way, as dependent upon the construction of title deeds and upon asserted adverse holding and user, is drawn in controversy, an injunction will not be granted until the question of title is settled in an action at law.—*Bernei v. Sappington*, 102 Md. 185, 62 Atl. 365.

(f) A party seeking the aid and protection of a court of equity to enjoin the obstruction of an alley must show a clear title, or at least a fair prima facie case in support of the title he asserts, and in addition thereto he must show that irreparable or serious injury will result from the invasion of his legal rights.—*Bernei v. Sappington*, 102 Md. 185, 62 Atl. 365.

(g) Code 1888, art. 25, §§ 100-117 (Code 1904, art. 25, §§ 104-121), providing procedure for the acquisition of private ways, do not affect the right to enjoin the obstruction of an existing right of way which was the only access to plaintiff's property, as such provisions have no application to pre-existing rights.—*Jay v. Michael*, 92 Md. 198,

48 Atl. 61. (In *Arnsperger v. Crawford*, 101 Md. 247, the constitutionality of §§ 100-117 was attacked. The appeal was dismissed, but the court stated, that under Const., art. 3, § 40, and Decl. of Rights, art. 23, §§ 100-117, would have been declared unconstitutional, had the court been authorized to decide the question. These sections omitted from Code 1911, see Code 1911, art. 25, § 104, notes.) [Cited and annotated in 7 L. R. A. (N. S.) 83, on injunctive relief as to fences or gates; in 26 L. R. A. (N. S.) 350, 355, on easements created by severance of tract with apparent benefit existing.]

(h) Injunction was the proper remedy for the obstruction of a right of way which was the only way of access to plaintiff's land, and the obstruction of which would permanently injure his property and destroy its value, since plaintiff was not bound to seek his remedy at law, by action in trespass.—*Jay v. Michael*, 92 Md. 198, 48 Atl. 61. [Cited and annotated, see supra.]

(i) Where plaintiff is engaged in a business requiring access to a certain creek, and is the owner of a right of way thereto through an alley, the obstruction of the way by the defendant, by erecting a permanent structure across the entire width of the alley except three feet, is such a wrongful act as equity will restrain by injunction.—*Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669. [Cited and annotated in 20 L. R. A. 634, on exception and reservation of easements; in 7 L. R. A. (N. S.) 73, 77, on injunctive relief as to fences or gates; in 22 L. R. A. (N. S.) 885, 886, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(j) There was only one way over which the complainant had a prescriptive right to carry his produce to market. By sufferance and revocable license he could use another circuitous way, or he could apply to the county courts to locate a private way at his expense on such a line as they might see fit. Held, that an obstruction of the first-mentioned road by the owner of the soil was good cause for an injunction.—*Shipley v. Caples*, 17 Md. 179. [Cited and annotated in 7 L. R. A. (N. S.) 83, on injunctive relief as to fences or gates.]

(k) The owner of an easement over the land of another for a particular purpose cannot recover damages for an obstruction of the way, where the owner of the land has informed him that he will remove the obstruction whenever occasion should require that he use the easement for such purpose.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated in 48 L. R. A. (N. S.) 88, on gates or bars across right of way; in 8 L. R. A. (N. S.) 329, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 352, 361, on easements created by severance of tract with apparent benefit existing.]

(l) The owner of a tract of land upon which was a mill and milldam and race necessary to the operation of the mill, and a road by the side of the race used for repairing it, conveyed by deed of gift the portion on which the dam, race, and road were situated, without reservation, and then conveyed by a like deed to another party the portion on which the mill was. Held, that the grantee of the portion on which the mill was situated was entitled to the use of the dam, race, and road in the manner in which they had been used by the grantor, and the erection by the grantee of the other portion of a fence across the road, which fence was easily removable, is not such an obstruction of the easement as will entitle the grantee of the mill to damages when the grantee informs him that he would remove the fence whenever occasion should require the use of the road for the purpose of repairing the race.—*McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353. [Cited and annotated, see supra.]

(m) At a public sale of lots, a certain person purchased two lots divided by an alley and situated at the upper end thereof, and received a conveyance for the same, including that part of the alley lying between them. Several years afterwards a purchaser, at the same sale of lots further down the alley and divided by it, questioned the right of the owner of the upper lots, and this difference was compromised by a deed in which the owner of the upper lots released to the owner of the lower lots all his right to the alley below his lots, and the lower owner relinquished to him all his right to that part of the alley between the upper lots. The

owner of the upper lots subsequently conveyed them to plaintiff subject to this deed of compromise, and after this conveyance the lower owner obstructed that part of the alley below the upper lots, and the plaintiff filed his bill to have these obstructions removed, and himself quieted in the use of the alley. *Held*, that, plaintiff having purchased expressly subject to the compromise contract, he was not entitled to the relief prayed for in his bill.—*Bosley v. McKim*, 7 H. & J. 468.

(n) The proper remedy for the disturbance of the enjoyment of an easement or incorporeal right is case.—*Shafer v. Smith*, 7 H. & J. 67. [Cited and annotated in 53 L. R. A. 627, on extent of trespasser's liability for consequential injuries.]

(o) Case is the proper remedy for injury or disturbance to a right of way.—*Wright v. Freeman*, 5 H. & J. 467. [Cited and annotated in 22 L. R. A. 536, on easements of light, air and prospect; in 26 L. R. A. 449, on abandonment by nonuser, or otherwise than by act of authorities; in 22 L. R. A. (N. S.) 882, 884, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

## § 62. Actions for damages for injuries.

*Cross-Reference.*

See ante, § 61.

## § 63.— Nature and form.

*Cross-Reference.*

See "Forcible Entry and Detainer," § 6.

## § 64.— Rights of action and defenses.

## § 65.— Jurisdiction and venue.

## § 66.— Time to sue and limitations.

*Cross-Reference.*

Limitation of actions to recover easements, see "Limitation of Actions," § 19.

## § 67.— Parties.

## § 68.— Pleading.

## § 69.— Evidence.

(a) Under a declaration alleging that plaintiff is entitled to a way over defendant's land to and from a private alley, and along the alley to a street, and that defendant has deprived him of the use of the way, plaintiff, to be entitled to damages, must prove a right of way over the alley.—*Vandegrift v. Burke*, 98 Md. 230, 56 Atl. 602. [Cited and anno-

tated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed.]

## § 70.— Damages.

*Annotation.*

Abutter's right to compensation for interference with easement of light, air, and access by railroad in street.—36 L. R. A. (N. S.) 736, 778, note.

Right of property owner to compensation for interference with light or air by railroad structure on company's own property.—20 L. R. A. (N. S.) 1061, note.

(a) Where there is no evidence of a malicious motive in obstructing the use of an easement, punitive damages should not be allowed.—*Eliason v. Grove*, 85 Md. 215, 36 Atl. 844. [Cited and annotated in 8 L. R. A. (N. S.) 348, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 316, 317, 339, on easements created by severance of tract with apparent benefit existing.]

(b) In an action for obstructing a right of way, the measure of damages is not the reasonable cost for removing the obstruction, but such as the jury, under all the circumstances, taking into view the modes of the parties, may think proper to allow.—*McTavish v. Carroll*, 13 Md. 429. [Cited and annotated in 53 L. R. A. 627, on extent of trespasser's liability for consequential injuries.]

(c) A declaration for obstructing a right of way used by plaintiff for repairing his milldam and race averred such obstruction whereby he lost all the benefit and profit which he would otherwise have had from working said mill, custom, and trade thereof. *Held*, that, under this declaration, evidence that plaintiff owned land around the mill on which he raised grain, and which, in consequence of the obstruction, he had been compelled to carry to another mill at a greater distance, is not admissible for the purpose of showing the increased cost of such transportation as part of the damages sustained.—*McTavish v. Carroll*, 13 Md. 429. [Cited and annotated, see supra.]

## § 71.— Trial.

*Cross-Reference.*

Proper use as question for jury, see ante, § 50.

(a) In an action against the grantor by the

grantee of a private right of way for obstructing the way by erecting gates, the questions of the necessity of such obstruction as regards the situation of the grantor's property, and whether the gates used were usual and proper under the circumstances, and whether under the circumstances the existence of the gates upon the right of way interfered with the grantee's reasonable use thereof, are for the jury.—*Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506. [Cited and annotated in 48 L. R. A. (N. S.) 89, on gates or bars across right of way.]

(b) Where an agreement showing a right of way does not in terms or legal effect necessarily deprive one of the parties of the right to erect gates, it is a question for the jury upon all the facts and circumstances to determine whether such right of way is proper or reasonable.—*Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506. [Cited and annotated, see supra.]

#### § 72.—Judgment and enforcement thereof.

#### § 73.—Appeal and error.

##### *Cross-Reference.*

Appellate jurisdiction as dependent on amount or value in controversy, see "Courts," § 222.

### EATING HOUSES.\*

##### *Cross-Reference.*

See "Innkeepers."

### EAVES-DRIP.

##### *Cross-Reference.*

Affecting adverse possession, see "Adverse Possession," § 37.

### EAVESDROPPING.\*

##### *Cross-Reference.*

See "Disorderly Conduct," §§ 1, 7.

### EBB AND FLOW.

##### *Cross-Reference.*

Tide-lands, see "Navigable Waters," § 36.

### ECCENTRICITY.\*

##### *Cross-Reference.*

Effect on testamentary capacity, see "Wills," § 41.

### ECCLESIASTICAL TRIBUNALS.

##### *Cross-Reference.*

See "Religious Societies," § 12.

### EDUCATION.\*

##### *Cross-References.*

See "Colleges and Universities"; "Schools and School Districts."

Affecting eligibility as juror, see "Jury," § 42.

Affecting right to vote, see "Elections," § 84.

Constitutional guaranty of right to education, see "Constitutional Law," § 85.

Department of, in cities, see "Municipal Corporations," § 211.

Gifts for purposes of education, see "Charities."

Of child, see "Parent and Child," § 3.

Of Indians, see "Indians," § 8.

Of ward, see "Guardian and Ward," § 80.

### EIGHT-HOUR LAW.

##### *Cross-References.*

See "Master and Servant," § 18; "Municipal Corporations," § 215.

As affecting per diem compensation of officers, see "Sheriffs and Constables," § 60.

Punishment for working more than, see "Criminal Law," § 1213.

Statute imposing penalty on persons working more than eight hours a day in mines as violating constitutional guaranty of right to acquire and possess property, see "Constitutional Law," § 87.

Stipulations in contract for public improvements, see "Municipal Corporations," § 339.

### EJECTION.\*

##### *Cross-References.*

From house as trespass, see "Trespass," § 6.

From theaters, see "Theaters and Shows," § 4.

Of child from vehicle, see "Negligence," § 7.

Of passenger from vessel, see "Shipping," § 166.

Of passengers or intruders from palace or sleeping cars, see "Carriers," § 416.

Of passengers or intruders from trains, see "Carriers," §§ 350-386.

Of tenant, see "Landlord and Tenant," § 278.

Of trespassers from freight trains, see "Railroads," § 277.

\*Annotation: Words and Phrases, same title.



## EJECTMENT.\*

*Scope-Note.*

[INCLUDES actions for recovery of specific real property, founded on right of possession and right to damages for being deprived thereof, whether proceeding according to common-law or statutory forms; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; incidental recovery, in the same action or in a separate proceeding, for use and occupation, profits, damages, improvements, etc.; verdict and judgment and enforcement thereof by writ of possession or otherwise; review of proceedings; and costs in such actions.

[EXCLUDES real actions in general, whether founded on right of property (see "*Real Actions*"), or on mere right of possession (see "*Entry, Writ of*"), and actions founded on forcible entry, unlawful detainer, etc. (see "*Forcible Entry and Detainer*"), or on right to damages for trespass (see "*Trespass to Try Title*"); actions for damages for wrongful entry upon or injury to real property (see "*Trespass*"); recovery of possession of particular kinds of property, or by holders of particular classes of estates or interests (see "*Mines and Minerals*"; "*Tenancy in Common*"; "*Landlord and Tenant*"; "*Mortgages*"; and other specific heads); effect of adverse possession and of statutes of limitation (see "*Adverse Possession*"; "*Limitation of Actions*"); and new trials as of right in actions of ejectment, etc. (see "*New Trial*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Right of Action and Defenses.**

- § 1. Nature and scope of remedy in general.
- § 2. Statutory provisions and remedies.
- § 3. Possessory or petitory action.
- § 4. Form of action.
- § 5. Existence of other remedy.
- § 6. Property which may be subject of action.
- § 7. Grounds of action in general.
- § 8. Title to support action.
- § 9. — In general.
- § 10. — Adverse possession.
- § 11. — Interest in public lands.
- § 12. — Paper title.
- § 13. — Equitable title.
- § 14. — Title by estoppel.
- § 15. — Title from common source.
- § 16. Prior possession of plaintiff.
- § 17. Right of plaintiff to possession.
- § 18. Ouster or disseism, or other acts of defendant.
- § 19. Possession of defendant.
- § 20. Claim of title to or acts of ownership of unoccupied lands.
- § 21. Demand or notice to quit.

\*Annotation: Words and Phrases, same title.

**I. Right of Action and Defenses—Continued.**

- § 22. Defenses.
- § 23. — In general.
- § 24. — Adverse possession.
- § 25. — Title or right of possession of third person.
- § 26. — Equitable defenses in general.
- § 27. — Equitable estoppel.
- § 28. — Set-off and counterclaim.
- § 29. Pendency of other action or proceeding.
- § 30. Abatement on death of party.
- § 31. Successive actions.
- § 32. Cross-actions.
- § 33. Persons entitled to sue.
- § 34. Compelling bringing of action.
- § 35. Persons against whom action may be brought.

**II. Jurisdiction, Parties, Process, and Incidental Proceedings.**

- § 36. Jurisdiction of subject-matter.
- § 37. Jurisdiction of the person.
- § 38. Venue.
- § 39. Time to sue and laches.
- § 40. Parties plaintiff.
- § 41. — In general.
- § 42. — Lessor of plaintiff.
- § 43. — Joinder.
- § 44. Parties defendant.
- § 45. — In general.
- § 46. — Casual ejector or tenant in possession.
- § 47. — Joinder.
- § 48. Notice to tenant and entry of consent rule.
- § 49. Notice to landlord and leave to defend.
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See "Entry, Writ of"; "Real Actions."

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Decision on trial by court without jury, see "Trial," § 387.

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Encroachment by adjoining landowner, see "Adjoining Landowners," § 9.

Enforcement of forfeiture for breach of condition in deed, see "Deeds," § 168.

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 Jurisdiction of justices of the peace in actions involving title, see "Justices of the Peace," § 36.  
 Laches in proceedings to revive, see "Abatement and Revival," § 74.  
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 Power of administrator to maintain, see "Executors and Administrators," § 130.  
 Presumption and burden of proof in action by state to recover canal lands, see "States," § 209.  
 Proceedings constituting commencement of action, see "Action," § 64.  
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 Right of dower to support action, see "Dower," § 71.  
 Right of executors and administrators to sue, see "Executors and Administrators," § 130.  
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 Surplusage in pleading, see "Pleading," § 35.  
 Tax title to support action, see "Taxation," § 789.  
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Title acquired through champertous conveyance to support action, see "Champerty and Maintenance," § 7.

Title of purchaser at partition sale to support action, see "Partition," § 109.

To determine water rights, see "Waters and Water Courses," §§ 33, 49, 282.

To foreclose mortgage, see "Mortgages," § 387.

To recover land on breach of contract of sale, see "Vendor and Purchaser," § 299.

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To recover possession of mines or mining lands, see "Mines and Minerals," § 50.

To recover possession of mortgaged property, see "Mortgages," §§ 213, 214.

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Traverses of denials or admissions, see "Pleading," §§ 112-129.

Vacation of judgment in general, see "Judgment," § 375.

Vexatious action, see "Action," § 9.

Waiver of objections to jurisdiction, see "Courts," § 37.

Waiver of plea in abatement, see "Abatement and Revival," § 84.

## I. RIGHT OF ACTION AND DEFENSES.

### Cross-Reference.

See "Forcible Entry and Detainer," §§ 1-48.

### § 1. Nature and scope of remedy in general.

#### Cross-References.

As against fraudulent conveyances, see "Fraudulent Conveyances," §§ 205-328.

Distinguished from forcible entry and detainer, see "Forcible Entry and Detainer," § 6.

#### Annotation.

Butter's right to ejectment against railroad in street.—36 L. R. A. (N. S.) 830, note.

Ejectment for a public easement.—11 L. R. A. (N. S.) 129, note.

Ejectment to remove electric wires.—11 L. R. A. (N. S.) 920, note.

Ejectment to recover possession of burial lot.—67 L. R. A. 125, note.

Ejectment for railroad right of way.—66 L. R. A. 40, note.

### § 2. Statutory provisions and remedies.

### § 3. Possessory or petitory action.

### § 4. Form of action.

### § 5. Existence of other remedy.

#### Cross-Reference.

Ejectment by grantor in sheriff's deed on foreclosure of tax lien, see "Taxation," § 792.

#### Annotation.

Injunction or ejectment as proper remedy where public highway is illegally opened over private property.—25 L. R. A. (N. S.) 511, note.

### § 6. Property which may be subject of action.

#### Cross-References.

Mining interests, see "Mines and Minerals," § 50.

Waters and water courses, see "Waters and Water Courses," §§ 49, 282.

(a) Where the owners of land granted a license merely to use the land on which to erect the abutments of a bridge, the erection of the abutments did not convert such license into a corporeal right to the land, so that a purchaser of the bridge, in proceedings to foreclose a mechanic's lien thereon, could maintain ejectment to recover such land, under Code 1888, art. 75, §§ 69-82, authorizing the maintenance of ejectment "to recover land."—*Nicolai v. City of Baltimore*, 100 Md. 579, 60 Atl. 627. (See Code 1911, art. 75, §§ 71-85.)

### § 7. Grounds of action in general.

### § 8. Title to support action.

#### Cross-References.

Admissibility of evidence, see post, § 90.

Pleading, see post, §§ 65, 82.

Title of third person as defense, see post, § 25.

Weight and sufficiency of evidence, see post, § 95.

Power of administrator to maintain ejectment, see "Executors and Administrators," § 130.

Right of dower, see "Dower," § 71.

Tax title, see "Taxation," § 789.

Title acquired through champertous conveyance, see "Champerty and Maintenance," § 7.

Title acquired under execution sale, see "Execution," § 280.

Title of purchaser at partition sale, see "Partition," § 109.

Title to Indian lands, see "Indians," § 15.

Trust property, see "Trusts," § 182.

### § 9.—In general.

#### Cross-References.

Instructions, see post, § 110.

Prior possession, see post, § 16.

**Annotation.**

Sufficiency of possessory title.—46 L. R. A. (N. S.) 487, 508, note.

General rule that plaintiff must recover, if at all, on the strength of his own title.—18 L. R. A. 781, note.

Right of action by owner of dominant estate subject to easement.—18 L. R. A. 787, note.

(a) A plaintiff in ejectment must recover on the strength of his own title, and must show a legal title and a right to possession not barred by limitations.—*Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962.

(b) A plaintiff in ejectment, who deduces title from a patent granted by the state, and who proves his right of possession, in entitled to recover.—*Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962.

(c) Plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not by reason of any defect in the defendant's title; and if defendant has a good legal title, or the plaintiff has no legal title, no recovery can be had.—*Mullen v. Brydon*, 117 Md. 554, 83 Atl. 1025.

(d) An action of ejectment by a city will not lie for land in which it claims an easement for park purposes, but does not claim the legal title.—*Canton Co. v. City of Baltimore*, 106 Md. 69, 66 Atl. 679, 67 Atl. 274. [Cited and annotated in 14 L. R. A. (N. S.) 1068, on effect of conveyance of lots laid down on plats, to prevent change in use or form; in 25 L. R. A. (N. S.) 514, on injunction or ejectment as proper remedy where highway illegally opened.]

(e) When plaintiff in ejectment claims under a mortgage, and defendant, instead of resting his case on the defect in plaintiff's title, sets up his own, derived from a sheriff's sale under a judgment against the mortgagor, the court should determine which is the better title, without reference to the rule in ejectment that plaintiff must show title regularly deduced from the state, or else an adverse possession for 20 years.—*Ahern v. White*, 39 Md. 409.

(f) Plaintiff in ejectment cannot recover without a legal interest, and whatever divests him of such interest takes from him the remedy of ejectment.—*Lannay v. Wilson*, 30 Md. 536.

(g) Plaintiff in ejectment must show a

legal and possessory title to the premises in order to recover; and, unless that be done, defendant need not show title in himself or a third person.—*Hammond v. Inloes*, 4 Md. 138. [Cited and annotated in 34 L. R. A. 331, on conclusiveness of prior decisions on subsequent appeals.]

(h) Plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness or want of title in defendant.—*Hall v. Gittings*, 2 H. & J. 112; *Mitchell's Lessee v. Mitchell*, 1 Md. 44. [Cited and annotated in 46 L. R. A. (N. S.) 512, on possessory title as a weapon of offense.]

(i) Plaintiff in ejectment must show that he has a legal title to the land, and the right of possession; and he cannot establish such legal title without proof of a grant from the state.—*Mitchell's Lessee v. Mitchell*, 1 Md. 44. [Cited and annotated, see supra.]

(j) Plaintiff in ejectment must, at the time of instituting his suit and at the trial of the cause, have a legal title to the land he sues for.—*Carroll v. Norwood*, 5 H. & J. 155. [Cited and annotated in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.] *Cresap's Lessee v. Hutson*, 9 Gill 269. [Cited and annotated in 33 L. R. A. (N. S.) 925, on adverse possession due to ignorance or mistake as to boundary; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

(k) To recover in ejectment, plaintiff must show legal title at the time of beginning the suit.—*Wilson v. Inloes*, 11 G. & J. 351. [Cited and annotated in 14 L. R. A. 498, on establishment of dock lines; in 22 L. R. A. (N. S.) 337, on right of state to grant tide lands.]

(l) Where a grant of a tract of land issued after the time of the demise laid in a declaration in ejectment for the same land, and after the suit was brought, reciting the date of the certificate of survey to be prior to the time of bringing the suit, it was held that the grant was not sufficient evidence of title, without producing the certificate itself.—*Henderson's Lessee v. Parker*, 3 H. & J. 117.

(m) Plaintiff in ejectment gave in evidence a grant to A., in 1673, for a tract of land; also, an act of the Legislature, passed in



1782, which recited that C. had set forth that he was seised and possessed of such tract, and directed that it should be laid out and form part of a certain town; also, that lot No. 687, for which the ejectment was brought, was part of such tract so claimed by C. and laid off as part of said town; also, that the lot was conveyed by C. to D., who possessed it from 1792 to 1795, when he conveyed it to E., who possessed it until 1802, when he conveyed it to the lessors of plaintiff. *Held*, that plaintiff had no right to recover, there being no title deduced from the grantee of A. to C., and there being no possession proved in E. and those under whom he claimed sufficient to entitle plaintiff to recover without showing title.—*Wood v. Grundy*, 3 H. & J. 13.

(n) Possession is presumptive evidence of right, and defendant cannot be deprived of his possession by any person but the rightful owner of the land.—*Hall v. Gittings*, 2 H. & J. 112.

(o) Where a lease was executed off the premises by the governor and an agent for and on behalf of the lord proprietary, it was held that the lessee might recover thereon in ejectment.—*Gilbert's Lessee v. Lee*, 4 H. & McH. 487. [Cited and annotated in 19 L. R. A. 849, on adverse possession against remaindermen and owners of future estate.]

(p) Plaintiff, in deducing his title, must show a grant of the land and a regular title from the grantee, or seisin of the land and a dying seised of the person under whom the lessor of plaintiff derives his title, and a regular title from the person dying seised, or 20 years' uninterrupted and exclusive possession of the land.—*Plummer v. Lane*, 4 H. & McH. 72, 1 Am. Dec. 395.

### § 10.—Adverse possession.

#### Cross-References.

See post, § 13.

Prior possession of plaintiff, see ante, § 9; post, § 16.

(a) Plaintiff in ejectment who shows a good title by adverse possession, is entitled to recover.—*Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962.

(b) In ejectment against a husband and wife, plaintiff claimed the land under a sheriff's deed, given on the sale of the land

under execution issued on a judgment against the husband. Defendants had no "paper title" to the land, but plaintiff's evidence tended to prove that prior to the sheriff's sale the title was in the husband by prescription. Defendants claimed that the title was in the wife by purchase. *Held*, that, as plaintiff's title depended wholly on the husband's title by prescription, the court properly instructed the jury that if they found that the husband and his family "occupied, used, and held actual, continuous, adverse, and exclusive possession since 1859" under a claim of title in the husband, plaintiff could recover.—*Johnson v. Turner*, 74 Md. xiv, memorandum case, 22 Atl. 1103, full report.

(c) Since plaintiff's title in such case was wholly dependent on the husband's title by prescription, he could not recover, where the husband occupied the land, not under claim of title in himself, but in right of his wife, who had purchased the property.—*Johnson v. Turner*, 74 Md. xiv, memorandum case, 22 Atl. 1103, full report.

(d) By force of the statute of 21 Jac. I. c. 16 (Alex. Brit. Stat. [Coe's ed.] 599), possession for 20 years is like a descent at common law, and tolls the entry of the person having right; and, though the very right be in defendant, yet he cannot justify his ejecting the plaintiff.—*Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115. [Cited and annotated in 25 L. R. A. 453, on oral proof of foreign laws; in 15 L. R. A. (N. S.) 1190, 1192, 1245, 1257, on necessity for color of title, not expressly made a condition by statute, in adverse possession; in 46 L. R. A. (N. S.) 511, on possessory title as a weapon of offense.]

(e) Twenty years' uninterrupted possession not only tolls the right of entry of all adversary claimants who are under no disability, but gives a right of re-entry to the party who had such possession, and those claiming under him, when ousted. Such right of entry must prevail in ejectment, although defendant may rely on an older title.—*Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115. [Cited and annotated, see supra.]

(f) Where a party and those under whom

he claims have held, for nearly a century, uninterrupted and unmixed possession of lands, the title founded on this possession is impregnable against any title which the state can grant, as is conclusively shown by act 1818, c. 90, and act 1849, c. 424.—*Chapman v. Hoskins*, 2 Md. Ch. 485. (See Code 1911, art. 54.)

(g) Where the plaintiff's right of entry is barred by the statute of limitations, there can be no recovery.—*Harbaugh v. Moore*, 11 G. & J. 283.

(h) Where the proprietary of Maryland was barred of his right to escheat lands by the statute of limitations, his lease of such lands was held inoperative to pass the same.—*Russell v. Baker*, 1 H. & J. 71.

(i) Where one makes title to a tract of land, and is in possession of a part thereof, he is in possession of the whole according to its true limits.—*Ridgely's Lessee v. Ogle*, 4 H. & McH. 123.

(j) A. conveyed land to B., and covenanted for quiet enjoyment. C. recovered such land in ejectment against B., as being included within an elder tract, and B. recovered back from the administratrix of A. the purchase money of said land. B., and those claiming under him, never had possession of the land since such recovery. *Held*, in ejectment, brought more than 20 years after, that an entry on such tract by A. and B., for the purpose of executing a deed to the lessor of plaintiff, and livery and seisin under such deed, were inoperative, under the circumstances, to support the action.—*Ridgely's Lessee v. Ogle*, 4 H. & McH. 123.

(k) A descent cast does not prevent the bringing of ejectment, though no entry has been made by plaintiff.—*Mockbee v. Clagett*, 2 H. & McH. 1.

(l) Prior possession is a good title against one who had expelled the prior possessor, and claimed under an escheat grant, where it did not appear that the original holder was dead, without heirs.—*Hutchins v. Erickson*, 1 H. & McH. 339.

#### § 11.—Interest in public lands.

##### Cross-References.

Prior possession of plaintiff, see post, § 16. Statutory provisions, see ante, § 2.

(a) An escheat grant is *prima facie* evi-

dence of title in plaintiff in ejectment.—*Clements' Lessee v. Ruckle*, 9 Gill 326.

(b) A. and B. claimed the same land, under different grants, bearing the same date, issued on certificate of survey, also bearing the same date, made under common warrants, that to B. granted by renewal October 29, 1754, and that to A. granted February 8, 1755, but A.'s certificate was first examined. In ejectment by A.'s lessee, it was *held* that he was not entitled to recover, though it should be proved that the grant to A. actually issued before the grant to B.—*Karn's Lessee v. Hughes*, 3 H. & J. 210.

(c) An escheat grant is *prima facie* evidence of title.—*Hall v. Gittings*, 2 H. & J. 112.

(d) A grant was held to pass the legal title to the land therein mentioned, although the certificate of survey had not laid in the land office six months, after the composition-money had been paid thereon, before the issuing of said grant.—*Boreing's Lessee v. Singery*, 4 H. & McH. 398.

(e) Where a certificate of survey made in 1720, and a grant issued in 1724, had been offered in evidence in an action of ejectment, and it appeared that the grantee was dead at the time of issuing the grant, but had devised the land to his three sons, from whom plaintiff showed title, it was *held* that the testator acquired an equitable interest in the land, by virtue of the certificate of survey, which was transmissible by will.—*Carroll v. Norwood*, 4 H. & McH. 287.

(f) A patent was held sufficient evidence of title to support ejectment.—*Savory v. Whayland*, 1 H. & McH. 206.

(g) A certificate of the survey of land, without a patent, is no evidence of title on which to support an ejectment.—*Seward v. Hicks*, 1 H. & McH. 22.

#### § 12.—Paper title.

##### Cross-References.

See post, § 13.

Interest in public lands, see ante, § 11.

(a) A., trustee, under decree of court, sold lands in Baltimore to B., the deed calling on Henry street, as laid out on the public plat. The grantor owned land on both sides of Henry street, and subsequently conveyed to C. land on the other side of Henry street, by

description "to the center of Henry street." Henry street, at the time of the executions of the deeds, had not been opened as a public street, or used as a public or private way, and subsequently the city authorities closed it, and assessed and paid damages to C. A. brought ejectment against C. to recover one-half of the bed of Henry street between Winder and Wells street. *Held*, that as the deed to B. did not convey the street bed to the center of Henry street, and the public easement had been extinguished by the act of the city, and C. had acquiesced therein by accepting damages for closing the street, A. was entitled to recover.—*Baltimore & O. R. Co. v. Gould*, 67 Md. 60, 8 Atl. 754.

(b) In 1752 a patent was granted for a tract of land called "P.," containing 50 acres. In 1754 another patent was granted for a tract called "Resurvey of P.," containing 375 acres. They were issued to the same grantee; and in 1791 his heirs conveyed a tract called "P.," containing 375 acres, to certain persons, their heirs and assigns, in trust. In an action of ejectment for a tract of land called the "Resurvey of P.," the lessor of the plaintiffs claimed title from the surviving trustee, under a deed for a part of the last-mentioned tract, describing the part conveyed by metes and bounds, and professing to be executed in pursuance of a decree in chancery. No decree was produced, nor any evidence that the aforesaid tracts were the same in fact, but called by different names. *Held*, that the deed of 1791 could only convey to its grantees, the trustees, the tract P., according to its original lines, metes, and bounds, and that they could transfer no title to the land claimed in the action.—*Shilknecht v. Eastburn's Heirs*, 2 G. & J. 114.

(c) Where there was no grant of the land produced, and no evidence that C., who conveyed the land to F., under whom defendant in ejectment claimed, was ever in possession of land, it was *held* that, if he ever was in possession, he was an intruder, and his deed could not operate to transfer any right to the land, and that the entry and possession of F. was an intrusion, the land being vacant.—*Cockey v. Smith*, 3 H. & J. 20.

(d) A., by his will, devised to B. and C. all his real estate, to be sold by them for the

payment of his debts. Evidence of a sale at auction, by them to D., of a portion of the real estate, with a memorandum of sale subscribed by the auctioneer, and a receipt given by them for the purchase money, was *held* to be a title at law in D., without a deed of bargain and sale, or other conveyance to him from trustee, and to be sufficient to enable his lessee to recover such real estate in ejectment.—*Keys v. Goldsborough's Lessee*, 2 H. & J. 369.

(e) Where one claims through mesne conveyances from a patentee, a title cannot be presumed to have been perfected if deeds showing a defective title are produced.—*Owings v. Norwood's Lessee*, 2 H. & J. 96.

(f) Proof of the execution, acknowledgment, and delivery of a defective deed of conveyance, and possession of the land for several years by the grantee, is sufficient to render the deed competent, in law, to pass such an estate to the grantee as will enable his heir in tail to recover in ejectment.—*Brashears' Lessee v. Hewitt*, 4 H. & McH. 222.

### § 13.—Equitable title.

#### Cross-References.

See ante, § 9.

Interest in public lands, see ante, § 11.

(a) An equitable title is not available to plaintiff in ejectment.—*Leonard v. Diamond*, 31 Md. 536. [Cited and annotated in 18 L. R. A. 781, on what title or interest will support ejectment; in 16 L. R. A. (N. S.) 1153, on statute of uses in United States.] *Paisley v. Holzshu*, 83 Md. 325, 34 Atl. 832.

(b) Plaintiff must prove either a paper title or a title by adverse possession; and prayers based on the principles of acquiescence and estoppel recognized by courts of equity, in relation to boundary lines, are properly refused.—*Winter v. White*, 70 Md. 305, 17 Atl. 84. [Cited and annotated in 49 L. R. A. (N. S.) 777, on suits in which equitable estoppel involving title or interest in realty is available.]

(c) A defendant in ejectment is estopped from denying the title and possession of the person under whom he claims.—*Elwood v. Lannon's Lessee*, 27 Md. 200.

### § 14.—Title by estoppel.

**§ 15.—Title from common source.***Cross-References.*

Instructions, see post, § 110.

Title or right of possession of third person as defense, see post, § 25.

(a) Where both parties claim title under the same grantor, it is sufficient to prove a title derived from him without proving his title, as neither party can deny such title.—*Elwood v. Lannon's Lessee*, 27 Md. 200; *Ahern v. White*, 39 Md. 409; *Jay v. Michael*, 82 Md. 1, 38 Atl. 322.

**§ 16. Prior possession of plaintiff.***Cross-References.*

See ante, §§ 9, 15; post, § 65.

Adverse possession, see ante, § 10.

Weight and sufficiency of evidence, see post, § 96.

**§ 17. Right of plaintiff to possession.***Cross-References.*

See ante, §§ 9, 16.

Admissibility of evidence, see post, § 90.

Pleading, see post, § 65.

Right of possession in third person as defense, see post, § 25.

Verdict and findings, see post, § 111.

Weight and sufficiency of evidence, see post, § 95.

(a) Plaintiff in ejectment cannot recover without the immediate right of possession, and whatever divests him of such right takes from him the remedy of ejectment.—*Lannay v. Wilson*, 30 Md. 536.

(b) Plaintiff must have a right to the possession of the land at the time of the commencement of the action.—*Harbaugh v. Moore*, 11 G. & J. 283.

(c) The right of entry in the lessor of plaintiff will support an ejectment, although the lessor has never made an actual entry; such entry being superseded by the common-consent rule.—*Matthews v. Ward*, 10 G. & J. 443. [Cited and annotated in 16 L. R. A. (N. S.) 1153, on statute of uses in United States; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

**§ 18. Ouster or disseisin, or other acts of defendant.***Cross-References.*

Admissibility of evidence, see post, § 91.

Pleading, see post, § 66.

Verdict and findings, see post, § 111.

Weight and sufficiency of evidence, see post, § 96.

**§ 19. Possession of defendant.***Cross-References.*

Pleading, see post, § 66.

Weight and sufficiency of evidence, see post, § 96.

Encroachment by adjoining landowner, see "Adjoining Landowners," § 9.

**§ 20. Claim of title to or acts of ownership of unoccupied lands.****§ 21. Demand or notice to quit.***Cross-Reference.*

In case of action between tenants in common, see "Tenancy in Common," § 38.

(a) Defendant took possession of land held in trust under a mere written order from the cestui que trust, who was authorized to lease the same, with the understanding that he should receive a lease for a term of years. Defendant paid no rent, and the cestui que trust died without executing a lease. Held, that, as against the trustee, defendant was only a tenant at sufferance, against whom ejectment may be maintained without notice or demand.—*Howard v. Carpenter*, 22 Md. 10.

(b) If an entry and demand is made by the owner of land, his grantee and those claiming under him may support an ejectment without further entry.—*Gwynn v. Jones' Lessee*, 2 G. & J. 173. [Cited and annotated in 53 L. R. A. 948, 949, 951, on tenant's right to acquire title not inconsistent with landlord's when tenancy commenced.]

**§ 22. Defenses.****§ 23.—In general.**

(a) Since the lease in ejectment is fictitious, and the lessors are the real plaintiffs, and the lessee, though a natural person, is not to be considered as really interested in the result, proof is not admissible on the part of defendant that a person under whom he claims purchased at sheriff's sale, on an execution against the lessee, all his interest in the land, and that such lessee is the same person as the nominal plaintiff in the action.—*Warner v. Hardy*, 6 Md. 525. [Cited and annotated in 19 L. R. A. (N. S.) 438, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

(b) Defendant may bar plaintiff's recovery by showing a title in himself.—*Hall v. Gittings*, 2 H. & J. 112.

**§ 24.—Adverse possession.**

(a) Where adverse possession is claimed of a part only of the lands, the proper defense is on warrant.—*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273.

(b) Defendant must have a claim of title to support an adverse possession.—*Davis v. Furlow's Lessee*, 27 Md. 536. [Cited and annotated in 15 L. R. A. (N. S.) 1187, 1205, 1206, 1208, 1210, on necessity for color of title, not expressly made a condition by statute, in adverse possession; in 38 L. R. A. (N. S.) 924, on adverse possession due to ignorance or mistake as to boundary.]

(c) By force of the statute of 21 Jac. I. c. 16 (Alex. Brit. Stat. [Coe's ed.] 599), possession for 20 years is like a descent at common law, and tolls the entry of the person having right; and, though the very right be in defendant, yet he cannot justify his ejecting the plaintiff.—*Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115. [Cited and annotated in 25 L. R. A. 453, on oral proof of foreign laws; in 15 L. R. A. (N. S.) 1190, 1192, 1245, 1257, on necessity for color of title, not expressly made a condition by statute, in adverse possession; in 46 L. R. A. (N. S.) 511, on possessory title as a weapon of offense.]

(d) Where a party and those under whom he claims have held, for nearly a century, uninterrupted and unmixed possession of lands, the title founded on this possession is impregnable against any title which the state can grant, as is conclusively shown by act 1818, c. 90, and act 1849, c. 424.—*Chapman v. Hoskins*, 2 Md. Ch. 485. (See Code 1911, art. 54.)

(e) Where the plaintiff's right of entry is barred by the statute of limitations, there can be no recovery.—*Harbaugh v. Moore*, 11 G. & J. 283.

(f) Where the proprietary of Maryland was barred of his right to escheat lands by the statute of limitations, his lease of such lands was held inoperative to pass the same.—*Russell v. Baker*, 1 H. & J. 71.

(g) A. conveyed to B., and covenanted for quiet enjoyment. C. recovered the land in

ejectment against B., as being included within an elder tract, and B. recovered back from the administratrix of A. the purchase money of said land. B. and those claiming under him never had possession of the land since such recovery. Held, that in ejectment, brought more than 20 years afterwards, such proceedings operated to extinguish all right and title which B. had in such land.—*Ridgely's Lessee v. Ogle*, 4 H. & McH. 123.

**§ 25.—Title or right of possession of third person.**

*Cross-References.*

See ante, §§ 16, 24.

Statutory provisions, see ante, § 2.

(a) An insolvent debtor, prior to his application, executed a deed of certain lands, for which the parties claiming under the deed brought ejectment against the heirs at law of the grantor. Held, that defendants could not show that the deed of their ancestor was executed in fraud of creditors, in order to set up the defense of an outstanding title in the trustee in insolvency.—*Cushwa v. Cushwa*, 5 Md. 44.

(b) If defendant relies on an outstanding title in a third person, he must show the title to be such as would enable the third person to recover against either party to the suit.—*George's Creek Coal & Iron Co. v. Detmold*, 1 Md. 225.

(c) Although the lease declared on in ejectment is in fact a fiction, yet it is essential to plaintiff's recovery that his lessor should have been possessed of a title which would authorize him to make such a lease; and where plaintiff's lessor had conveyed the premises in trust to secure the payment of certain claims, but with a proviso that until default in payment the grantor should hold and enjoy the premises, and receive the rents, issues, and profits, and from time to time, with the consent of the trustees, or the survivor of them, make leases of any part of the premises, and grant licenses and privileges for raising, working, and conveying the coal, iron ore, etc., it was held that this did not hinder plaintiff from recovering, as the outstanding title would not avail defendant.—*George's Creek Coal & Iron Co. v. Detmold*, 1 Md. 225.

(d) The transfer by plaintiff in ejectment of his title to the demanded premises during the pendency of the action does not affect his right to recover, which will inure to his grantee.—*Cresap's Lessee v. Hutson*, 9 Gill 269. [Cited and annotated in 33 L. R. A. (N. S.) 925, on adverse possession due to ignorance or mistake as to boundary; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

(e) When defendant in ejectment is in possession under color of title or right, he can avail himself of an outstanding title as a defense.—*Hall v. Gittings*, 2 H. & J. 112.

#### § 26.—Equitable defenses in general.

##### Cross-References.

Converting case into suit in equity, see ante, § 4.

Equitable title in third person, see ante, § 25.

Issues, proof, and variance, see post, §§ 84, 85.

Plea or answer, see post, § 69.

In federal courts, see "Courts," §§ 262, 371.

(a) A defense which is good at law cannot be pleaded in an action in ejectment on equitable grounds, for such grounds include only defenses as could not formerly have been pleaded at law.—*Feldmeyer v. Wernitz*, 119 Md. 285, 86 Atl. 986.

(b) In ejectment, the fact that defendant was a lessee holding over because of the lessor's failure to pay for improvements in accordance with the lease providing for the extension of the term or compensation is a good equitable defense.—*Feldmeyer v. Wernitz*, 119 Md. 285, 86 Atl. 986.

(c) A plea in ejectment by trustees of a canal company acquiring land under condemnation proceedings held a bad plea by way of equitable defense, and not one permitted by act 1888, c. 547.—*Bond v. Murray*, 118 Md. 445, 84 Atl. 655. (See Code, art. 75, § 86.)

(d) A defense in ejectment, based on the fact that defendant and those under whom he claims have for more than 60 years occupied the premises without interference, and have made extensive improvements thereon, so that it would be inequitable for plaintiff to eject him, is available, if valid, under the plea of not guilty, and cannot be pleaded as an equitable defense.—*Bond v. Murray*, 118

Md. 445, 84 Atl. 655. (See Code, art. 75, § 86.)

(e) A defense in ejectment, based on the fact that the land occupied and claimed by defendant has been abandoned by plaintiff for more than 60 years, and that plaintiff is equitably estopped from setting up any claim, is, if valid, available under the plea of not guilty, and cannot be pleaded as an equitable defense.—*Bond v. Murray*, 118 Md. 445, 84 Atl. 655. (See Code, art. 75, § 86.)

(f) Where, though a 10-year lease to land was not acknowledged or recorded as required by statute to pass a legal estate, the lessee took possession and occupied it for seven years, the owner accepting a yearly rent under the lease, and continuing to accept rent from the lessee's wife after his death, she had an estate the nature of a tenancy from year to year, which would be a good legal defense in ejectment by the owner; so that she could not set up such facts as a defense on equitable grounds, as permitted by Code 1904, art. 75, § 86, in cases where a defendant may have relief on equitable grounds against a judgment in a legal action.—*Falck v. Barlow*, 110 Md. 159, 72 Atl. 678. (See Code 1911, art. 75, § 86.) [Cited and annotated in 42 L. R. A. (N. S.) 652, on nature of tenancy created by entry under lease void under statute of frauds.]

(g) In ejectment, the defense that plaintiff derives title through a voluntary conveyance made in fraud of the grantor's creditor, through whom defendant claims, cannot be pleaded under Code 1888, art. 75, § 83, providing that in actions at law defendant may plead such equitable defenses as would entitle him to relief against the judgment if recovered.—*Williams v. Peters*, 72 Md. 584, 20 Atl. 175. (See Code 1911, art. 75, § 86.)

(h) Though equitable titles escheat when the owner dies without heirs, in ejectment by the trustee of the legal title of lands or his grantee, the land escheating on the death of the cestui que trust without heirs against the party claiming under the escheat, the legal title will prevail; the remedy of defendant being in equity.—*Matthews v. Ward*, 10 G. & J. 443. [Cited and annotated in 16 L. R. A. (N. S.) 1153, on statute of

uses in United States; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

### § 27.—Equitable estoppel.

#### Cross-Reference.

Following state statutes and practice in federal courts, see "Courts," § 342.

### § 28.—Set-off and counterclaim.

#### Cross-References.

Cross-complaint and answer thereto, see post, § 73.

Pleading, see post, § 72.

Set-off arising out of another transaction, see "Set-Off and Counterclaim," § 33.

(a) The doctrine of set-off cannot be applied in an action of ejectment.—*Nutwell v. Tongue's Lessee*, 22 Md. 419.

### § 29. Pendency of other action or proceeding.

#### Cross-Reference.

Pendency of ejectment as bar to forcible entry and detainer, see "Forcible Entry and Detainer," § 13.

### § 30. Abatement on death of party.

#### Cross-References.

Laches in proceedings to revive, see "Abatement and Revival," § 74.

Persons against whom action may be revived, see "Abatement and Revival," § 73.

(a) Prior to the act of 1801, c. 74, an action of ejectment was abated by the death of the lessor of the plaintiff.—*Carroll v. Norwood*, 5 H. & J. 155. [Cited and annotated in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.] *Howard's Lessee v. Gardiner*, 3 H. & McH. 98. (See Code, art. 75, § 25.)

(b) Since the passage of the act of 1801, c. 74, an action of ejectment does not abate on the death of the plaintiff's lessor.—*Carroll v. Norwood*, 5 H. & J. 155. [Cited and annotated, see supra.] *Howard v. Moale*, 2 H. & J. 249. See also *Stevenson v. Howard*, 3 H. & J. 554. (See Code, art. 75, § 25.)

### § 31. Successive actions.

#### Cross-References.

Compelling bringing of second action, see post, § 34.

Restraining successive actions, see "Injunction," § 26.

Stay of proceedings, see "Action," § 68.

Stay of subsequent action until payment of costs, see "Costs," § 277.

Vexatious action, see "Action," § 9.

### § 32. Cross-actions.

### § 33. Persons entitled to sue.

#### Cross-References.

Parties plaintiff, see post, §§ 40-43.

Executors and administrators, see "Executors and Administrators," § 130.

Husband or wife or both, see "Husband and Wife," §§ 209, 210.

Purchaser in foreclosure, see "Mortgages," § 544.

Right of action by landlord against third person, see "Landlord and Tenant," § 54.

#### Annotation.

Who is real party in interest by whom action must be brought.—64 L. R. A. 620, note.

### § 34. Compelling bringing of action.

### § 35. Persons against whom action may be brought.

#### Cross-References.

Parties defendant, see post, §§ 45-47.

Fraudulent grantee, see "Fraudulent Conveyances," §§ 227, 230.

Husband or wife or both, see "Husband and Wife," § 214.

## II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

#### Cross-References.

Concurrent jurisdiction of state courts, see "Courts," § 472.

Exclusive and concurrent jurisdiction of state and federal courts, election of tribunal, see "Courts," § 491.

Jurisdiction of courts of general original jurisdiction, see "Courts," §§ 140, 154.

Jurisdiction of federal courts, see "Courts," §§ 262, 282, 285, 328, 435.

Jurisdiction of justices of the peace in actions involving title, see "Justices of the Peace," § 36.

Proper parties in ejectment by tenant, see "Landlord and Tenant," § 179.

Waiver of objections to jurisdiction, see "Courts," § 37.

### § 36. Jurisdiction of subject-matter.

### § 37. Jurisdiction of the person.

### § 38. Venue.

### § 39. Time to sue and laches.

#### Cross-Reference.

Limitations, see "Limitation of Actions," §§ 19, 32, 44, 58, 70-78, 105, 127, 183, 184.

### §§ 40-43. Parties plaintiff.

#### Cross-References.

Executor as party, see "Executors and Administrators," § 438.

Guardians as parties, see "Guardian and Ward," § 118.

(a) Where several heirs have been made

parties to an action in ejectment, the fact that one of them was an infant at the time of the trial does not entitle defendant to a verdict against those who were of full age.—*James v. Boyd*, 1 H. & G. 1.

(b) Where an action of ejectment is entered for the use of any person, such person is substantially a party.—*Hammond v. Ridgely's Lessee*, 5 H. & J. 245, 9 Am. Dec. 522.

#### §§ 44-47. Parties defendant.

##### *Cross-References.*

Persons against whom action may be brought, see ante, § 35.

Making defendant party refusing to join as plaintiff, see "Parties," § 35.

#### § 48. Notice to tenant and entry of consent rule.

(a) Where defendant, in ejectment by one tenant in common against another, wishes to deny ouster, he must not enter into the general consent rule, but apply on affidavit for a special rule to confess lease and entry, and not ouster.—*Van Bibber v. Frazier*, 17 Md. 436.

#### § 49. Notice to landlord and leave to defend.

#### § 50. Intervention and bringing in new parties.

##### *Cross-Reference.*

Of mortgagee in ejectment against mortgagor, see "Mortgages," § 214.

(a) Where the parties applied to be admitted as defendants in an action of ejectment, not upon the ground that they were in fact the landlords of the tenant in possession, but upon the ground that they were coparceners with the tenant, and entitled to undivided shares in the premises, *held*, that they were not entitled to be admitted as defendants, because they did not show that they were interested in the result of the suit.—*Minke's Lessee v. McNamee*, 30 Md. 294, 96 Am. Dec. 577.

#### § 51. Substitution of parties.

##### *Cross-Reference.*

Substitution of landlord, see ante, § 49.

#### § 52. Process.

#### § 53. Declaration and notice as process.

(a) An action of ejectment was instituted by proceedings against the casual ejector, and service was made upon the tenant in possession, who at the same term appeared

and entered into the consent rule. *Held*, that the plaintiff, before he could enter a default, must have served a new or altered declaration.—*Cushwa v. Cushwa*, 9 Gill 242.

(b) There can be no recovery against a defendant unless a copy of the declaration was served upon him.—*Spurrier's Lessee v. Yieldhall*, 2 H. & McH. 173.

#### § 54. Appearance.

#### § 55. Defense bonds.

##### *Cross-References.*

Scope of inquiry and powers of court, see post, § 102.

Appealability of discretionary order extending time to file, see "Appeal and Error," § 87.

Right to default judgment on failure to file, see "Judgment," § 106.

(a) Removal of a cause after rule for security does not change the time within which plaintiff is required to give security.—*Holt v. Tennallytown & R. Ry. Co.*, 81 Md. 219, 31 Atl. 809.

#### § 56. Estoppel.

#### § 57. Injunction.

##### *Cross-References.*

Jurisdiction of federal court to enjoin ejectment against one claiming riparian rights by prescription, see "Courts," § 262.

Restraining ejectment, see "Injunction," § 26.

#### § 58. Surveys.

#### § 59.— In general.

(a) Code 1888, art. 75, § 78, provides that in ejectment, "where the parties hold or claim under the same title the lands in dispute, no warrant of resurvey shall issue, except in cases where the parties claim different parcels under the same title, and it appears to the court that there is a dispute about the location of the divisional line or lines." *Held*, that it was error to issue a warrant for a resurvey where both parties claimed through a common source, and where it was expressly stated on the face of defendant's deed that the land embraced in such deed was a part of the land conveyed by the deed under which plaintiffs claimed, and there was no dispute as to the location of any divisional line between the two parts.—*Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18. (See Code, art. 75, § 81.)



(b) If the beginning of a tract of land is lost, or cannot be proved, then it is to be found by reversing the lines from the first known and established boundary. — *Hammond v. Norris*, 2 H. & J. 130.

#### § 60.— Amendment or resurvey.

(a) Code 1888, art. 75, § 81, provides that in ejectment "the plats and certificates of survey in every case may be amended at bar." *Held*, to authorize amendments only in respect to matters which were unknown or overlooked at the time of the survey. — *Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166. (See Code 1911, art. 75, § 84.) [Cited and annotated in 22 L. R. A. (N. S.) 674, as to whether one is a riparian or littoral owner, whose property abuts on highway bordering on navigable water.]

(b) The court permitted a new location on a plat to be made by a surveyor in response to a request to "locate for plaintiffs the adverse holdings of D. in his lifetime in the lands opposite lot 31, in the town \* \* \*, and between W. street in said town and the S. river." *Held*, error, since a new location could be made only in obedience to specific instructions as to the boundaries, courses, and distances to be surveyed. — *Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166. [Cited and annotated, see *supra*.]

(c) In ejectment, a warrant of resurvey was properly directed where it was a question of fact, on which the parties joined issue, whether the land in controversy was within the lines of a certain tract. — *Shartzer v. Mountain Lake Park Ass'n*, 86 Md. 335, 37 Atl. 786.

#### § 61. Notice of pendency of action.

##### Cross-References.

Cancellation of notice, see "Lis Pendens," § 20.

Filing pleading as notice, see "Lis Pendens," § 7.

### III. PLEADING AND EVIDENCE.

##### Cross-References.

Action by personal representative, see "Executors and Administrators," §§ 130, 443.

Admissibility of record of foreign will, see "Wills," § 434.

Advancements, see "Descent and Distribution," §§ 115, 117.

As to adverse possession, see "Adverse Possession," §§ 110-117.

As to boundaries, see "Boundaries," §§ 32-37.

Filing pleading as notice of pendency of action, see "Lis Pendens," § 7.

In ejectment by tenant, see "Landlord and Tenant," § 179.

Pleadings to sustain default judgment, see "Judgment," § 101.

Surplusage in pleading, see "Pleading," § 35.

Testimony as to matters occurring after death of party to contract or cause of action, see "Witnesses," § 168.

Testimony as to transactions with persons since deceased, see "Witnesses," §§ 125, 139, 140, 144, 146, 150, 159, 160, 163, 164, 166, 167, 175, 176, 178.

#### §§ 62-67. Declaration, complaint, or petition.

##### Cross-References.

Declaration and notice as process, see ante, § 53.

Form of action, see ante, § 4.

Necessity of proof of title pleaded, see post, § 82.

Ambiguity in pleading, see "Pleading," § 19.

Pleading matters judicially noticed, see "Pleading," § 6.

(a) In ejectment, separate demises from several lessors may be laid in a declaration. — *Magruder v. Peter*, 4 G. & J. 323.

(b) A petition in ejectment should so describe the land sued for that, in the event of a recovery, the officer executing the writ of possession will know to what land the plaintiff is entitled. — *Fenwick v. Floyd's Lessee*, 1 H. & G. 172.

(c) A declaration claiming 251 acres, "part of a tract of land called," etc., without any description of the part claimed, is defective. — *Fenwick v. Floyd's Lessee*, 1 H. & G. 172.

(d) Where a declaration in ejectment contains two counts, one good and the other defective, the plaintiff may recover on the good count. — *Bevans v. Taylor*, 7 H. & J. 1.

(e) A tract of land known by a particular name may be described by such name in the complaint. — *Fouke v. Kemp's Lessee*, 5 H. & J. 135.

#### §§ 68-72. Plea, answer, and disclaimer.

##### Cross-References.

Disclaimer as affecting right to litigate title, see post, § 82.

Pleading in abatement and in bar, see "Abatement and Revival," § 85.

Pleading matters of evidence, see "Pleading," § 11.

Plea of limitations, see "Limitation of Actions," § 183.

Traverses or denials or admissions, see "Pleading," §§ 112-129.

Waiver of plea in abatement, see "Abatement and Revival," § 84.

(a) A plea in ejectment *held* defective for presenting issues outside of those in the case.—*Bond v. Murray*, 118 Md. 445, 84 Atl. 655.

(b) In taking his defense, not on warrant, but on title, the defendant stated that he took it for certain lots, being part of a tract called "Lorrain," without stating what part. *Held*, that, in such case, the proper defense is on warrant, and that the plaintiff's land and the lots for which defense is taken must be located.—*Clements' Lessee v. Ruckle*, 9 Gill 326.

§ 73. Cross-complaint and answer thereto.

§ 74. Replication or reply.

§ 75. Demurrer.

§ 76. Amended and supplemental pleadings.

*Cross-References.*

Notice at end of declaration, see ante, § 58.

Action against devisee, see "Wills," § 749.

Amendment to plead statute of limitations, see "Limitation of Actions," § 184.

Changing form or cause of action, see "Pleading," § 249.

Effect on limitations, see "Limitation of Actions," § 127.

(a) Where a demurrer to the pleas in ejectment is sustained, it is discretionary with the court to allow defendant to file special pleas, and its refusal so to do is not the subject of appeal.—*Wallis v. Wilkinson*, 73 Md. 128, 20 Atl. 787.

(b) A motion to enlarge the term of the demise in an action of ejectment, whereon judgment has been recovered in the general court in 1790, was refused.—*Frazier v. Hall*, 5 H. & J. 437.

(c) If the term of a demise in the declaration in ejectment expired before the verdict and judgment in the court below, though the judgment is erroneous, yet the court below in such case, under *procedendo*, may

enlarge the demise.—*Roseberry v. Seney*, 3 H. & J. 228.

§ 77. Affidavits accompanying pleadings.

*Cross-References.*

Affidavit to be filed with *præcipe*, see ante, § 52.

As affecting burden of proof, see post, § 86.

§ 78. Delivery or filing of abstract or evidence of title.

*Cross-References.*

Proof of conveyance not recited in abstract, see post, § 84.

Title bond, see "Vendor and Purchaser," § 219.

(a) Where the same title paper is located by both parties in ejectment in the same manner, covering the same ground, the location is binding upon both.—*Langley's Lessee v. Jones*, 26 Md. 462.

(b) Where the beginning tree of a tract is admitted upon the plats, both parties are estopped from denying its location.—*Wilson v. Inloes*, 6 Gill 121.

(c) In ejectment, where defense is taken on warrant of resurvey, all possessions, whether relied on to prove title, for illustration, or to disqualify witnesses, must be located on the plats of the cause.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated in 18 L. R. A. 781, on what title or interest will support ejectment; in 48 L. R. A. (N. S.) 759, 768, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another.]

(d) Where there is a location on the plats in the case, by either of the parties, of a tract of land, deed, plot, etc., and there is no counterlocation by the adverse party, such location is admitted.—*Jarrett's Lessee v. West*, 1 H. & J. 501; *Hughes v. Howard*, 3 H. & J. 9; *Shilknecht v. Eastburn's Heirs*, 2 G. & J. 114.

(e) If a deed from A. to B. for part of a tract of land has been located on the plots, then a deed from A. and B. to C. for the same part of the said tract of land need not also be located.—*Roseberry v. Seney*, 3 H. & J. 228.

(f) Where plaintiff in ejectment declares

for a whole tract, and makes title to a part only, it is sufficient to locate such part on the plots, if there is no controversy about the location of the whole.—*Mitchell v. Gover*, 1 H. & J. 507.

(g) Plaintiff in the present ejectment, claiming under the title of a defendant in a former ejectment for the same land, brought by one under whom defendant in the present ejectment claims, is precluded and estopped from locating the same land in any other manner than that in which the defendant in the former ejectment located the same on the plots in that ejectment.—*Ridgeley's Lessee v. Ogle*, 4 H. & McH. 123.

(h) In ejectment, in Maryland, it was held that evidence might be given that the land lay in the District of Columbia, without locating it, or the plots filed in the action, it being delineated, described, and admitted, by a law of the state.—*Davidson's Lessee v. Beatty*, 3 H. & McH. 594. [Cited and annotated in 55 L. R. A. 353, on plaintiff's right to summon or charge himself as garnishee; in 15 L. R. A. (N. S.) 1196, 1243, 1246, on necessity for color of title, not expressly made a condition by statute, in adverse possession.]

(i) Where, under leave to add to and amend the plots returned in a cause, some of the plots have been amended, the plots which have not been amended cannot be admitted, as plots filed in the case.—*Gill's Lessor v. Cole*, 3 H. & McH. 576.

#### § 79. Motions for judgment on pleadings.

#### § 80. Issues, proof, and variance.

##### Cross-Reference.

Responsiveness of verdict to issues, see post, § 111.

#### § 81.— Issues in general.

(a) Under the express provision of Code 1904, art. 75, § 71, the plea of not guilty in ejectment is in legal effect a confession of possession and ejectment, and puts in issue the plaintiff's legal title to the premises, the right of possession, and the amount of damages.—*Mullen v. Brydon*, 117 Md. 554, 83 Atl. 1025. (See Code 1911, art. 75, § 71.)

(b) Under Code 1888, art. 75, § 69, relating

to the effect of a plea of not guilty in ejectment, there is no error in an instruction that such plea puts in issue the title and right of possession to the premises, and the damages sustained by plaintiff.—*Wallis v. Wilkinson*, 73 Md. 128, 20 Atl. 787. (See Code 1911, art. 75, § 71.)

#### § 82.— Necessity of proof of title pleaded.

(a) Plaintiff in ejectment, when suing as heir at law, must prove his descent from the ancestor from whom he claims, and must show that all the intermediate heirs are dead, without issue.—*Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18.

(b) Plaintiff in ejectment cannot recover without showing a paper title in the person who executed the first deed in his chain of title, or possession by him or by some of the mesne grantees under whom plaintiff claims.—*Adams v. School Com'rs of Baltimore County*, 73 Md. xiii, memorandum case, 20 Atl. 954, full report.

(c) In an action of ejectment, the plaintiff claimed title by collateral descent, making it material for him to prove that the original ancestor from whom his title was derived had died without issue. It appeared that the ancestor had conveyed land more than 100 years before the suit. Held, it must be proved that he died without issue.—*Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698. [Cited and annotated in 26 L. R. A. (N. S.) 299, on time of death of one presumed dead after seven years' absence.]

(d) Plaintiff in ejectment who bases his title on his nearness of kin to the last owner of the estate must prove the death of all other relatives, who, if living, would inherit before him.—*Elwood v. Lannon's Lessee*, 27 Md. 200.

(e) The plaintiff declared for certain tracts of land, viz. A., B., and C., being "the dwelling plantation of W." Held, that the latter words were only terms of additional description, and did not impose upon the plaintiff, the necessity of proving that they did, in fact, compose the dwelling plantation of W., if he could have otherwise proved a good title to them.—*Medley v. Williams*, 7 G. & J. 61.

(f) The declaration, in an action of ejectment, was for a tract of land called "Rupalta," and the deed offered in evidence was of a tract called "Repalta." *Held*, that this was no material variance.—*Mitchell v. Gover*, 1 H. & J. 507.

(g) One bringing ejectment for an entire tract of land cannot recover on showing title to an undivided moiety.—*Cretzer's Lessee v. Thomas*, 1 H. & J. 463.

(h) Though, in an action of ejectment, the plaintiff can recover less than he claims, yet it must consist of the same nature with that claimed. If he claims 100 acres, less than 100 acres may be recovered. If he claims an undivided moiety, an undivided third or any undivided part may be recovered; but he cannot recover an undivided part where he claims an entirety, or entirety when he demands an undivided portion.—*Carroll v. Norwood*, 1 H. & J. 463, note.

(i) In ejectment for a tract of land by the name of "Enlargement," which was surveyed and patented by the name of "The Enlargement," it was *held* that the variance was not material; the land being located on the plots returned in the cause by the name of "The Enlargement."—*Carroll v. Norwood*, 4 H.-& McH. 287.

(j) The plaintiff in ejectment located his claims on the plots as beginning "at the end of the 13th line of the resurvey on the addition of Pile's Delight," and produced in evidence a patent describing the beginning to be "at the end of the 13th line of a tract of land called 'Addition to Pile's Delight.'" *Held*, that this was no variance, and that evidence might be permitted to show that they were the same tract.—*Smith's Lessee v. Volgamot*, 2 H. & McH. 155.

(k) The demise, in a declaration in ejectment, described the land by course and distances, from boundary to boundary. The plots in the certificates returned in the cause, showed a variance, though it sufficiently appeared to be the same lands. *Held*, that the variance was not fatal.—*Chamberlaine's Lessee v. Crawford*, 1 H. & McH. 355; *Redding v. McCubbin*, Id. 368.

### § 83.—Necessity of proof of title of all coplaintiffs.

(a) In an action of ejectment on the joint demise of A. and B. to the plaintiff for part of a tract of land, and on separate demises by each of them for an undivided moiety of such part, the death of B. was suggested after issue was joined, and a verdict was given for the plaintiff for one undivided twelfth part of the tract, described by lines on the plots. A motion in arrest of judgment was overruled, and judgment rendered on the verdict for the plaintiff.—*Stevenson v. Howard*, 3 H. & J. 554.

### § 84.—Evidence admissible under pleadings.

#### Cross-Reference.

See ante, § 27.

(a) A former judgment is admissible in ejectment under a plea of not guilty.—*Brooke v. Gregg*, 89 Md. 234, 43 Atl. 38. [Cited and annotated in 4 L. R. A. (N. S.) 298, on conclusiveness of judgment in ejectment, etc., as to previous claim of title, not in use.]

(b) Where the plaintiff in an action of ejectment, on the execution of a warrant of resurvey, located on the plots for his claim and pretensions all that part of a certain tract of land "which was in the possession of M.," making no reference as to the time to which such possession related, it is incompetent for him to prove by witnesses that M. was in possession thereof for several years prior to his death.—*Mitchell v. Mitchell*, 8 Gill 98.

(c) In ejectment, the plaintiff declared for a tract of land called "Nonesuch," and professed to locate it according to its patent. *Held*, that he could not offer evidence of the boundaries of certain other tracts, and that they were comprised under the reputed name of "Nonesuch," there being no location of it as a parcel of land by that name.—*Budd v. Brooke*, 3 Gill 198, 43 Am. Dec. 321.

(d) Where a plaintiff in ejectment has not located his escheat grant on the plots in the cause, coextensive with the location of the original tract, he cannot give evidence to extend his pretensions beyond the lines and limits he has given to the escheat grant, nor

can he give evidence of the lines of his escheat grant running otherwise than he has located them on the plots in the case as his pretensions.—*Howard v. Moale*, 2 H. & J. 249.

(e) Plaintiff must prove the bounds and location of the lands he has made title to, although no defense is taken for any land within the bounds claimed by him.—*Dockery v. Maynard*, 1 H. & McH. 209.

#### § 85.—Variance between allegations and proof.

*Cross-Reference.*

See ante, §§ 81-83.

#### § 86. Presumptions and burden of proof.

*Cross-References.*

Instructions, see post, § 110.

In action by state to recover canal lands, see "States," § 209.

Lapse of time raising presumption of payment of mortgage under which title is claimed, see "Payment," § 66.

(a) In ejectment, the burden is on plaintiff to show that he has a legal title and right of possession; but, having established a prima facie title, the burden is then on defendant, attempting to set up an outstanding title in a third person, to establish its existence sufficiently to enable such person to recover thereon against either of the parties to the suit.—*Richardson v. Baltimore & D. B. R. Co.*, 89 Md. 126, 42 Atl. 938.

(b) Under the plea of not guilty in ejectment the onus of establishing a good title is on the plaintiff.—*Langley's Lessee v. Jones*, 26 Md. 462.

(c) Plaintiff in ejectment produced a patent to B., for the land, dated in 1774, and produced a deed for the same land from C. to F., dated November 7, 1785, containing a recital of a deed, also for the same land, from B., the patentee, to C., and proved possession in C. of a part of said land, in 1782 and afterwards, and in F., claiming under him, and in the lessor of the plaintiff, claiming under F.; all claiming to hold such possession under a title to the whole tract. Held, that a conveyance from the patentee to C. might be presumed.—*Beall's Lessee v. Lynn*, 6 H. & J. 336.

(d) Plaintiff, in deducing his title to the

land claimed by him, offered evidence of a grant for the land in 1671 to A. and B., and that C. was seised and possessed of said lands, and died so seised in 1746, having, by his will, in 1744, devised the land in tail to his son D., after his mother's death; that D. in 1780, being in possession, conveyed the land to E., who died intestate in 1800, leaving six children, one of whom conveyed all his interest to the lessor of the plaintiff. The action was brought in 1808. Held, that the life estate to the mother, from the length of time that had elapsed, must be considered as having expired before the ejectment was brought, and that plaintiff was entitled to recover.—*Stevenson v. Howard*, 3 H. & J. 554.

(e) Where the defendant in ejectment produces an office copy of a deed, it lies on the plaintiff to prove that the deed was not indented.—*Smith's Lessee v. Steele*, 3 H. & McH. 103.

#### § 87. Admissibility of evidence.

*Cross-References.*

As affected by delivery or filing of abstract or evidence of title, see ante, § 78. Evidence admissible under pleadings, see ante, § 84.

Best and secondary evidence, see "Evidence," §§ 157-187.

Declarations, see "Evidence," §§ 266-313.

Establishment of title to land after loss or destruction of record thereof, see "Records," § 18.

Res gestæ, see "Evidence," §§ 118-128.

#### § 88.—In general.

(a) The demise, in a declaration in ejectment, was stated to be on January 1, 1801, and the conveyance offered in evidence, under which the plaintiff claimed, was dated February 23, 1802. Held, that the plaintiff could not recover.—*Wood v. Grundy*, 3 H. & J. 13.

#### § 89.—Identity and description of property.

(a) Code 1888, art. 75, § 78, provides that in ejectment, "where the parties hold or claim, under the same title, the lands in dispute, no warrant of resurvey shall issue, except in cases where the parties claim different parcels under the same title, and it appears to the court that there is a dispute about the location of the divisional line or lines." Held, that it was error to admit

locations in evidence, where both parties claimed through a common source, and where it was expressly stated on the face of defendant's deed that the land embraced in such deed was a part of the land conveyed by the deed under which plaintiffs claimed, and there was no dispute as to the location of any divisional line between the two parts.—*Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18. (See Code 1911, art. 75, § 81.)

(b) Where the whole of a tract is located on the plats, a deed conveying the whole may be given in evidence in ejectment, though not itself located, and two deeds, one for a specific portion and the other for the residue of the same tract, when the patent has been located may be received in evidence, without being otherwise located.—*Langley's Lessee v. Jones*, 26 Md. 462.

(c) Since act 1852, c. 177, gives defendant the right to take defense on warrant, the plaintiff must make a location of any title paper he offers in evidence in strict conformity with the calls, or courses and distances, mentioned in the title paper.—*Clary v. Kimmell*, 18 Md. 246. (See Code, art. 75, §§ 22, 71, et seq.)

(d) In ejectment, upon a question of disputed boundary, respecting which a survey and plats of the premises have been made, it is not competent to ask a witness the position of an object which it does not appear, from the plats and explanations, he had pointed out to the surveyor.—*Carroll v. Granite Mfg. Co.*, 11 Md. 399.

(e) In an action of ejectment, where a certified copy from the land office of a warrant of a surveyor was offered in evidence, in connection with a certificate of his survey, to prove the boundaries of a tract of land, its admissibility is not affected because the name of the register who issued the warrant was not appended to it, since the names of the registers are not appended to the record of warrants issued.—*Mitchell v. Mitchell*, 8 Gill 98.

(f) In ejectment, an exemplification of the return of the surveyor to a warrant of a resurvey of the land is inadmissible, where the resurvey purports to locate the tract of land described in it in a way wholly incon-

sistent with the calls and expressions contained in the original patent.—*Wilson v. Inloes*, 6 Gill 121.

(g) Locations made by a lessor of the plaintiff, in an action of ejectment, as his claim to a tract of land, being transferred to the plots in another action of ejectment, brought against those claiming under the lessor in the first action, and who took defense for the same tract in the second action, are competent evidence, in the second action, to show the true location of the tract, although the first action was dismissed.—*Rogers' Lessee v. Raborg*, 2 G. & J. 54.

(h) A deed recited that the grantor was seised in fee of a tract called "B.," lying in A. county, which was granted by the proprietary of Maryland to D., and by D. conveyed to C., and by C. to the grantor, and that the grantor had bargained and contracted with the grantee for the sale of the said tract of land as shall not have been affected by older surveys, and then professed, for \$5,000 decreed to the grantor by the chancellor, to convey to the grantee "the said tract, as corrected by a survey made by a decree of the chancellor,—the metes, bounds, courses, and distances being then established,—to have and to hold the said tract thereby granted to the grantee and his heirs," etc. *Held*, that such deed conveyed only the quantity of land included within the metes and bounds, courses and distances, established by the chancellor, and could not be given in evidence, in an action of ejectment for the tract B. unless located.—*Beall's Lessee v. Bayard*, 5 H. & J. 127.

(i) In ejectment, plaintiff gave in evidence a certificate of survey of the land in question, called "Notlar's Desire," and also offered in evidence a certain deed for part of a tract of land called "Notley's Desire." *Held*, that the deed for a part of the tract of land called "Notley's Desire" was not admissible as evidence of a title under the survey for the tract called "Notlar's Desire."—*Roseberry v. Seney*, 3 H. & J. 228.

(j) In ejectment, where there is a location on the plats, by either of the parties, of a tract of land, deed, plot, etc., and there is no counterlocation by the adverse party, no

evidence can be given of the locations of a deed, plot, etc., which does not correspond with it.—*Jarrett's Lessee v. West*, 1 H. & J. 501; *Hughes v. Howard*, 3 H. & J. 9.

(k) Where a deed for part of a tract of land has not been particularly located on the plots in the cause, it may be read in evidence, if the whole tract is united in the same person, and the whole has been located.—*Hall v. Gittings' Lessee*, 2 H. & J. 380.

(l) In ejectment, defendants produced a witness, who proved that the person under whom plaintiff made title and defendant employed witness to survey the land in controversy, and that both were present, and that a certain line was run at the instance of the person under whom plaintiff claims, in order to show the true location thereof. Plaintiff produced a plot of the land, and proved by witness that the plot was the one which he made, and further proved that the lines on this plot were actually located on the plots in this case. Plaintiff then offered to read in evidence the plot made by witness. Held, that the plot was admissible, as, defendant having offered evidence, by the witness who made the survey, to show that the person under whom plaintiff claimed did not claim, it was proper that the plot should go to the jury.—*Howard v. Moale*, 2 H. & J. 249.

(m) Though plaintiff cannot give any evidence of the lines of his escheat grant, under which he claims, running otherwise than he has located them on the plots in the cause, as his pretensions, he is not precluded from giving evidence of any other lines as the lines of the original tract, by way of illustration, and may support the location of his pretensions so far as he can show that they are located within the limits of the original tract.—*Howard v. Moale*, 2 H. & J. 249.

(n) The testimony of a witness to identify the bounds of land with the location on a plot is admissible, when the land in which it is claimed the witness is interested is not located on the plot.—*Hall v. Gittings*, 2 H. & J. 112.

(o) The record of the proceedings, and the plots of the commissioners appointed for

ascertaining the bounds of the land, under act 1715, c. 45, are legal and proper evidence, as to such bounds, where they are not reversed.—*Davis v. Batty*, 1 H. & J. 264. (See Code, art. 75, §§ 71, et seq.)

(p) Where plaintiff in ejectment declares for a whole tract, and makes title to a part only, and locates such part on the plots, he may, on such partial location, read the patent in evidence.—*Mitchell v. Gover*, 1 H. & J. 507.

(q) Locations made by a party to an action of ejectment, on a plot in another cause, in which the other party was not interested, may be given in evidence against the party making them.—*Jarrett's Lessee v. West*, 1 H. & J. 501.

(r) Evidence as to where a tree stood will not be admitted unless it is located on the plots filed in the case.—*Carroll v. Norwood*, 1 H. & J. 167.

(s) Where land comprehended in a deed is located on the plots filed in an action of ejectment, evidence may be given by plaintiff of possession of that land, although particular marks, or places of possession, are not located.—*Carroll v. Norwood*, 1 H. & J. 167.

(t) A deed, although located on the plots in the case by a wrong date, may be read in evidence in support of the location.—*Carroll v. Norwood*, 1 H. & J. 167.

(u) Deeds for different parts of a whole tract of land, located on the plots, may be read in evidence, though such deeds are not themselves severally located.—*Hall's Lessee v. Gough*, 1 H. & J. 119.

(v) A deed for a moiety of land held in common cannot be exhibited in evidence, in ejectment, where defense is taken on warrant, unless the deed and the courses therein described are located on the plots.—*Carroll v. Norwood*, 1 H. & J. 100.

(w) Evidence is not admissible to prove that the locations made on the plots in the cause were not in compliance with the parties' instructions to the surveyor.—*Gittings' Lessee v. Hall*, 1 H. & J. 14, 2 Am. Dec. 502. [Cited and annotated in 35 L. R. A. (N. S.)]

762, on effect of conveyance of land held adversely.]

(x) A place called a "glade" being located on the plots returned in an action of ejectment by the defendant, he produced a witness, and asked him if he knew any other glade than that located, who answered that he did not. The court then permitted the plaintiff to ask another witness if he knew any other glade than that located by the defendant, although no other glade, or place so called, had been located.—*Nelm's Lessee v. Smith*, 4 H. & McH. 389.

(y) The return made by a jury, under a warrant issued in pursuance of act 1699, c. 18, for ascertaining the bounds of lands, is not admissible in evidence, in an action of ejectment, where it was not located on the plots returned in the case, and where the return was not in conformity to the directions of said act; the jury having exceeded their authority.—*Ruff's Lessee v. Webster*, 4 H. & McH. 499. (See Code, art. 75, §§ 71, et seq.)

(z) In ejectment, the plot of a surveyor on a former survey was given in evidence to corroborate what the surveyor had said to a witness as to the location of the land, though the plot offered in evidence was not located on the plots returned in the case.—*Scott's Lessee v. Ollabaugh*, 3 H. & McH. 511.

(aa) A deed was admitted in evidence, in an action of ejectment, though the courses of said deed were not located on the plots in the cause.—*Catrop's Lessee v. Dougherty*, 2 H. & McH. 383.

(bb) In ejectment, where plots are returned, proof of possession of a particular part of the tract cannot be admitted unless it is located on the plots.—*Hawkins v. Middleton*, 2 H. & McH. 119.

#### § 90.—Title and right to possession.

##### Cross-References.

Conclusiveness and effect of admissions, see "Evidence," § 265.

Documentary evidence in general, see "Evidence," §§ 325-383.

Hearsay evidence, see "Evidence," § 317.

Opinion evidence, see "Evidence," § 471.

(a) In ejectment a copy of a deed not tending in the remotest degree to show title in

plaintiff is properly excluded.—*Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962.

(b) A plaintiff in ejectment, who fails to establish a good legal title, may not inquire into the character of the title of defendant, and evidence relating thereto is properly excluded.—*Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962.

(c) Under Code 1904, art. 75, § 22, providing that it is not necessary to state in the declaration the name by which the land may have been patented, but it may be described by any description certain enough to identify it, a deed describing land as the part of a tract of land called "King's Hill," situate in a designated county known as the landing on King's creek, is on its face admissible in evidence, and, where the location of the land can be proved by reference to it, it is sufficient.—*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273. (See Code 1911, art. 75, § 22.)

(d) In ejectment against a husband and wife, plaintiff claimed the land under a sheriff's deed given on the sale of the land under execution, issued on a judgment against the husband. Defendants had no "paper title" to the land, but plaintiff alleged that before the sheriff's sale the title was in the husband by prescription, while defendants alleged that the wife had title by purchase. *Held*, that evidence of a surveyor as to "who paid for a survey of the land" in question many years before is inadmissible, for it would not show an act indicative of ownership.—*Johnson v. Turner*, 74 Md. xiv, memorandum case, 22 Atl. 1103, full report.

(e) In ejectment instituted in 1878, against the heirs of H., it was admitted that the plaintiffs were the heirs at law of M., wife of D., who had been seised in fee in her own right, during coverture, of the land, together with her husband; and that she died feme covert and intestate in 1851, and D. in 1858. The defendants then offered in evidence the record of a deed of the land, dated in 1833, from D. and M. to H., who, it was admitted, at once entered into possession, and so remained until his death, in 1876; and it was admitted that the defendants had been in possession ever since. The plaintiffs then offered in evidence a paper writing purporting to be the original deed from D. and M.



to H., the record of which had been given in evidence by the defendants, and the certificate of acknowledgment of which contained no mention of a private examination of the wife; and the plaintiffs offered to follow this up by parol proof of forgery. *Held*, that the original deed and the parol testimony were admissible.—*Davis v. Hamblin*, 51 Md. 525. [Cited and annotated in 41 L. R. A. (N. S.) 1173, on impeachment of certificate of acknowledgment.]

(f) Where a title deed of defendant in ejectment was impeached for fraud by plaintiff, a stranger thereto, it was competent, in rebuttal, to prove a parol contract between grantor and grantee whereby the latter was to pay certain debts of the former in consideration of the deed.—*Leiter v. Grimes*, 35 Md. 434.

(g) A testator devised to S. a life interest in 147 acres of land to be laid off from the north end of his dwelling plantation. After the death of S., an action of ejectment was brought for land which formed part of the 147 acres by the plaintiff, who was residuary devisee of all the dwelling plantation not devised to S., and also entitled, as heir at law, to half of the land devised to her. *Held*, that evidence to the effect that an informal survey and location of the land, which did not amount to a partition under the will, had been made, and that S. took possession under it, was admissible on behalf of the plaintiff to show that S. held under the will, and not adversely to it, and thus to negative the theory that the holding of S. was adverse to plaintiff's title.—*Nutwell v. Tongue's Lessee*, 22 Md. 419.

(h) The defendant, in an ejectment brought on an escheat patent, may show by parol that the owner did not, in fact, die intestate and without heirs.—*Brown v. Shilling*, 9 Md. 74.

(i) Plaintiffs claimed title to 190 acres of land in Howard county by virtue of a deed dated December 24, 1850, from two sons of H., deceased, from whom the sons traced their title. Defendant offered in evidence an agreement under the hand and seal of one of the sons and one H., dated February 17, 1844, which stated that a certain tract of land lying in Howard district, containing

196 acres, more or less, had been sold to H. September 7, 1841; that, part of the purchase money being unpaid, one S., who claimed to have lately purchased at sheriff's sale H.'s interest in the land, tendered to the owner the balance due on the purchase price, which was accepted, and demanded a deed; and that the vendor thereupon bound himself in a penalty of \$500 to execute a deed to S. if he would remove any difficulty which might arise on account of H. being the first purchaser. Defendant claimed under S. *Held*, that such agreement was inadmissible for the purpose of showing title in defendant or any other person.—*Warner v. Hardy*, 6 Md. 525. [Cited and annotated in 19 L. R. A. (N. S.) 438, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

(j) Plaintiffs claimed title to 190 acres in a certain county by virtue of a deed executed in 1850 by two grantees. Defendant offered in evidence a written agreement of one of such grantees and one H., dated in 1844, which stated that a certain tract of land lying in the above-mentioned county, containing 196 acres, more or less, had been sold to H. in 1841; that, part of the purchase money being unpaid, one S., who claimed to have lately purchased at sheriff's sale H.'s interest in the land, tendered to the owner the balance due on the purchase money, which was accepted, and demanded a deed; and that the vendor thereupon bound himself in a penalty of \$500 to execute a deed to S. if he would remove any difficulty which might arise on account of H. being the first purchaser. Defendant claimed under S. The agreement was introduced to show, together with other evidence thereafter to have been offered, that defendant occupied such a position in relation to the land in controversy as entitled him to notice and demand before suit brought. *Held*, that the contract was inadmissible, since it did not identify the land as that demanded, and defendant did not accompany his offer by a proposal to adduce evidence of identity.—*Warner v. Hardy*, 6 Md. 525. [Cited and annotated, see *supra*.]

(k) In ejectment, plaintiff, to prove the death of A. before the year 1745 without

heirs and intestate, offered in evidence a warrant of resurvey to B. issued in 1725, a certificate of survey returned under such warrant dated September 21, 1726, but upon which no patent appeared to have been issued, and also an escheat patent relating to the same lands, granted September 28, 1759, founded upon a special warrant of resurvey dated June 18, 1759, and returned on the 30th of that month. The defendant objected to the admissibility of the warrant of resurvey to B., and certificate returned thereon, either with, or independent of, the escheat patent of 1759, and proceedings on which the same were founded. *Held*, the proceedings on that warrant not having been prosecuted, no purchase money being paid by B., nor patent accepted by him, that neither the warrant nor certificate was proof of the facts recited in them as to the death of A. at the time specified.—*Wilson v. Inloes*, 6 Gill 121.

(l) Where a sale of lands was made by a trustee appointed by a decree of the court of chancery directing him, on payment of the purchase money, to convey to the purchaser and his heirs the land sold, and the purchaser died without having obtained a conveyance from the trustee, who made it to the heirs, *held*, in an action of ejectment by one claiming under the heirs to recover the lands, that the conveyance might be read in evidence.—*Massey v. Massey's Lessee*, 4 H. & J. 141.

(m) In an action of ejectment, the defendant, having read in evidence a grant of the land in dispute to A. in 1708, proved that B. was in possession of part of the land from 1765 to the time of his death, and that those claiming under him had been in possession ever since, and that the defendant was the only heir of B. He then, without showing any title or possession in C., offered to read in evidence a deed from C. to B. of said land in 1765 for the purpose of proving in what manner, and at what time, B. came into possession of such land. *Held*, that for such purpose the deed might be read in evidence.—*Cockey v. Smith*, 3 H. & J. 552.

(n) Plaintiff claimed under a deed of one A., conveying the land to one B., in trust for one of his creditors, provided such cred-

itor assented, in a specified time, to accept it in full satisfaction for a debt due to him from A. To establish the fact of his assent, the plaintiff offered in evidence the record of a decree of a court of chancery, rendered upon a bill filed by such creditor against the trustee, for the conveyance of said land, which decree directed such conveyance to be made. The bill was filed, and the conveyance made, long after the expiration of the time limited for the assent of the creditor. The complainant having assigned the decree to the plaintiff, the conveyance was made by the trustee directly to him. *Held*, that the record and decree could not be read in evidence, in this action, against the executrix of A.—*Dorsey v. Courtenay*, 3 H. & J. 474.

(o) A bond executed in 1759, by a person then claiming the land in dispute jointly with another, conditioned to abide by a division which certain persons should make of the land, was permitted to be read in evidence by the plaintiff in an action of ejectment where the defendant claimed under the obligor in the bond.—*Dale v. Fassett's Lessee*, 3 H. & J. 119.

(p) In ejectment, there was no grant of the land produced, and no evidence that C., who conveyed the land to F., under whom defendant claimed, was ever in possession of the land. *Held*, that the deed from C. to F., which was offered in evidence, and the certificate of the receipt for the alienation fine indorsed thereon, were not competent evidence.—*Cockey's Lessee v. Smith*, 3 H. & J. 20.

(q) A deed for a certain number of acres of land, being part of a tract, without metes or bounds, but referring to another deed, not produced, to ascertain the same, is not legal evidence to show title, or to support the location of the same on the plots in the case, without producing the deed to which it refers.—*Hammond v. Norris*, 2 H. & J. 130.

(r) In an action of ejectment, evidence was permitted to be given to the jury that a certificate of survey returned to the land office was a forgery, and that the grant issued thereon was void.—*Boreing's Lessee v.*

*Singery*, 4 H. & McH. 398; *Same v. Same*, 2 H. & J. 455. (See *Singery v. Attorney-General*, 2 H. & J. 487.)

(s) A conveyance for a moiety of the land for which an ejectment was brought may be read in evidence, before it is proved that the grantor therein has a right to convey; but if it is not afterwards shown that he has such right, the deed will not be held evidence.—*Lowes v. Holbrook*, 1 H. & J. 153.

(t) A patent with the following marginal entry: "This patent delivered into the land office, and made void, and another issued,"—was held to be evidence, in ejectment.—*Maxwell v. Lloyd*, 1 H. & McH. 212.

#### § 91.— Possession and ouster.

(a) Where one had a deed of tract A, being a resurvey of an original tract called "B," he may offer evidence to rebut any presumption arising from the deed that he entered only under it, and may prove that he entered into and possessed the original tract.—*Helms' Lessee v. Howard*, 2 H. & McH. 57.

#### § 92. Weight and sufficiency of evidence.

#### § 93.— In general.

(a) Where plaintiff claimed under a deed from the patentee, and defendant claimed a part of the land by adverse possession for more than 30 years, the fact that the patent and deed covered the land in controversy was not sufficient alone to entitle plaintiff to a verdict.—*Morgan's Lessee v. Slider*, 22 Md. 267.

#### § 94.— Identity and description of property.

(a) In ejectment evidence held to show the location of a parcel of land claimed by defendant under a deed conveying land to him.—*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273.

(b) In an action of ejectment, evidence considered and held to entirely fail to show that a certain avenue, a point on which formed the starting point for the description in the deed from defendants to plaintiffs, was located as claimed by plaintiffs.—*Yost v. Moog*, 104 Md. 92, 63 Atl. 1059.

(c) In an action of ejectment, matters mentioned in a deed to defendants held insuffi-

cient of themselves to establish, according to plaintiffs' contention, the starting point for the description of the land in defendant's deed to plaintiffs.—*Yost v. Moog*, 104 Md. 92, 63 Atl. 1059.

#### § 95.— Title and right to possession.

(a) Where in ejectment defendant admitted the dates of a deed, and a decree of foreclosure under which the deed was executed, it was not necessary to show the dates by the introduction of the deed.—*Joseph v. Bonaparte*, 118 Md. 591, 85 Atl. 962.

(b) In ejectment, where plaintiff claimed a life estate in the land by virtue of a deed to his deceased wife from the ancestor of defendants, who set up adverse possession, and the agreed statement of facts admitted the execution of the deed, evidence that the ancestor stated such fact to a witness could not alone entitle plaintiff to recover.—*Hackett v. Webster*, 97 Md. 404, 55 Atl. 480. [Cited and annotated in 15 L. R. A. (N. S.) 1190, 1196, 1200, 1246, on necessity for color of title, not expressly made a condition by statute, in adverse possession.]

(c) In ejectment, plaintiff, to prove the death of A. before the year 1745, without heirs and intestate, offered in evidence a warrant of resurvey to B., issued in 1725, a certificate of survey returned under such warrant, dated September 21, 1726, but upon which no patent appeared to have been issued, and also an escheat patent relating to the same lands, granted September 28, 1759, founded upon a special warrant of resurvey, dated June 18, 1759, returned on the 30th of that month. The defendant objected to the admissibility of the warrant of resurvey to B. and certificate returned thereon, either with or independent of the escheat patent of 1759, and proceedings on which the same were founded. Held, that B.'s refusal to pay for the land was evidence that he had discovered that no title by escheat had devolved on the lord proprietary.—*Wilson v. Inloes*, 6 Gill 121.

(d) An owner of land executed a deed of trust, in which he authorized the trustees to convey to one of his creditors the lot in question in payment of a debt, in case the creditor should consent to accept and receive the lot in satisfaction of said debt within six

weeks from the date of the deed. The creditor did not accept such lot within the six weeks, but long afterwards filed a bill against the trustees to compel them to execute the trust deed by conveying to him the lot, and a decree was passed for that purpose, and a deed made by the trustees to the creditor. *Held*, in ejectment by such creditor against one claiming title indirectly from the grantor in the deed, that the decree, together with the deed from the trustee to the creditor, was not sufficient evidence to prove an acceptance by such creditor of the lot so conveyed in trust for his use within six weeks from the date of the trust deed, according to the terms thereof.—*Dorsey v. Courtenay*, 3 H. & J. 474.

(e) The recital, in a grant, of the date of the certificate of survey upon which the grant was founded, is not sufficient evidence of the time when the survey was made.—*Henderson's Lessee v. Parker*, 3 H. & J. 117.

(f) In an action of ejectment, evidence *held* sufficient to prove seisin of plaintiff's grantor.—*Davis' Lessee v. Davis' Heirs*, 2 H. & J. 295.

(g) Where there has been a certificate of survey returned, and sundry conveyances and possession by persons claiming thereunder, the jury may presume a grant regularly issued.—*Hall's Lessee v. Gough*, 1 H. & J. 119.

(h) In ejectment, plaintiff claimed under a certificate of survey which was made to a certain person, who died before the issuing of the patent, having devised the lands to his sons. *Held*, that the jury might presume that the patent issued to the sons of the testator, from the length of time (over 70 years) which has elapsed since the date of the certificate, if they found that possession of the land had been held under the said title.—*Carroll v. Norwood*, 4 H. & McH. 287.

#### § 96.— Possession and ouster.

### IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

#### Cross-References.

Effect of stipulation, see "Stipulations," § 14.

Trial and review in respect to adverse possession, see "Adverse Possession," §§ 110-117.

#### §§ 97-100. Dismissal or nonsuit before trial.

#### Cross-References.

See ante, § 63.

Effect of agreement for discontinuance, see "Compromise and Settlement," § 21.

#### §§ 101-103. Scope of inquiry and powers of court.

#### Cross-Reference.

Defense bonds, see ante, § 55.

#### § 104. Proceedings preliminary to trial.

#### § 105. Mode and conduct of trial.

#### Cross-References.

Decision on trial by court without jury, see "Trial," § 387.

Declarations of law on trial by court, see "Trial," § 386.

Rulings as to weight and sufficiency of evidence on trial by court, see "Trial," § 382.

(a) Under the plea of not guilty in ejectment, plaintiff is not obliged to pursue any particular order of proof in tracing his title.—*Langley's Lessee v. Jones*, 26 Md. 462.

(b) Where defendants in an action of ejectment take a joint defense, they cannot be permitted at the trial to sever their defense.—*Carroll v. Norwood*, 1 H. & J. 167.

#### § 106. Questions for jury in general.

#### Cross-References.

Amount of damages or of mesne profits, see post, § 136.

Right to trial by jury, see "Jury," §§ 9-37.

(a) In ejectment, where it was essential to the right of plaintiff to recover to prove that his wife died intestate, his life estate depending on the fact, the record, while not disclosing any contradiction of his testimony on that subject, did not show that the fact was admitted. *Held*, a question for the jury.—*Hackett v. Webster*, 97 Md. 404, 55 Atl. 480. [Cited and annotated in 15 L. R. A. (N. S.) 1190, 1196, 1200, 1246, on necessity for color of title, not expressly made a condition by statute, in adverse possession.]

(b) In ejectment, it is error to charge that, if defendant held the land in controversy for 20 years before the action was brought, plaintiff cannot recover. The question should have been left to the jury

whether the possession was held adversely and with claim of title.—*Davis v. Furlow's Lessee*, 27 Md. 536. [Cited and annotated in 15 L. R. A. (N. S.) 1187, 1205, 1206, 1208, 1210, on necessity for color of title, not expressly made a condition by statute, in adverse possession; in 33 L. R. A. (N. S.) 924, on adverse possession due to ignorance or mistake as to boundary.]

(c) Where both parties in ejectment claiming title under a common grantor admit by their locations on the plats the beginnings of the first two lines of a tract of land, the jury are concluded thereby; and, when the first two lines of the defendant's deed run with the lines whose beginnings are thus admitted, the jury must find the beginning of his third line as located by defendant.—*Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115. [Cited and annotated in 46 L. R. A. (N. S.) 511, on possessory title as a weapon of offense; in 15 L. R. A. (N. S.) 1190, 1192, 1245, 1257, on necessity for color of title, not expressly made a condition by statute, in adverse possession.]

(d) In the absence of a plea in ejectment, the court can merely adjudge the title to plaintiff. The damages must be ascertained by the verdict of a jury.—*Cushwa v. Cushwa*, 9 Gill 242.

(e) In ejectment, where it is necessary to determine the priority between two grants to public lands, the time when a manor was laid out is a matter of fact for the jury, there being no record thereof to be found.—*Ringgold's Lessee v. Malott*, 1 H. & J. 299.

(f) The question whether one died seised or not is for the jury.—*Helms' Lessee v. Howard*, 2 H. & McH. 57.

(g) The intention of an entry into lands, the right by which, and the extent to which, such entry was made, are facts for the jury to determine.—*Helms' Lessee v. Howard*, 2 H. & McH. 57.

### § 107. Submission of issues.

#### Cross-Reference.

Submission of special issues on trial by court, see "Trial," §§ 370, 374.

### § 108. Dismissal or nonsuit at trial.

#### Cross-Reference.

See ante, § 63.

### § 109. Direction of verdict.

### § 110. Instructions.

#### Cross-References.

Relating to damages or mesne profits, see post, § 136.

Amendment or correction, see "Trial," § 340.

Assumption of facts in instructions, see "Trial," § 191.

As to priority between judgment and deed, see "Judgment," § 792.

Invading province of jury, see "Trial," § 194.

(a) In ejectment, a prayer merely relying on the failure of defendant to prove adverse possession to entitle plaintiff to recover was erroneous.—*Hackett v. Webster*, 97 Md. 404, 55 Atl. 480. [Cited and annotated in 15 L. R. A. (N. S.) 1190, 1196, 1200, 1246, on necessity for color of title, not expressly made a condition by statute, in adverse possession.]

(b) In ejectment, a prayer for an instruction that the defendant shows no title to a certain lot "as delineated on the plat, including the square from — street to the water," is defective, neither the square nor the water being properly specified.—*Hammond v. Inloes*, 4 Md. 138.

(c) In ejectment, it was error to charge the jury to ascertain the principle of law by which the starting point of the boundaries of a particular tract was established.—*Wilson v. Inloes*, 6 Gill 121.

(d) Where a defendant offers in evidence, collaterally, the proceedings in a former suit in ejectment, the plaintiff's prayer to instruct the jury that such proceedings do not vest any title in the defendant, and are no bar to the plaintiff's right, is not too general, under act 1825, c. 117.—*Walter v. Alexander*, 2 Gill 204. (See Code, art. 75, § 73.)

(e) In ejectment, the court refused to direct the jury that, if the plaintiff is estopped from showing the true location of the land for which the ejectment is brought, different from what is located by him for his pretensions, so as to prevent him from recovering what is contained in his pretensions within the true location, the defendant is also estopped from saying that the true location is different from the location given by the plaintiff.—*Howard v. Moale*, 2 H. & J. 249.

(f) In an action of ejectment, the court directed the jury that they might find the true location of the tract for which the action was brought, by a greater or less variation of the compasses, as might appear to them proper from the evidence, provided that, by such allowance of variation, they did not enlarge or extend the plaintiff's pretensions beyond the location of his pretensions made on the plots, or beyond a straight line to be drawn from certain specified points on the plots.—*Howard v. Moale*, 2 H. & J. 249.

(g) An instruction in ejectment requiring the jury to locate a boundary line of the premises in question in a certain manner is erroneous, where it appeared that, at most, it could only be in the discretion of the jury to so locate the tract, if from the whole evidence they thought that such a location would carry into effect the intention of the parties to the grant under which claim was made.—*Ridgely v. Norwood*, 1 H. & J. 128.

### § 111. Verdict and findings.

#### Cross-References.

Conclusiveness on review by United States Circuit Court of Appeals, see "Courts," § 406.

Conformity of findings of court to pleadings, see "Trial," § 396.

Effect of stipulations as to findings, see "Stipulations," § 18.

In ejectment by tenant, see "Landlord and Tenant," § 179.

(a) A plaintiff in ejectment declared for a term certain in the lands described in the declaration, and issue was joined on the plea of not guilty. The plaintiff's title to the lands described in the declaration was the only question involved. The jury found a verdict "for the plaintiff, and assessed the damage at one cent." Held, that the verdict was sufficient, and that judgment might be entered thereon that the plaintiff recover his term, etc., in the lands, etc.—*Kershner v. Kershner's Lessee*, 36 Md. 309.

(b) A verdict in ejectment which calls to run from one fixed object to another, "with the meanders of a stream" not located upon the plots, renders it so entirely uncertain whether it is within the lines of the tract claimed and defended, or not, that no judgment can be entered upon it, or writ of possession executed under it. It will, therefore,

be set aside, upon a motion in arrest, and a venire de novo awarded.—*Miles v. Knott's Lessee*, 12 G. & J. 442.

(c) The jury is concluded by the admissions of the parties as located on the plots; but if they disregard the admissions, and find the beginning of the tract at a different place, and the rest of the finding of the jury is predicated upon that mistake, the court has no power to change the verdict.—*Hughes v. Howard*, 3 H. & J. 9.

(d) In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, being part of a tract of land called "H. F.," the jury by their verdict found the true location of that tract, and also the locations of other tracts of land for which the defendant took defense. They also found for the plaintiff all the land called "H. F.," as located by them, which lay clear of the other tracts so located, and which lay to the eastward of a division line between the plaintiff's lessor and J. S. from a particular point to another. Held, that the verdict and the judgment thereon rendered were not uncertain, or for more land than the plaintiff claimed in his action.—*Hall v. Gittings*, 2 H. & J. 380.

(e) In an action of ejectment, the jury found the true location of the land to be on the plots "from A to a, to 3, to four perches below big F, the head of Howard's Branch, and then to A." They also found, for the plaintiff, his pretensions to be "from A to a, to V, to four perches below big F, the head of Howard's Branch, and then to A," which finding was not to the extent of the location. They then found that the defendant was guilty of the trespass complained of within the said pretensions, and not guilty as to the residue of the trespass complained of in the residue of the land. Held, that the verdict was not uncertain.—*Howard v. Moale*, 2 H. & J. 249.

(f) Where the plaintiff in an action of ejectment has made but one location on the plots of the beginning of the tract of land for which the ejectment is brought, and that is counterlocated, the jury cannot, by reversing lines, etc., find a beginning for the

plaintiff different from that located by him.  
—*Hammond v. Norris*, 2 H. & J. 130.

(g) In an action of ejectment, the jury are not estopped by the location made upon the plots, provided that the part for which they give their verdict, if for the plaintiff, is within his claim.—*Darnall's Lessee v. Goodwin*, 1 H. & J. 282.

(h) A general verdict for the plaintiff in ejectment is good, although it includes a part of the defendant's land, admitted by the plaintiff's plot to be the defendant's, and an elder grant.—*Reeder v. Smith*, 1 H. & McH. 158.

(i) Where, in ejectment, the dispute related to bounds only, and not to title, and the statute of limitations did not extend thereto, a verdict finding for defendant on the act of limitations was void.—*Miller's Lessee v. Hynson*, 1 H. & McH. 84.

## § 112. New trial on ground of error or irregularity.

### Cross-References.

See ante, § 111.

As affecting right to writ of possession, see post, § 120.

Survey pursuant to decree, see ante, § 60.

Amendment or correction of judgment in general, see "Judgment," § 305.

Laws denying two new trials as of right as applied to pending actions, see "Constitutional Law," § 191.

Mandamus to revoke order for writ of restitution pending motion for new trial, see "Mandamus," § 54.

Statutory new trial as of right, see "Constitutional Law," § 191; "New Trial," § 178.

## § 113. Judgment.

### Cross-References.

On pleadings, see ante, § 79.

By default, see "Judgment," §§ 92, 101, 106, 119, 126, 135, 143, 148, 149, 151, 164.

Collateral attack on judgment, see "Judgment," § 501.

Conclusiveness of judgment in general, see "Judgment," § 747.

Equitable relief against, see "Judgment," §§ 429, 436, 441, 443, 446, 447, 456.

Judgment for reformation of deed, see "Reformation of Instruments," § 30.

Right of landlord's vendee to open judgment, see "Lis Pendens," § 25.

Vacation of judgment in general, see "Judgment," § 375.

## § 114.—Form and requisites in general.

(a) There was no error in refusing to strike out a judgment against a defendant

in ejectment because her grantor was not made a party.—*Chappell v. Real Estate Pooling Co.*, 91 Md. 754, 46 Atl. 982.

(b) After a writ of habere facias possessionem has been issued in ejectment, the judgment will not be set aside because, 22 years before, the sheriff made return of service of a copy of the declaration on "Elizabeth Hodges, tenant in possession," the action having been against "Ellen Shannabrook and Ellen Amey, tenants in possession."—*Amey v. Marshall*, 63 Md. 369.

(c) Judgment by default in an action of ejectment was rendered against the casual ejector in May, 1862, and in June, 1862, a writ of habere facias possessionem was issued, under which the plaintiff took possession. Held, that a motion, in June, 1884, to strike out the judgment, on the ground of irregularity in the proceedings, came too late.—*Amey v. Marshall*, 63 Md. 369.

(d) Act 1872, c. 346, relating to actions of ejectment, does not allow a judgment in favor of plaintiff on the mere failure of the sole defendant, or all of the defendants, to appear.—*MacKenzie v. Renshaw*, 55 Md. 291. (See Code, art. 75, §§ 71, et seq.)

(e) A judgment against a casual ejector will be stricken out, even after the lapse of several terms, upon the application of the real defendant, if he is not chargeable with laches and makes application immediately upon receiving actual notice.—*Dennis' Lessee v. Kelso*, 28 Md. 333.

(f) In an action of ejectment, where damages are laid in the declaration, before the plaintiff could claim a default judgment simply to establish his title, he would be required to release his damages.—*Cushwa v. Cushwa*, 9 Gill 242.

(g) In ejectment, a judgment upon nihil dicit can be entered only against the casual ejector, and not against the tenant in possession.—*Cushwa v. Cushwa*, 9 Gill 242.

(h) A judgment against the casual ejector must always be entered before the jury are sworn, unless the defendant takes defense for all the land claimed.—*Clements' Lessee v. Ruckle*, 9 Gill 326.

(i) A judgment in ejectment upon the fail-

are of the tenant to appear will not be stricken out after the lapse of nine years from the date of such judgment.—*Klinefelter's Lessee v. Carey*, 3 G. & J. 349.

(j) The verdict in an action of ejectment was general against the defendant for all the land for which he took defense on the plots. The judgment was entered by lines described on the plots, which included more land than the defendant took defense for, and was affirmed on appeal.—*Easton v. Snavely's Lessee*, 4 H. & J. 17.

(k) If the term of a demise in the declaration in ejectment expires before the verdict and judgment in the court below, the judgment is erroneous, and will be reversed on appeal.—*Roseberry v. Seney*, 3 H. & J. 228.

(l) Where a plaintiff in ejectment makes two locations of his claims on the plots, and there is a general verdict and judgment, such judgment is erroneous.—*Gittings' Lessee v. Hall*, 1 H. & J. 14, 2 Am. Dec. 502. [Cited and annotated in 35 L. R. A. (N. S.) 726, on effect of conveyance of land held adversely.]

(m) Where the defendant in ejectment, in amending his plots under leave given, lessened his claims by narrowing the limits of his defense, judgment was given against the casual ejector for all the lands undefined on the plots.—*Berry's Lessee v. Willett*, 2 H. & McH. 376.

#### § 115.—Partial recovery.

(a) The fact that one has not acquired title by prescription to the entire tract claimed by him in ejectment does not preclude a recovery of such part as he has been possessed of for the required time.—*Jacob Toms Institute v. Davis*, 87 Md. 591, 41 Atl. 166.

(b) Though the declaration in ejectment is for an entire tract, plaintiff can recover an undivided interest, under act 1833, c. 276, providing that, in case of a joint holding, plaintiff can declare on a joint demise, and that, if title be shown in any of the lessors of the plaintiff, he may recover to the extent of his title, notwithstanding the joinder of others, who had no title, or had parted with their interest.—*Matthews v. Turner*, 64 Md. 109, 21 Atl. 224. (See Code, art. 75, § 78.)

(c) A plaintiff in ejectment may recover less than he demands but not more.—*Magruder v. Peter*, 4 G. & J. 323.

(d) A plaintiff in ejectment may declare for less than he is entitled to, and recover it, but it must be of the same nature with that claimed.—*Magruder v. Peter*, 4 G. & J. 323.

(e) Under a demise, an entire tract less than the whole may be recovered, but it must be an entire, not an undivided, interest.—*Benson's Lessee v. Musseter*, 7 H. & J. 208.

(f) A plaintiff in ejectment may recover less than he claims, but it must be of the same nature. If he declares for an undivided part, he may recover for a smaller undivided part; but he cannot recover an entirety if he declares for an undivided interest, nor an undivided interest if he declares for an entirety.—*Carroll v. Norwood*, 5 H. & J. 155. [Cited and annotated in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

(g) Where plaintiff in ejectment has located the line of his grant in a certain manner, he cannot recover any lands which are found to lie without and beyond such line, though those lands should lie within the lines of the tract of land for which the action was brought, and also within the lines of the plaintiff's pretensions as located on the plots.—*Howard v. Moale*, 2 H. & J. 249.

#### § 116.—For defendant.

#### § 117.—Operation and effect.

##### Cross-References.

Decisions of state courts as to effect of verdict and judgment as authority in federal courts, see "Courts," § 367.

Effect as suspending limitations, see "Limitation of Actions," § 105.

Persons bound by judgment as affected by lis pendens, see "Lis Pendens," § 22.

Purchasers pendente lite, see "Lis Pendens."

##### Annotation.

Judgment against plaintiff in trespass to try title involving boundary as establishing boundary claimed by defendant. —38 L. R. A. (N. S.) 1026, note.

(a) In ejectment, it was held that a recovery, in a former action of ejectment, of land, as being included in an elder tract, divested the possession out of the then defendant, and vested the same in the then plaintiff; and that the fact that the de-



fendant, and those claiming under him, had never been in possession since (more than 20 years having elapsed since such recovery), was conclusive evidence of the location of the elder tract; and that the right of entry was taken away.—*Ridgely's Lessee v. Ogle*, 4 H. & McH. 128.

### § 118. Execution and enforcement of judgment.

#### Cross-References.

Survey pursuant to decree, see ante, § 60.  
Mandamus to compel, see "Mandamus," § 4.

Rights and liabilities of purchasers pendente lite, see "Lis Pendens."

### § 119.—In general.

#### Cross-References.

Joinder of tenant in common in suit to enjoin, see "Tenancy in Common," § 55.  
Supersedeas to restrain execution, see "Supersedeas."

(a) Injunction to restrain the execution of a judgment of ejectment will not lie where the warrant of summary ejectment issued on the judgment has been executed before injunction proceedings were instituted.—*Goldberg v. Novickow*, 118 Md. 29, 77 Atl. 261.

### § 120.—Writ of possession.

#### Cross-References.

Sufficiency of description of land in declaration to warrant writ, see ante, § 64.

Restraining enforcement against purchaser pendente lite, see "Lis Pendens," § 25.

(a) Where a motion was made to quash a return to a writ of possession, and to show that more land was delivered than was authorized by the writ, the court granted leave to take proof by affidavit on notice, and make surveys.—*Penn v. Isherwood*, 5 Gill 206.

(b) Where the writ stated that the judgment upon which it issued was rendered against two defendants, and proceeded, upon that statement of facts, against the tenants of one only, without a suggestion of the death of the other, the parties proceeded against may take advantage of the defect by general demurrer.—*Nesbit v. Manro*, 11 G. & J. 261.

(c) A writ of possession claiming 251 acres, part of a tract of land called, etc., without any description of the part claimed, is de-

fective.—*Fenwick v. Floyd's Lessee*, 1 H. & G. 172.

### § 121. Appeal and error.

#### Cross-References.

Appealability of discretionary order extending time to file defense bond, see "Appeal and Error," § 87.

Appellate jurisdiction, see "Courts," §§ 219, 224, 231, 242.

Conclusiveness of verdict or findings on review by United States Circuit Court of Appeals, see "Courts," § 406.

(a) A plat is a part of the record and a copy should be annexed to the transcript.—*Orndorff v. Mumma*, 3 H. & J. 70.

### § 122. Restitution.

#### Cross-Reference.

Mandamus to revoke order for writ pending motion for new trial, see "Mandamus," § 54.

### § 123. Costs.

#### Cross-References.

Modification of verdict leaving costs on plaintiff, see ante, § 111.

Security for, see "Costs," §§ 107, 136.

Stay of subsequent action until payment, see "Costs," § 277.

## V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

#### Cross-References.

Bond by defendant to pay damages, see ante, § 55.

Rights in respect to improvements placed on railroad right of way, see "Railroads," § 73.

Right to crops, see "Crops," § 2.

Set-off of judgment for damages and rent against judgment for improvements, see "Judgment," § 883.

Statute relating to improvements as affecting vested rights, see "Constitutional Law," § 93.

Tender of money for improvements, see "Tender," § 24.

### §§ 124-126. (See Analysis.)

### § 127. Recovery of actual damages or mesne profits in action of ejectment.

#### Cross-References.

See ante, § 109.

Actions for mesne profits, see post, § 128.

(a) After a recovery in ejectment, a plaintiff who was an infant when the ejector acquired possession of the land may have a bill against the latter as his guardian for the rents and profits.—*Drury v. Conner*, 1 H. & G. 220.

(b) A party who merely rented out an estate, and collected and paid over the rent as it came into his hands as the friend of another, for whose use he received the rent, and to whom he was bound to pay it over as agent, but never occupied the estate, nor derived any advantage from it himself, is not responsible in equity for mesne profits to the owner of such estate.—*Drury v. Conner*, 1 H. & G. 220.

(c) If a third person entered into possession of the premises during the pendency of the ejectment, the defendant would still be answerable for the mesne profits. If, however, he can prove that the plaintiff received the profits, he is then not answerable for the profits so received.—*West v. Hughes*, 1 H. & J. 574, 2 Am. Dec. 539.

(d) In an action for mesne profits, the defendant is not estopped by the judgment in the ejectment from proving that the plaintiff was in possession of part of the land during the pendency of the action.—*West v. Hughes*, 1 H. & J. 574, 2 Am. Dec. 539.

### § 128. Actions for mesne profits.

#### Cross-References.

Action against coheirs for share of mesne profits collected by them, see "Tenancy in Common," § 28.

Limitations, see "Limitation of Actions," § 32.

(a) An action for mesne profits cannot be maintained before a recovery in ejectment. Such action is consequential to the recovery in ejectment.—*Mitchell v. Mitchell*, 1 Md. 55.

(b) In an action of trespass brought in the name of the lessor of the plaintiff against the tenant in possession for mesne profits from the time of the demise, it is not necessary for the plaintiff to prove an entry or actual possession in him after the recovery in ejectment.—*Shipley v. Alexander*, 3 H. & J. 84, 5 Am. Dec. 421.

### § 129. Damages for waste or other injury.

#### Cross-Reference.

Measure of damages, see post, § 132.

### § 130. Interest as element of damages.

### § 131. Exemplary damages.

(a) Though no special damage is proven, an unauthorized beneficial use and occupation of another's land, though under color

of right, entitles the owner to substantial damages.—*Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

### § 132. Measure of damages or profits.

#### Cross-Reference.

See ante, § 131.

(a) In an action for mesne profits of vacant, unimproved city lots, the defendant, a bona fide purchaser, cannot be required to account for more than such rental value as he might fairly have obtained during the time of the ouster by a lease of premises from year to year in their unimproved condition.—*Worthington v. Hiss*, 70 Md. 172, 16 Atl. 534.

(b) Damages to which an owner is entitled for an unauthorized beneficial use and occupation of his land, under color of right, should be measured by the fair rental value of land during the time and for the purpose it was occupied.—*Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

(c) A., having recovered from B. in ejectment a moiety of certain land, sued B. in trespass for mesne profits. B. had insured, on his own account, a house on the land, which was afterwards destroyed by fire, and he recovered on the policy the amount for which the house was insured. Held, that A. could not recover, in the action for profits, any part of the money received by B. on the policy.—*Tongue v. Nutwell*, 31 Md. 302. [Cited and annotated in 37 L. R. A. 150, on rights of vendor and vendee to proceeds of insurance.]

(d) Where a party is to be charged with the rents and profits of land, who is entitled to an allowance for lasting improvements, he should not be charged with the increased rents and profits by reason of the improvements.—*Neale v. Hagthorpe*, 3 Bland 551. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

### § 133. Injunction or receiver as to rents and profits.

#### Cross-References.

Effect of stipulation in suit to enjoin cutting timber, see "Stipulations," § 14.

Effect of stipulation on right to receiver, see "Stipulations," § 18.

**§ 134. Allegations and prayers in pleadings as to damages or mesne profits.**

**§ 135. Evidence as to damages, rents, or profits.**

(a) In ejectment, where plaintiff sought damages, evidence as to the rental value of the premises is admissible.—*Feldmeyer v. Werntz*, 119 Md. 285, 86 Atl. 986.

(b) In trespass for mesne profits, evidence to show that defendant entered bona fide as purchaser for value, as a ground on which he would be entitled to be allowed for costs of improvements, was inadmissible in mitigation of damages, where exemplary damages were not claimed.—*Tongue v. Nutwell*, 31 Md. 302. [Cited and annotated in 37 L. R. A. 150, on rights of vendor and vendee to proceeds of insurance.]

(c) Evidence of mesne profits is inadmissible on a writ of inquiry of damages issued on a judgment in ejectment.—*Gore's Lessee v. Worthington*, 3 H. & McH. 96.

**§ 136. Assessment of damages or mesne profits.**

(a) In ejectment where the entry and ouster are actual, the party may proceed for the damages sustained by reason thereof by writ of inquiry.—*Joan v. Shields*, 3 H. & McH. 7.

§§ 137, 138. (See Analysis.)

**§ 139. Rights of parties as to improvements in general.**

*Cross-References.*

Grounds for compensation, see post, § 142.  
Liability for increased rental value of lands caused by improvements, see ante, § 132.

**§ 140. Statutory provisions as to improvements or taxes.**

*Cross-Reference.*

Statute, relating to improvements as affecting vested rights, see "Constitutional Law," § 93.

**§ 141. Improvements for which compensation may be claimed.**

*Annotation.*

Plowing and cultivating land as an improvement.—20 L. R. A. (N. S.) 378, note.

**§ 142. Grounds for compensation for improvements or taxes paid.**

*Cross-Reference.*

Rights as to improvements in general, see ante, § 139.

(a) A., acting in good faith, purchased a lot of ground and made valuable improvements thereon. A. paid full value for the land, and neither he nor his grantor had any suspicion that the title thereto was defective. Nearly seven years afterwards it was ascertained by judicial proceeding that the title to the land was in B., who was accordingly placed in possession by due process of law. On bill in equity by A. for relief, held, that B. should elect whether he would convey the land to A. at its unimproved value, or take and hold the lot with the improvements, paying to A. the value thereof.—*Union Hall Ass'n v. Morrison*, 39 Md. 281. [Cited and annotated in 52 L. R. A. 936, on retroactive statute creating right of action or set-off; in 53 L. R. A. 339, on right to compensation for bona fide improvements on land under oral contract or gift.]

**§ 143. Set-off of improvements or taxes against damages or mesne profits.**

*Cross-References.*

See ante, §§ 119, 139.

Set-off of judgment for damages and rent against judgment for improvements, see "Judgment," § 883.

(a) Defendant in ejectment has the right at common law to set off his claim for improvements against the rents of the land or the damages claimed by plaintiff for its detention.—*Tongue v. Nutwell*, 31 Md. 302. [Cited and annotated in 37 L. R. A. 150, on rights of vendor and vendee to proceeds of insurance.]

§§ 144-152. (See Analysis.)

**§ 153. Costs.**

*Annotation.*

Liability of beneficial plaintiff for costs in ejectment.—62 L. R. A. 623, note.

**VI. EQUITABLE EJECTMENT.**

§§ 154-167. (See Analysis.)

**EJUSDEM GENERIS.\****Cross-References.*

See "Arson," § 12; "Burglary," § 4.  
 Application of rule to construction of contract of guaranty, see "Guaranty," § 62.  
 Application of rule to construction of deed, see "Deeds," § 95.  
 Rule of construction of statutes, see "Statutes," § 194.  
 Rule specifically applied to particular statutes, see "Gaming," § 63; "Intoxicating Liquors," § 115; "Reports," § 2; "Taxation," § 193.

**ELECTION.\****Cross-References.*

See "Election of Remedies"; "Elections."  
 As to county or district in which suit shall be brought, see "Venue," §§ 16, 31.  
 As to medium of payment, see "Payment," § 9.  
 As waiver of right of review, see "Appeal and Error," § 157.  
 Between acts of accused, proof of which is offered under one count, see "Criminal Law," § 678.  
 Between causes of action, counts, or defenses, see "Pleading," § 369.  
 Between counts in indictment or information, see "Indictment and Information," § 132.  
 Between homestead and distributive share, see "Homestead," § 138.

Between homestead and dower, see "Dower," § 59.  
 Between jointure or settlement and dower, see "Dower," § 58.  
 Between testamentary provisions and other rights in general, see "Wills," §§ 778-803.  
 By stockholder to declare debt from corporation due, see "Corporations," § 178.  
 For jury trial, see "Jury," § 25.  
 In ejectment to take value of land, see "Ejectment," § 151.  
 Of guardian by ward, see "Guardian and Ward," § 19.  
 Of insurer to rebuild or replace insured property, see "Insurance," § 595.  
 Of tribunal for trial of cause, see "Courts," §§ 473, 491, 513.  
 To accept satisfaction for trespass as bar to action for statutory penalty, see "Trespass," § 63.  
 To foreclose mortgage, see "Chattel Mortgages," § 251.  
 To prosecute for act constituting several offenses, see "Criminal Law," § 29.  
 To reconvert realty converted into personality, see "Conversion," § 22.  
 To renew lease, see "Landlord and Tenant," § 86.  
 To rescind contract of sale, see "Sales," §§ 197, 127; "Vendor and Purchaser," §§ 101, 120.  
 To rescind contracts in general, see "Contracts," § 271.  
 To take dismissal or nonsuit, see "Dismissal and Nonsuit," §§ 28, 30.

**ELECTION OF REMEDIES.\****Scope-Note.*

[INCLUDES choice between different means of redress afforded by law for the same injury or different forms of proceeding on the same cause of action; when such election is allowed or required; and nature, requisites, operation, and effect of such election.

[EXCLUDES election between inconsistent or alternative rights, claims, etc. (see "Wills"; "Contracts"; "Principal and Agent"; "Equity"); election between remedies incident to particular transactions (see "Carriers"; "Insurance"; "Sales"; and other specific heads); and election between counts in pleadings (see "Pleading") or in indictments (see "Indictment and Information").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature and grounds in general.
- § 2. Causes of action and remedies subject to election.
- § 3. Inconsistency of alternative remedies.
- § 4. Right of election.
- § 5. Necessity for election.
- § 6. Compelling election between remedies at law and in equity.
- § 7. Acts constituting election.

\*Annotation: Words and Phrases, same title.

- § 8. Validity and finality of election.
- § 9. — In general.
- § 10. — Mistake or ignorance of facts.
- § 11. — Mistake as to remedy.
- § 12. — Want of jurisdiction or ineffectiveness of remedy.
- § 13. Operation and effect.
- § 14. — In general.
- § 15. — Remedies barred.

### Cross-References.

Acceptance of benefits of relief association as bar to action against master by servant injured, see "Master and Servant," § 100.  
 As affecting allowance of claims against bankrupt's estate, see "Bankruptcy," § 310.  
 As affecting right to claim under assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 297.  
 As waiver of right to jury trial, see "Jury," § 28.  
 Between action for price of land paid and for breach of contract, see "Vendor and Purchaser," § 342.  
 Between action on covenants and for price of land paid, see "Vendor and Purchaser," § 338.  
 By creditor of corporation as against stockholder, see "Corporations," § 259.  
 Effect on limitation of action, see "Limitation of Actions," § 17.  
 Election as to term for application for review in proceedings to establish private road, see "Private Roads," § 2.  
 Enforcement of provisions of interstate commerce act, see "Carriers," § 34.

For breach of contract, see "Contracts," § 324.  
 For recovery of trust property, see "Trusts," § 350.  
 For restitution on reversal, see "Appeal and Error," § 1208.  
 For wrongful dispossession of tenant, see "Landlord and Tenant," § 315.  
 In admiralty, see "Admiralty," §§ 26-39.  
 Mandamus as affected by resort to other remedy, see "Mandamus," § 5.  
 On contract of conditional sale, see "Sales," §§ 479, 480.  
 Proceeding against principal or agent, see "Principal and Agent," §§ 145, 184.  
 Remedies available between seller and purchaser of goods, see "Sales," §§ 316, 322, 339, 340, 369, 390, 399, 404, 425.  
 Remedies for review, see "Appeal and Error," § 12; "Criminal Law," § 1013.  
 Right of action against principal or agent, see "Principal and Agent," § 184.  
 Right to waive tort and sue in assumpsit, see "Action," § 28.  
 To enforce vendor's lien, see "Vendor and Purchaser," § 269.

### § 1. Nature and grounds in general.

### § 2. Causes of action and remedies subject to election.

(a) A suit at law on a bond not being maintainable without reformation, a plaintiff having sued to reform and to enforce a bond in equity is not required to elect which action he would prosecute.—*Etna Indemnity Co. v. Baltimore, S. P. & C. Ry. Co.*, 117 Md. 523, 84 Atl. 166.

#### Annotation.

Election between tort and assumpsit.—17 L. R. A. (N. S.) 280, note.

Form of remedy for enticement of servant.—5 L. R. A. (N. S.) 1096, note.

### § 3. Inconsistency of alternative remedies.

### § 4. Right of election.

#### Annotation.

Remedy of pretermitted heirs.—37 L. R. A. (N. S.) 1143, note.

Choice of remedy of landlord on abandonment of premises by tenant.—13 L. R. A. (N. S.) 398, note.

### § 5. Necessity for election.

### § 6. Compelling election between remedies at law and in equity.

#### Cross-Reference.

Effect of abolition of distinction between actions at law and suits in equity, see "Action," § 25.

(a) H. and D. executed to M. a deed of trust for the benefit of their creditors. M. took possession of the property, and converted it into money, after which some of the creditors filed a bill to set aside the deed, and other of the creditors attached the funds in the hands of M. Pending the proceedings in

equity, and on the attachments, a new bill was filed by some of the preferred creditors to have the funds in the hands of M. brought into court for distribution, and for an injunction to stay further proceedings under the former bill and under the attachment. *Held*, that the attaching creditors, who were also complainants in the bill in equity first filed to vacate the deed, should have been compelled to elect which remedy they would pursue.—*Laupheimer v. Rosenbaum*, 25 Md. 219.

(b) One who, after recovery in ejectment, elects to proceed at law to recover the mesne profits, and fails to recover a part thereof because barred by limitations, is not entitled to relief in equity as to the part barred in the action at law.—*In re Mitchell*, 21 Md. 585.

(c) Where a party is pursuing two remedies, one in equity and one at law, a court of equity will put him to his election whether he will proceed at law or in equity.—*Bradford v. Williams*, 2 Md. Ch. 1; *Gibson v. Finley*, 4 Md. Ch. 75.

(d) If a creditor is pursuing two remedies, when only one is open to him, chancery may, on application, compel him to elect; but, until this is done, his pursuit of both will not deprive him of either.—*Gibson v. Finley*, 4 Md. Ch. 75.

(e) If a party elects to proceed at law, his bill will be dismissed; and, if he elects to proceed in equity, he will be restrained from further prosecuting his suit at law without leave of court of chancery first had and obtained.—*Union Bank v. Kerr*, 2 Md. Ch. 460.

(f) Where plaintiff has sued both in law and in equity, he will be allowed a reasonable time to determine as to which court he will proceed in.—*Bradford v. Williams*, 2 Md. Ch. 1.

(g) Where plaintiff sues both at law and in equity, and refuses to elect between the remedies, his bill will be dismissed with costs.—*Bradford v. Williams*, 2 Md. Ch. 1.

(h) Where plaintiff sues several defendants, both at law and in equity, one of the defendants, without the concurrence of the

rest, has the right to compel an election of the remedies.—*Bradford v. Williams*, 2 Md. Ch. 1.

(i) Where a plaintiff sues both at law and in equity, the rule compelling an election of remedies cannot be evaded by mingling other grounds of complaint in the action at law with those which are comprehended in the bill in equity, where the real grounds are the same in both courts.—*Bradford v. Williams*, 2 Md. Ch. 1.

(j) A person having an option of law or equity, after selecting one tribunal, cannot resort to the other.—*McMechen v. Maggs*, 4 H. & J. 132. [Cited and annotated in 6 L. R. A. (N. S.) 591, on specific performance of contract to give security.]

## § 7. Acts constituting election.

### Cross-Reference.

Effect of proof of claim in insolvency proceedings, see "Insolvency," § 125.

## §§ 8-12. Validity and finality of election.

### Annotation.

Bringing suit not prosecuted to judgment as a conclusive election of remedies.—34 L. R. A. (N. S.) 309, note.

## § 13. Operation and effect.

## § 14.—In general.

### Annotation.

Conclusiveness of election by parent for enticing or harboring of minor child.—45 L. R. A. (N. S.) 874, note.

Election of remedy against one purchasing goods with knowledge that he cannot pay for them.—44 L. R. A. (N. S.) 25, note.

Bringing action for purchase price as waiver of right of vendor in conditional sale to recover property in specie.—28 L. R. A. (N. S.) 144, note.

Suit for damages as waiver of right to forfeit deed for breach of condition.—5 L. R. A. (N. S.) 603, note.

Effect, on common-law action, of employers' liability act.—12 L. R. A. (N. S.) 1038, note.

(a) An election by plaintiff, in a suit in chancery, to charge defendant, who was originally liable for property in kind, with interest on its value, cannot be abandoned subsequently, when the property is in possession of the defendant and has increased in value.—*Evans v. Iglehart*, 6 G. & J. 171.

**§ 15.— Remedies barred.***Cross-References.*

Nature and form of remedy as affecting merger and bar by judgment, see "Judgment," § 589.

Withdrawal of cause in former action as affecting bar to subsequent action, see "Judgment," § 590.

*Annotation.*

Effect of bringing action at common law to bar action under federal employers' liability act.—47 L. R. A. (N. S.) 78, note.

Commencing action of taking judgment against either an undisclosed principal or his agent as a bar to a subsequent action against the other.—21 L. R. A. (N. S.) 786, note.

Action against agent as bar to one against principal undisclosed when first action begun.—6 L. R. A. (N. S.) 729, note.

Attempt to enforce lien under clause in a lease giving landlord lien on crops and chattels, as election preventing its enforcement as a chattel mortgage.—20 L. R. A. (N. S.) 259, note.

Action for price as bar to action for damages for fraud.—8 L. R. A. (N. S.) 582, note.

**ELECTIONS.\****Scope-Note.*

[INCLUDES choice by popular vote at general or special elections of public officers, and determination by such vote of questions submitted thereto in general; nature of right of suffrage and regulation of its exercise in general; constitutional and statutory provisions relating thereto; qualifications and registration of voters; ordering or calling elections, regular or special, and notice thereof; election districts or precincts, election officers, and places and times of voting; nominations and ballots; conduct of elections; ascertaining results and making returns thereof; proceedings to contest result; and violations of election laws.

[EXCLUDES election or appointment of officers by legislative or other bodies, boards, etc. (see "States"; "Counties"; "Towns"; "Municipal Corporations"; "Officers"; and titles of particular bodies or officers); and election of officers of private corporations (see "Corporations"); and determination of particular questions by popular vote (see "Intoxicating Liquors"; "Schools and School Districts"); etc.

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Right of Suffrage and Regulation Thereof in General.**

- § 1. Nature and source of right.
- § 2. Power to confer and regulate.
- § 3. — In general.
- § 4. — Congress.
- § 5. — State Legislatures.
- § 6. — Territorial Legislatures.
- § 7. Constitutional provisions conferring or defining right.
- § 8. Statutory provisions conferring or defining right.
- § 9. — Constitutionality and validity.
- § 10. — Construction and operation.
- § 10½. Constitutional guaranties in general.
- § 11. Operation of provisions of Constitution of United States.
- § 12. Denial or abridgment on account of race.
- § 13. Discrimination on account of sex.
- § 14. Power to restrict or extend.
- § 15. — In general.

\*Annotation: Words and Phrases, same title.

**I. Right of Suffrage and Regulation Thereof in General—Continued.**

- § 16. — Limitation as to number of candidates or propositions to be voted for.
- § 17. — Cumulative voting.
- § 18. Power to prescribe qualifications.
- § 19. Power to require registration or proof of qualifications.
- § 20. Power to regulate nominations and ballots.
- § 21. — In general.
- § 22. — Official ballots.
- § 23. Power to regulate conduct of election.
- § 24. — In general.
- § 25. — Place for voting.
- § 26. — Time for voting.
- § 27. — Mode of voting in general.
- § 28. — Secrecy as to vote.

**II. Ordering or Calling Election, and Notice.**

- § 29. Authority and exercise thereof in general.
- § 30. Constitutional and statutory provisions.
- § 31. Authority to hold general or regular election.
- § 32. Authority to call special election.
- § 33. Submission of specific questions.
- § 33½. Petition and proceedings thereon.
- § 34. Order.
- § 36. Warrant or writ.
- § 37. Place for holding election.
- § 38. Time for holding election.
- § 39. Notice or proclamation.
- § 40. — Necessity.
- § 41. — Requisites and sufficiency.
- § 42. — Publication and posting.
- § 43. Adjournment or new election.
- § 44. Irregularities and defects.
- § 45. Review by courts of proceedings ordering or calling election.

**III. Election Districts or Precincts and Officers.**

- § 46. Nature and status of districts or precincts.
- § 47. Constitutional and statutory provisions.
- § 48. Creation and alteration of districts or precincts.
- § 49. Creation and abolition of offices.
- § 50. Appointment, qualification, and tenure of officers.
- § 51. — In general.
- § 52. — Representation of political parties.
- § 53. Compensation of officers.
- § 54. Powers and proceedings of officers in general.
- § 55. Defects in appointment, ineligibility, or disqualification of officers.
- § 56. Irregularities or misconduct of officers.
- § 57. Liabilities of officers.
- § 58. Actions against officers.



**IV. Qualifications of Voters.**

- § 59. Eligibility in general.
- § 60. Constitutional and statutory provisions.
- § 61. Race or color.
- § 62. Sex.
- § 63. — General elections.
- § 64. — Special elections.
- § 65. — Municipal, school, or other local elections.
- § 66. Age.
- § 67. Citizenship.
- § 68. — In general.
- § 69. — Aliens having made declaration of intention to become citizens.
- § 70. — Resident aliens.
- § 71. Residence.
- § 72. — Sufficiency in general.
- § 73. — Change in general.
- § 74. — Employment in public service.
- § 75. — Employment in navigation.
- § 76. — Students.
- § 77. — Inmates of public institutions.
- § 78. — Places under jurisdiction of United States.
- § 79. Property.
- § 80. — General elections.
- § 81. — Special or local elections.
- § 82. — Transfers for purpose of qualification.
- § 83. Payment of taxes.
- § 84. Education.
- § 85. Religious belief.
- § 86. Disqualification.
- § 87. Forfeiture of citizenship and disfranchisement.
- § 88. — In general.
- § 89. — Deprivation of citizenship.
- § 90. — Conviction of crime.
- § 91. — Bribery.
- § 92. — Betting on election.
- § 93. — Dueling.
- § 94. — Restoration to citizenship.

**V. Registration of Voters.**

- § 95. Constitutional and statutory provisions.
- § 96. Elections subject to registration laws.
- § 97. Necessity of registration.
- § 98. Persons entitled to registration.
- § 99. Registration officers.
- § 100. — Appointment, qualification, and tenure in general.
- § 101. — Representation of political parties.
- § 102. — Compensation.
- § 103. — Powers and functions in general.
- § 104. — Liabilities.

**V. Registration of Votes—Continued.**

- § 105. Time for registration.
- § 106. Proceedings for registration.
- § 107. Compelling registration.
- § 108. Correction of lists.
- § 109. Filing or posting lists.
- § 110. Custody and disposition of registration lists or books.
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*Cross-References.*

Best and secondary evidence, see "Evidence," §§ 158, 178.  
 Constitutionality of act legalizing elections, see "Constitutional Law," § 196.  
 Constitutionality of statute investing General Assembly with power to determine result of vote, exercise of judicial power, see "Constitutional Law," § 55.  
 Constitutionality of statute prohibiting bribery and providing for ousting successful candidate, due process of law, see "Constitutional Law," § 306.  
 Constitutionality of statute providing for selection of election commissioners, conferring executive power on legislative department, see "Constitutional Law," § 58.  
 Constitutionality of statute submitting question to popular vote, delegation of legislative power, see "Constitutional Law," § 65.  
 Constitutional law, self-executing provisions, see "Constitutional Law," § 31.  
 Constitutional law, subjects and titles of acts relating to the election of public officers, see "Statutes," § 125.  
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 Determination by Legislature of election of members, see "States," § 30.  
 Election courts, see "Courts," § 196.  
 Election days as holidays, see "Holidays," § 1.  
 Estoppel by participation in election, see "Estoppel," § 90.  
 Exemption of persons voting from payment of poll tax as violative of requirement of uniformity, see "Taxation," § 42.  
 Fees of sheriff or constable for attendance at and services connected with elections, see "Sheriffs and Constables," § 56.  
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 Judicial notice as to results of, see "Criminal Law," § 304; "Evidence," § 45.  
 Jurisdiction of federal court to determine validity of statute where no federal question is involved, see "Courts," § 281.  
 Liability of city for injuries caused by constructing polling place in street, see "Municipal Corporations," § 776.  
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 Liability of county for election expenses, see "Counties," § 134.  
 Mandamus to control acts of public officers or boards in reference to elections, see "Mandamus," § 74.  
 Oath of officers as to election expenses, see "Officers," § 36.  
 Permitting landowners to decide whether drain shall be constructed as exercise of election franchise, see "Drains," § 25.  
 Power of city to tax persons not voting, see "Municipal Corporations," § 966.  
 Power of Legislature to amend charter provisions as to elections, see "Municipal Corporations," § 44.  
 Presidential electors, see "United States," § 25.

Privileged communications concerning candidates, for office, see "Libel and Slander," § 48.  
 Regulations as to sale of intoxicating liquors on election day, see "Intoxicating Liquors," §§ 120, 145, 163.  
 Right of state to enjoin conspiracy to commit fraud at election, see "States," § 192.  
 Taking depositions on election day, see "Holidays," § 5.

*By particular bodies or authorities.*

See "Associations," § 17; "Joint-Stock Companies," § 16; "Religious Societies," § 8.  
 Members and stockholders of corporations, see "Corporations," §§ 191-201, 281-295.  
 School committees, see "Schools and School Districts," § 48.  
 School district meetings, see "Schools and School Districts," §§ 50, 97.  
 Town meetings, see "Towns," §§ 23, 56.  
 Township trustees, see "Schools and School Districts," § 48.

*Of particular officers.*

See "Judges," § 3; "Justices of the Peace," § 3; "Sheriffs and Constables," § 9.  
 Assignees or trustees in insolvency, see "Insolvency," § 46.  
 Board of agriculture, see "Agriculture," § 2.  
 Board of education, see "Schools and School Districts," § 12.  
 County boards, see "Counties," § 41.  
 County officers, see "Counties," § 62.  
 County superintendent of schools, see "Schools and School Districts," § 48.  
 Municipal officers, see "Municipal Corporations," §§ 129-136.  
 Of banks, see "Banks and Banking," §§ 51, 251.  
 Of corporations in general, see "Corporations," §§ 281-295.  
 Of district or prosecuting attorneys, see "District and Prosecuting Attorneys," § 2.  
 Of irrigation district, see "Waters and Water Courses," § 227.  
 Of unincorporated association, see "Associations," § 17; "Joint-Stock Companies," § 16.  
 School officers, see "Schools and School Districts," § 53.  
 State officers, see "States," § 46.  
 Town officers, see "Towns," § 28.  
 Trustees in bankruptcy, see "Bankruptcy," §§ 123-126.  
 Trustees of private academy, see "Schools and School Districts," § 6.

*To determine particular questions.*

Acquisition of bridges by public authorities, see "Bridges," § 26.  
 Adoption of highway laws, see "Highways," § 19.  
 Adoption of local act by municipal corporation, see "Municipal Corporations," § 75.  
 Adoption of local option law, see "Intoxicating Liquors," §§ 29-38.

Aid to corporations and investments in stock, see "Counties," § 154; "Municipal Corporations," § 874; "Towns," §§ 46, 52, 57.  
 Alteration of geographical or political divisions, see "Counties," § 14; "Municipal Corporations," § 34; "Schools and School Districts," § 38.  
 Amendment of municipal charters, see "Municipal Corporations," § 46.  
 Amendment or revision of constitution, see "Constitutional Law," § 9.  
 Change of school house site, see "Schools and School Districts," § 69.  
 Construction of free gravel roads or turnpikes, see "Highways," § 107.  
 Control of schools by municipality, see "Schools and School Districts," § 12.  
 Creation and organization of school districts, see "Schools and School Districts," § 27.  
 Creation of sanitary district, see "Health," § 4.  
 Dissolution of municipality, see "Municipal Corporations," § 51.  
 Enactment of statutes, see "Statutes," § 35.  
 Establishment of county, see "Counties," § 3.  
 Establishment of fisheries, see "Fish," § 3.  
 Establishment of graded or high school districts, see "Schools and School Districts," § 42.  
 Grant of consent or license to street railroad company, see "Street Railroads," § 24.  
 Incorporation of municipality, see "Municipal Corporations," § 12.  
 Issuance of school district bonds, see "Schools and School Districts," § 97.  
 Issue of bonds by irrigation district, see "Waters and Water Courses," § 230.  
 Issue of county bonds, see "Counties," § 178.  
 Issue of municipal bonds, see "Municipal Corporations," § 918.

Issue of town bonds in general, see "Towns," § 52.  
 Levy of city taxes, see "Municipal Corporations," § 956.  
 Levy of county taxes, see "Counties," § 190.  
 Levy of highway taxes, see "Highways," § 127.  
 Levy of levee tax, see "Levees," § 25.  
 Levy of school taxes, see "Schools and School Districts," § 103.  
 Levy of town taxes, see "Towns," § 56.  
 Levy of town taxes to aid railroad, see "Towns," § 57.  
 Location and establishment of county seat, see "Counties," § 29.  
 Location of school buildings, see "Schools and School Districts," § 68.  
 Location or purchase of school house site, see "Schools and School Districts," § 67.  
 Organization of townships, see "Towns," § 3.  
 Payment of highway taxes in labor, see "Highways," § 151.  
 Pensions for teachers, see "Schools and School Districts," § 146.  
 Public expenditure, see "Counties," § 151; "Municipal Corporations," § 867; "Towns," § 46.  
 Public improvements, see "Municipal Corporations," § 279.  
 Ratification of municipal contract, see "Municipal Corporations," § 244.  
 Removal of county seat, see "Counties," § 35.  
 Removal of seat of justice of county judicial district, see "Courts," § 45.  
 Removal of site of county buildings, see "Counties," § 37.  
 Reorganization of municipal government, see "Municipal Corporations," § 48.  
 Sale of county property, see "Counties," § 110.  
 Vacation of highway, see "Highways," § 75.

## I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

### Cross-References.

Constitutionality of statute restricting privilege of voting, abridging privileges or immunities of citizens, see "Constitutional Law," § 206.  
 Denial of right to vote for member of House of Representatives as involving constitutional question conferring jurisdiction on federal courts, see "Courts," § 282.  
 Injunction to protect right, see "Injunction," § 94.  
 Validity of by-law of corporation requiring members to give up exercise of right of suffrage, see "Corporations," § 55.  
 Validity of rules of police department, see "Municipal Corporations," §§ 176, 181.

### §1. Nature and source of right.

#### Annotation.

How far the right to vote is absolute.—25 L. R. A. 480, note.

(a) None of the elementary writers include

the right of suffrage among the rights of property or of person. It is not an absolute, unqualified, personal right, but is altogether conventional.—*Anderson v. Baker*, 23 Md. 531. [Cited and annotated in 25 L. R. A. 483, as to how far right to vote is absolute: in 11 L. R. A. (N. S.) 501, on personal liability of election officer for rejecting ballots; in 31 L. R. A. (N. S.) 1108, on right to damages for being prevented from voting.]

### §§ 2-6. Power to confer and regulate.

#### Cross-Reference.

Irrigation districts, see "Waters and Water Courses," § 227.

#### Annotation.

Existence, sources, and extent of power.—53 L. R. A. 660, note.

Federal control of election of presidential electors.—43 L. R. A. (N. S.) 284, note.

(a) The right to regulate the elective fran-



chise is an absolute and unqualified right of the state.—*Anderson v. Baker*, 23 Md. 531. [Cited and annotated, see supra, § 1.]

(b) The right of suffrage, being the creation of the organic law, may be modified or withdrawn by the authority which conferred it; and the withdrawal is not to be deemed a punishment inflicted on those who are disqualified.—*Anderson v. Baker*, 23 Md. 531. [Cited and annotated, see supra.]

**§ 7. Constitutional provisions conferring or defining right.**

**§§ 8-10. Statutory provisions conferring or defining right.**

*Annotation.*

Validity of statutory regulation of voters.—25 L. R. A. 484, note.

(a) In construing statutes relating to elections, the intention must be ascertained and effectuated from the language of the statute and a consideration of its general scope and policy.—*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232.

**§ 10½. Constitutional guaranties in general.**

**§ 11. Operation of provisions of Constitution of United States.**

**§ 12. Denial or abridgment on account of race.**

*Annotation.*

Federal control of elections under 15th Amendment forbidding abridgment of right to vote on account of race, color, or previous condition of servitude.—53 L. R. A. 668, note.

**§ 13. Discrimination on account of sex.**

**§§ 14-17. Power to restrict or extend.**

**§ 18. Power to prescribe qualifications.**

(a) Const. art. 1, § 1, prescribing the qualifications of electors at all elections under it, among which there is no property qualification, does not apply to elections for municipal officers (outside the corporate limits of Baltimore city), and hence is not violated by act 1896, c. 359, which repeals certain sections of Code Pub. Loc. Laws, entitled "Harford County," subtitle "Bel Air," and provides (§ 30) that as a condition precedent to voting at municipal elections in the town of Bel Air each elector must show that he was assessed with \$100 worth of real or

personal property on the tax book of said town.—*Hanna v. Young*, 84 Md. 179, 85 Atl. 674, 34 L. R. A. 55, 57 Am. St. Rep. 396.

**§ 19. Power to require registration or proof of qualifications.**

*Annotation.*

Registration as condition of right to vote.—25 L. R. A. 480, note.

(a) Act 1890, c. 573, § 14, relating to the registration of voters, who, prior to the passage of the act had removed from the state and taken up a domicile elsewhere, does not add to the qualifications of voters as prescribed by the Constitution, but only declares by what evidence those qualifications must be shown to exist, which is within the province of the Legislature.—*Southerland v. Norris*, 74 Md. 326, 22 Atl. 137. (See Code, art. 33, § 28.)

**§§ 20-22. Power to regulate nominations and ballots.**

(a) Const. art. 3, § 42, providing that the General Assembly shall pass laws for the preservation of the purity of elections, does not confer legislative power; but is a mandate to execute a power existing independently thereof, and does not deprive the Legislature of the power to pass a primary election law.—*Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249. [Cited and annotated in 22 L. R. A. (N. S.) 1136, 1142, 1145, on constitutionality of primary election laws.]

(b) Act 1904, p. 870, c. 580, providing for the holding of primary elections in a certain county for the nomination of candidates for public office, is not, by reason of § 112 (p. 875), requiring candidates for nomination to pay a fee to be used exclusively in defraying the expenses of holding the election, void because undertaking to add a property qualification for holding public office not contained in the Constitution; the imposition of the fee not being the imposition of a property qualification on the candidates.—*Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249. [Cited and annotated, see supra.]

(c) Act 1904, p. 870, c. 580, providing for the holding of primary elections in a certain county for the nomination of candidates for public office, is not invalid by reason of §

111 (p. 875), whereby the nomination of candidates of the minority party by dishonest administration of law may be postponed until a day or two before election and the candidates thereby excluded from the official ballot.—*Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249. [Cited and annotated, see *supra*.]

## §§ 23-28. Power to regulate conduct of election.

### Cross-Reference.

Contests, see post, § 293.

## II. ORDERING OR CALLING ELECTION, AND NOTICE.

### Cross-References.

Primary election, see post, § 126.

Constitutional provisions fixing term of office as self-executing, see "Constitutional Law," § 31.

Designation and compensation of newspapers for publishing notice, see "Newspapers," §§ 1, 3, 5.

Election of school officers, see "Schools and School Districts," § 53.

For removal of county seat, see "Counties," §§ 34, 35.

Identification of act amended relating to the election of certain officers, see "Statutes," § 138.

Injunction restraining acts of election officers, see "Injunction," § 80.

Issuance of municipal bonds, see "Municipal Corporations," § 918.

Mandamus to compel calling of election, see "Mandamus," § 74.

Mode of action by city counsel, see "Municipal Corporations," § 85.

Order as to local option election, see "Intoxicating Liquors," § 33.

Power of county board to contract for publication of election notice, see "Counties," § 113.

Power of mayor to call election, see "Municipal Corporations," § 168.

Validity of election held in violation of preliminary injunction, see "Injunction," § 205.

## § 29. Authority and exercise thereof in general.

## § 30. Constitutional and statutory provisions.

## § 31. Authority to hold general or regular election.

## § 32. Authority to call special election.

### Cross-Reference.

See post, § 125.

(a) Act 1896, c. 202, taking effect on April 2nd of that year, repealed absolutely Code 1888, art. 33, entitled "Elections," but provided, in § 2, that supervisors of election

appointed before its passage, under the Code, should hold office as if appointed under its provisions. Under Const. art. 2, § 13, however, supervisors of election cannot enter upon their duties until May 1, 1896. Prior to the passage of act 1896, the House of Delegates had ordered a special election to be held April 21st. *Held*, that the order not being self-executing, and the Legislature having provided no means for executing it, either through act 1896 or otherwise, the election cannot be held.—*Munroe v. Wells*, 83 Md. 505, 35 Atl. 142. (See Code 1911, art. 33, §§ 1, 2.)

## § 33. Submission of specific questions.

### Cross-References.

See "Counties," § 34; "Intoxicating Liquors," § 33; "Municipal Corporations," § 918; "Schools and School Districts," § 53.

Constitutional and statutory provisions, see ante, § 30.

### Annotation.

What objects or purposes may be combined in a single question submitted to the voters of a municipality.—26 L. R. A. (N. S.) 665, note.

## §§ 33½-45. (See Analysis.)

## III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

### Cross-References.

Canvassing boards, see post, § 258.

Offenses by officers, see post, § 314.

Presence of officers at polls, see post, § 209.

Primary election officers, see post, § 126.

Registration officers, see post, §§ 100-104.

Authority to administer oaths as affecting responsibility for perjury, see "Perjury," § 9.

Constitutionality of statute relating to election commissioners, encroachment on executive, see "Constitutional Law," § 58.

Disqualification of judge of election for organization of school district, as affecting validity of organization, see "Schools and School Districts," § 27.

Mandamus to election officers, see "Mandamus," §§ 64, 74, 76.

Officers at town meetings, see "Towns," § 22.

Removal of county clerk for violation of election laws, see "Counties," § 67.

Removal of municipal election officer, see "Municipal Corporations," § 156.

Restraining unauthorized acts of officers, see "Injunction," § 80.

## § 46. Nature and status of districts or precincts.

#### § 47. Constitutional and statutory provisions.

(a) Act 1894, c. 533, after declaring that certain statutes shall not apply to municipal elections in the city of Annapolis, provides that the corporation shall appoint the persons to be judges of its municipal elections, and the necessary clerks; that in performing their duties they are to conform to the provisions of the Code of 1888, and that the supervisors of election in Anne Arundel county are relieved of duties in connection with such elections. *Held*, not repealed by act 1896, c. 202, which devises an entirely new scheme for all elections in the state, and declares that all laws inconsistent therewith are repealed, but which provides (§ 13) that in any city other than Baltimore, in which the municipal elections "are now regulated by the public local laws of the state," the conduct of such elections shall continue to be so regulated, and such local law shall continue in force.—*Jones v. Monroe*, 86 Md. 333, 37 Atl. 964. (See Code 1911, art. 33, §§ 14, 162; *Id.* [vol. 3], art. 33, § 14.)

#### § 48. Creation and alteration of districts or precincts.

##### Cross-References.

Effect of irregularities, see post, § 56.  
Mode of action, see post, § 54.

(a) Code 1888, art. 33, § 117A (act 1901, c. 10), empowering supervisors of elections of the several counties to subdivide election precincts when, "in their judgment, \* \* \* it shall be expedient for the convenience of the voters" to do so, confers a continuing power, to be exercised from time to time as public convenience may require, similar to the power conferred by § 117 (act 1896, c. 202), on supervisors of Baltimore City to change election precincts from time to time, and the supervisors of Calvert County may in good faith change the boundaries of precincts established under Code Pub. Loc. Laws, art. 5, § 70, applicable to Calvert county, authorizing the county commissioners to redistrict or increase the number of election precincts in the county.—*Brome v. Dorsey*, 99 Md. 602, 58 Atl. 1020. (See Code 1911, art. 33, §§ 126, 127.)

(b) Where supervisors of elections have, in the exercise of the power conferred by Code

1888, art. 33, § 117A (act 1901, c. 10), changed the boundaries of election precincts, they may, pursuant to the express authority given by the section, have registry books prepared for the new precincts.—*Brome v. Dorsey*, 99 Md. 602, 58 Atl. 1020. (See Code 1911, art. 33, § 127.)

#### § 49. Creation and abolition of offices.

#### § 50. Appointment, qualification, and tenure of officers.

##### Cross-References.

Effect of disqualification or irregularities in appointment, see post, § 55.  
Evidence as to qualifications, see post, § 291.  
Registration officers, see post, § 100.  
Repeal of statutes, see ante, § 47.  
Legislative encroachments on executive, see "Constitutional Law," § 58.  
Mandamus to control appointment, see "Mandamus," § 76.  
Prohibition to control, see "Prohibition," § 6.  
Repeal of ordinance, see "Municipal Corporations," § 116.

#### § 51.— In general.

(a) Under Const. art 2, § 11, authorizing the Governor to fill vacancies occurring during vacation of the Senate, and under the direct provisions of Code 1904, art. 33, § 4, the Governor may, during a recess of the Legislature, fill a vacancy in the office of supervisors of elections.—*Truitt v. Collins*, 122 Md. 526, 89 Atl. 850. (See Code 1911, art. 33, § 4.)

(b) Act 1896, c. 202, taking effect on April 2nd of that year, repealed absolutely Code 1888, art. 33, entitled "Elections," but provided, in § 2, that supervisors of election appointed before its passage, under the Code, should hold office as if appointed under its provisions. Under Const. art. 2, § 13, however, supervisors of election cannot enter upon their duties until May 1, 1896. *Held*, that no vacancy in the offices of supervisors of election occurred between April 2nd and May 1st which the Governor was authorized to fill by appointment.—*Munroe v. Wells*, 83 Md. 505, 35 Atl. 142. (See Code 1911, art. 33, §§ 1, 2.)

#### § 52.— Representation of political parties.

##### Cross-References.

Inspectors and other representatives at polling places, see post, § 210.  
Registration officers, see post, § 101.

(a) Under act 1892, c. 701, and act 1890, c. 538, § 152, providing, in regard to the appointment of ballot clerks, that, if the supervisors cannot "agree" upon the appointment of any clerk, then the supervisor representing the party entitled to be represented by the clerk to be appointed shall present three names, from which the other supervisors shall select a clerk, a majority of the supervisors have not power, against the will of the supervisor representing the party to be represented by the ballot clerk, to appoint a person belonging to such party, but one of the three whose names are presented by the supervisor representing the party must be selected.—*Sudler v. Lankford*, 82 Md. 142, 33 Atl. 455. (See Code, art. 33, §§ 7, 8.)

### § 53. Compensation of officers.

#### *Cross-References.*

Registration officers, see post, § 102.

Repeal of statute, see ante, § 47.

Claim for compensation as subject of conversion, see "Trove and Conversion," § 2.

Implied repeal of act relating to compensation of election officers by act on same subject, see "Statutes," § 161.

Liabilities of counties, see "Counties," § 134.

Special police appointed by city, see "Municipal Corporations," § 186.

### § 54. Powers and proceedings of officers in general.

### § 55. Defects in appointment, ineligibility, or disqualification of officers.

#### *Cross-Reference.*

Function of county clerk as election officer as disqualifying him for re-election, see "Counties," § 64.

### § 56. Irregularities or misconduct of officers.

#### *Cross-Reference.*

By policemen, see "Municipal Corporations," § 190.

### § 57. Liabilities of officers.

#### *Cross-Reference.*

See post, § 58.

### § 58. Actions against officers.

#### *Cross-Reference.*

Restraining unauthorized acts, see "Injunction," § 80.

(a) In an action for damages against a judge of election for refusing to receive the plaintiff's vote, the latter must show that

the defendant acted maliciously and corruptly.—*Friend v. Hamill*, 34 Md. 298. [Cited and annotated in 11 L. R. A. (N. S.) 501, on personal liability of election officer for rejecting ballots; in 31 L. R. A. (N. S.) 1108, on right to damages for being prevented from voting.]

(b) In an action against judges of election for fraudulently rejecting the plaintiff's vote, every fact and circumstance, the admission of which does not violate the cardinal rules of evidence, should be allowed to go to the jury to prove, on the one hand, the fraudulent, malicious, and corrupt motives by which the defendant is charged to have been influenced, and, on the other hand, that the injury of which the plaintiff complains was the result of an honest and innocent mistake on the part of the defendant.—*Friend v. Hamill*, 34 Md. 298. [Cited and annotated, see supra.]

(c) In an action for damages against judges of election for corruptly refusing to receive the vote of the plaintiff, who was a registered voter, declarations of the plaintiff which tended to prove that he was constitutionally disqualified from voting are not admissible as evidence on behalf of the defendant, when such declarations had not come to the latter's knowledge at the time he rejected the vote.—*Elbin v. Wilson*, 33 Md. 135. [Cited and annotated in 11 L. R. A. (N. S.) 501, on personal liability of election officer for rejecting ballots; in 31 L. R. A. (N. S.) 1107, on right to damages for being prevented from voting.]

(d) In an action for damages against a judge of election for corruptly refusing the vote of a citizen who was duly registered, the fact that the defendant knew that the plaintiff differed from him in political sentiments is admissible as an element of proof, to be considered by the jury in determining how far he was influenced by bias, prejudice, or corrupt motives in rejecting the vote.—*Elbin v. Wilson*, 33 Md. 135. [Cited and annotated, see supra.]

(e) An election officer who honestly and conscientiously rejects a legal vote is not responsible in damages for the consequences of his mistake. In order to sustain such a

charge against an election officer, proof of malice is absolutely necessary.—*Bevard v. Hoffman*, 18 Md. 479, 81 Am. Dec. 618. [Cited and annotated in 11 L. R. A. (N. S.) 501, on personal liability of election officer for rejecting ballots; in 31 L. R. A. (N. S.) 1107, 1108, 1109, on right to damages for being prevented from voting.]

#### IV. QUALIFICATIONS OF VOTERS.

##### Cross-References.

Evidence, see post, §§ 291-295.  
Power to prescribe a qualification, see ante, § 18.  
Voters at primary elections, see post, § 126.  
Annexation of territory to city, see "Municipal Corporations," § 84.  
Indians, see "Indians," § 29.  
Issuance of town bonds, see "Towns," § 52.  
Levying school taxes, see "Schools and School Districts," § 108.  
Qualifications as voter as affecting eligibility as juror, see "Jury," § 52.  
Removal of county seat, see "Counties," § 35.

#### § 59. Eligibility in general.

#### § 60. Constitutional and statutory provisions.

(a) The provisions of act 1865, c. 174, entitled "An act for the registration of the voters of the state," and disqualifying as voters all persons who have been in armed hostility to the United States, are not in conflict with the Decl. of Rights and Constitution of Maryland.—*Anderson v. Baker*, 23 Md. 531. [Cited and annotated in 25 L. R. A. 483, as to how far right to vote is absolute; in 11 L. R. A. (N. S.) 501, on personal liability of election officer for rejecting ballots; in 31 L. R. A. (N. S.) 1108, on right to damages for being prevented from voting.]

#### § 61. Race or color.

##### Cross-Reference.

Constitutional provisions, see ante, § 60.

#### §§ 61-65. Sex.

##### Annotation.

Right of women to vote.—21 L. R. A. 662; 27 L. R. A. (N. S.) 522, notes.

#### § 66. Age.

#### §§ 67-70. Citizenship.

##### Cross-References.

Forfeiture of citizenship, see post, §§ 88-94.  
Evidence of alienage, see "Aliens," § 2.

#### § 71. Residence.

##### Cross-References.

As affecting place for voting, see post, § 204.

Evidence, see post, § 295.

##### Annotation.

Does "residence" as a qualification of voters mean "domicile."—19 L. R. A. (N. S.) 759, note.

#### § 72.—Sufficiency in general.

##### Cross-References.

See post, § 73.

Employment in navigation, see post, § 75.

(a) Where a person, clearly a resident of and legal voter in one place, is improperly permitted to vote in another, that fact alone will not disqualify him from continuing to vote at the place of his actual residence.—*Jones v. Skinner*, 87 Md. 560, 40 Atl. 381, 40 L. R. A. 752.

(b) A man who has been away from his father's residence for four years, except for occasional visits, during two years of which time he has kept house and conducted business in another county, living all the time in the same place, and who intends to remain so long as his business is satisfactory, cannot register in the precinct in which his father resides, though he has always claimed it as his home, and voted there.—*Turner v. Crosby*, 85 Md. 687, 36 Atl. 769.

(c) Prior to July, 1892, complainant was a resident of Washington, D. C. In the spring of 1892 he bought a country place in Maryland, to which he and his family removed in July, and remained till November, when they returned to Washington. About the same portions of the years 1893, 1894, and 1895 were so spent by complainant and family at the country place. Complainant paid taxes on his personal securities in the District of Columbia, and continued to live at his former dwelling there under the same conditions and circumstances, except when at the country place. Held, that the facts were insufficient to show a bona fide intention of abandoning his home in Washington for a fixed residence in the state of Maryland, within the election law.—*Thomas v. Warner*, 83 Md. 14, 34 Atl. 830.

(d) Under Const. art. 1, § 1, requiring a residence of one year in the state and six months in a county before a person is en-

titled to vote, one who removes to the state with his family, and builds a house intending to make it his actual home, is entitled to registration after the time specified, although his business during that time was in Washington city, where he went every Monday morning, and did not return until the following Saturday night.—*McLane v. Hobbs*, 74 Md. 166, 21 Atl. 708.

### § 73.—Change in general.

(a) Where a voter has lived temporarily outside the election district where he has his legal residence, but has not voted elsewhere, and has never intended to abandon his domicile there and acquire one elsewhere, he does not cease to be a qualified voter of such district because of his temporary absence, so as to justify the board of registry of such district in striking his name from the list of voters.—*Chew v. Wilson*, 93 Md. 196, 48 Atl. 708.

(b) Act 1892, c. 36, amending Hagerstown City Charter, provides, in § 156, that a person, otherwise qualified, who has resided in the state and town for 12 months, and in the ward 6 months, preceding an election, shall be entitled to register, "provided always that where any person shall be legally registered in any of said wards, and shall remove therefrom to any other of said wards, and remain therein, he shall be entitled to have his name remain on the registry list of the ward from which he shall remove as aforesaid, and to vote therein, until he shall reside in the ward to which he shall have removed and remain therein a sufficient time to entitle him to register therein." Section 159, relating to qualifications of voters, contains a proviso that "the voter shall have resided for six months next preceding the election in the ward in which he offers to vote," and also provides that "in case of removal, or until such residence is acquired, the voter must vote in the ward from which he has removed, and in which he is a qualified elector." *Held*, that one who removed from one ward into another, where he resided for over six months, lost his residence in the former, and was not entitled to vote therein, though, from lack of opportunity, he had not been able to register in the latter.—*Rauth v. Ward*, 86 Md. 201, 37 Atl. 898.

(c) Act 1896, c. 202, § 23, provides that, in determining whether any person is a resident of any voting precinct, it shall be presumed that, if he is shown to have acquired a residence in one locality, he retains the same until it is affirmatively shown that he has acquired another. R. was a resident and voter of M. county October 28, 1895, and voted at the general election in November. He removed with his family to Washington, D. C., in the fall of 1895, and filed an affidavit that he did not intend to change his residence, but had a fixed purpose to return within six months preceding the election in November, 1896, and did return about April 15, 1896. There was evidence that R.'s principal place of business was in Washington, and that he occupied his Maryland home only a portion of each year,—from April to November. *Held*, that R. was entitled to registration as a qualified voter in M. county.—*Ritter v. Etchison*, 86 Md. 206, 37 Atl. 795. (See Code, art. 33, § 25.)

(d) Under act 1896, c. 202, § 23, which provides that, in determining whether any person is a resident of a precinct, if he has acquired a residence in one locality it shall be presumed that he retains the same until it is affirmatively shown that he has acquired another residence, a man 33 years old, who became a resident of a voting precinct in infancy, and has always voted and claimed his residence there since his majority, is entitled to register, although his business takes him from the precinct with his family for a large portion of the time, if he has no intention of acquiring a residence elsewhere.—*Turner v. Crosby*, 85 Md. 178, 36 Atl. 760. (See Code, art. 33, § 25.)

(e) Act 1890, c. 573, § 14, providing that persons who vacate their actual abode in the state, and take up one elsewhere, shall be conclusively presumed to have lost their residence, unless, when they go, they make affidavit before the clerk of the Circuit Court that they do not intend to change their legal residence, but to return six months or more before the next November election, is mandatory, and no proof of actual intent to return will supply the absence of the affidavit.—*Bowling v. Turner*, 78 Md. 595, 28 Atl. 1100; *Dement v. Tubman*, 78 Md. xiv,

memorandum case, 29 Atl. 11, full report. (See Code, art. 33, § 28.)

(f) Act 1890, c. 573, § 14, providing that any one taking up a domicile out of the state shall be conclusively presumed to have lost his residence in the state, and shall therefore become disqualified to vote, unless at or about or within ten days after removal he make affidavit that, notwithstanding such removal, he does not thereby intend to change his residence, but that he has a fixed and definite purpose to return to the state on or before six months preceding the next succeeding election in November, and further providing that, if he does not return six months before such November election, he shall become disqualified to vote, applies to one who removes from the state within six months of a November election, but in such case means the first November election more than six months after making the oath.—*Sterling v. Horner*, 74 Md. 573, 24 Atl. 713. (See Code, art. 33, § 28.)

(g) Act 1890, c. 573, § 14, provides that all persons whose names were upon the registration list at the date of its passage, but who had previously removed from the state, shall be presumed to have thereby intended to abandon their legal residence, unless within 30 days after the passage of the act they shall go in person before the clerk of the Circuit Court, and make and acknowledge an affidavit that they did not intend to change their residence therein, on or before six months next preceding the Tuesday after the first Monday of November, 1890. In addition to making the oath, the person must return to the state within the time expressed. *Held*, that one who made the required affidavit, but did not take up his residence as expressed therein, and who had lived in Washington for 16 years, and was practicing law there, was not a legal voter, although he owned property in the county, and said he intended to return there.—*Lancaster v. Herbert*, 74 Md. 334, 22 Atl. 139. (See Code, art. 33, § 28.)

(h) Const. art. 1, § 1, provides that a voter shall be a citizen of the United States of the age of 21 years or upward, a resident of the state for 1 year, and of the county 6 months, next preceding the election, and

must be duly registered. Act 1890, c. 573, § 14, provides that all persons whose names were upon the registration list at the date of its passage, but who had previously removed from the state, shall be presumed to have thereby intended to abandon their legal residence, unless within 30 days after the passage of the act they shall go in person before the clerk of the Circuit Court, and make and acknowledge an affidavit that they did not intend to change their residence therein, on or before 6 months next preceding the Tuesday after the first Monday of November, 1890. *Held*, proper for the officer of registration to strike the name of a voter off the list, when such affidavit was not made, although he left the state before the act took effect.—*Southerland v. Norris*, 74 Md. 326, 22 Atl. 137. (See Code, art. 33, § 28.)

#### § 74.—Employment in public service.

*Cross-Reference.*

See post, § 106.

#### § 75.—Employment in navigation.

*Cross-Reference.*

See ante, § 72.

(a) An unmarried steamship clerk, employed as such for over three years, who resides on the steamer, and has no other place of residence during that time, acquires no voting domicile at the steamer's home port.—*Howard v. Skinner*, 87 Md. 556, 40 Atl. 379, 40 L. R. A. 753.

(b) A purser on a steamer cannot change his voting domicile by residing thereon.—*Jones v. Skinner*, 87 Md. 560, 40 Atl. 381, 40 L. R. A. 752.

#### § 76.—Students.

*Annotation.*

Acquiring residence as a voter while attending school.—23 L. R. A. 215; 40 L. R. A. (N. S.) 170, notes.

(a) Appellee, after reaching 21 years of age, went from his home, in Harford county, to Baltimore, and entered Morgan College, where he lived for 7 years, except during vacations, when he was employed as a waiter at various summer resorts. During this time he supported himself by his own efforts, and once a year visited his mother at his old home in Harford county, remaining each time two or three days. Several years after

entering college he procured a transfer of his registration as a voter from Harford county to Baltimore, and has voted there ever since. *Held*, that, under Const. art. 1, § 1, prescribing the qualifications of voters, he was a "resident" at the college and was entitled to registration in the precinct in which it was situated.—*Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434. [*Cited and annotated* in 23 L. R. A. 216, on acquiring residence as voter while attending school at public institution.]

### § 77.—Inmates of public institutions.

#### *Cross-Reference.*

Power to prescribe qualification, see ante, § 18.

#### *Annotation.*

Acquiring residence as a voter while attending school or public institution.—23 L. R. A. 215; 40 L. R. A. (N. S.) 168, notes.

### § 78.—Places under jurisdiction of United States.

### §§ 79-82. Property.

#### *Annotation.*

Constitutionality of statute prescribing property qualification on right to vote on establishment of drainage district.—44 L. R. A. (N. S.) 539, note.

### § 83. Payment of taxes.

#### *Cross-References.*

Proof of payment on challenge of voter, see post, § 223.

Annexation of territory to city, see "Municipal Corporations," § 34.

#### *Annotation.*

Payment of poll taxes as a qualification of electors.—29 L. R. A. 414, note.

Tax or property qualification of voters.—25 L. R. A. 482, note.

### §§ 84-86. (See Analysis.)

### §§ 87-94. Forfeiture of citizenship and disfranchisement.

#### *Cross-References.*

Betting on election as an offense, see post, § 315.

Bribery as affecting validity of election, see post, § 230.

Bribery as an offense, see post, § 316.

#### *Annotation.*

Disqualification of voter for crime.—25 L. R. A. 483, note.

Denial of right to vote for person whose name is not on ballot as disfranchisement.—16 L. R. A. 278, note.

Restoration of right to vote by service of sentence upon conviction for crime.—32 L. R. A. (N. S.) 418, note.

## V. REGISTRATION OF VOTERS.

#### *Cross-References.*

Evidence, see post, §§ 293, 295.

Fraudulent registration as an offense, see post, § 312.

Power to require, see ante, § 19.

As qualification of signer of petition for amendment of municipal charter, see "Municipal Corporations," § 46.

Election for establishment of graded schools, see "Schools and School Districts," § 42.

Election to determine question of levying school taxes, see "Schools and School Districts," § 103.

Mandamus as affected by existence of other remedy against registration officers, see "Mandamus," § 3.

Use of registration and poll lists by witness to refresh memory, see "Witnesses," § 255.

Validity and constitutionality of statutory provisions, see "Constitutional Law," §§ 42, 211; "Statutes," §§ 64, 101.

### § 95. Constitutional and statutory provisions.

#### *Cross-References.*

Partial invalidity of statute, see "Statutes," § 64.

Persons entitled to question constitutionality of act providing for registration, see "Constitutional Law," § 42.

Prohibiting nonregistered persons from voting as denial of equal protection of laws, see "Constitutional Law," § 211.

Uniformity of operation of general laws, see "Statutes," § 101.

#### *Annotation.*

Validity of statutory regulation of registration.—25 L. R. A. 484, note.

(a) Act 1890, c. 573, § 14, providing that anyone who before the passage of the act has removed from the state, and taken up his abode elsewhere, shall be presumed to have abandoned his legal residence, and to have surrendered his right to registration, unless he makes the affidavit therein required, does not apply to one who obtained a residence before the passage of the act.—*McLane v. Hobbs*, 74 Md. 166, 21 Atl. 708. (See Code, art. 33, § 28.)

(b) Act 1865, c. 174, entitled "An act for the registration of the voters of the state," and imposing on the citizen offering himself for registration the duty of taking an oath to answer interrogatories, is not in conflict with the Decl. of Rights, art. 22, which provides that no man ought to be compelled to give evidence against himself in a criminal case.—*Anderson v. Baker*, 23 Md. 531. (See Code, art. 33, § 17.) [*Cited and annotated*



in 25 L. R. A. 483, as to how far right to vote is absolute; in 11 L. R. A. (N. S.) 501, on personal liability of election officer for rejecting ballots; in 31 L. R. A. (N. S.) 1108, on right to damages for being prevented from voting.]

#### § 96. Elections subject to registration laws.

(a) Const. art. 1, § 5, which provides that "no person shall vote at any election, federal or state, \* \* \* or at any municipal election in the city of Baltimore, unless his name appears in a list of registered voters," does not apply to local municipal elections in other towns in the state.—*Smith v. Stephan*, 66 Md. 381, 7 Atl. 561, 10 Atl. 671. [Cited and annotated in 27 L. R. A. 704, on statutes legalizing invalid municipal contracts.]

#### § 97. Necessity of registration.

#### § 98. Persons entitled to registration.

(a) Act 1896, c. 202, § 16, par. 4, declares that only persons qualified to vote at the next election, and personally applying for registration, shall be registered; and § 21 provides that no new name shall be added when the registers meet to revise their registry. On application for registration, it appeared that applicant was an unnaturalized foreigner, under age; and the registers, after entering his name, refused to register him as qualified, but the applicant stated that he would soon attain his majority, and would then take out his papers, and present them to the registers. *Held*, that, when the registers again met to revise their registry, the applicant, who had meanwhile become a qualified voter, was entitled to be registered as such.—*Barret v. Taylor*, 85 Md. 173, 36 Atl. 708, 36 L. R. A. 129. (See Code, art. 33, §§ 17, 23.)

(b) One who makes personal application therefor to the officer of registration is entitled to be registered as a voter on the day appointed for the revision of the registry list, under act 1890, c. 573, § 14, providing that the officers of registration, "when sitting at any time thus provided for the registration of voters or for the revision of their registries of voters, shall register all persons making personal application" to be

registered.—*Blackford v. Robinson*, 80 Md. 419, 31 Atl. 448. (See Code, art. 33, § 23.)

(c) Where it is undisputed that a registered voter has lived in the city and precinct for the statutory period, the fact that he has no particular home in the precinct does not render his registration invalid.—*Langhammer v. Munter*, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

(d) Code 1888, art. 33, § 19, fixes certain days for registration of voters, and certain other days on which the registration officers shall sit for revision and for hearing applications for reinstatement by persons who have been stricken from the list, and provides that one who has been registered in one district shall not be registered in another unless he produces a certificate that his name has been stricken off in the former. At the proper time petitioner made application to be registered in Baltimore, satisfactorily answered all questions, and was registered; but the officers learned that he was formerly registered in Frederick city, and required him before 9 o'clock p. m. of the following day to furnish a certificate that his name had there been stricken off. This he at once proceeded to do, but received the certificate too late, and his name was stricken off. *Held*, that, on presenting his certificate on the day fixed for hearing applications for reinstatement, he was entitled to be reinstated.—*Rellihan v. Titlow*, 74 Md. 77, 21 Atl. 694. (See Code 1911, art. 33, § 27.)

#### §§ 99-104. Registration officers.

(a) Under act 1882, c. 22, § 32 (Code 1888, art. 33, § 31), officers for the registration of voters are entitled to compensation at the rate per diem named, not only for the time occupied in registering names, but for the time, not exceeding five days, occupied in making and publishing the handbill list of voters registered.—*Ryninger v. Keating*, 60 Md. 334. (See Code 1911, art. 33, § 118.)

(b) Officers for the registration of votes are properly qualified by taking and subscribing the oath in the registration books before anyone having authority to administer oaths.—*Hardesty v. Taft*, 23 Md. 512, 87 Am. Dec. 584. [Cited and annotated in

25 L. R. A. 483, as to how far right to vote is absolute; in 3 L. R. A. (N. S.) 383, on equity interference in matters preceding elections; in 31 L. R. A. (N. S.) 1108, on right to damages for being prevented from voting.]

### § 105. Time for registration.

### § 106. Proceedings for registration.

(a) Act 1896, c. 202, § 26, amending Code 1888, art. 33, provides that names may be added to the registers of voters at times of intermediate periods of general registration, "in the same way as in the case of general registration, and all the same forms and requirements shall be observed." Also that, if any applicant has previously been registered in another precinct, he shall produce a certificate of removal from the board of registry, etc. *Held*, that the section contemplates the registration de novo of one previously registered, and hence to omit the inquiries required by § 16, to be put to applicants for registration, and to register the applicant on his assertion that the statements in the affidavit indorsed on his certificate of removal were true, was error. — *Davis v. O'Berry*, 98 Md. 708, 50 Atl. 273. (See Code 1911, art. 33, §§ 17, 31.)

(b) A voter who had been duly registered after his removal from another county, and whose sworn testimony is that he then exhibited to the registration officers a certificate from the registration officers of the county of his former residence, showing that his name had been stricken from the registration lists of such county, as required by act 1892, c. 239, § 19, need not, on applying for registration for another election at the same precinct, again produce a certificate from the registration officers of the county of his former residence. — *Carle v. Musgrove*, 77 Md. 174, 26 Atl. 407. (See Code, art. 33, § 27.)

(c) One who left the state before act 1890, c. 573, § 14, relating to registration, took effect, cannot prove his residence by the rules of evidence in force at that time, but must prove it as required at the time the board of registration meets to revise the registry list. — *Southerland v. Norris*, 74 Md. 326, 22 Atl. 187. (See Code, art. 33, § 28.)

(d) One in the employ of the federal government is not exempted from the operation of the rules of evidence prescribed by act 1890, c. 573, § 14, as it applies to all persons who depart from the state and acquire residence elsewhere. — *Southerland v. Norris*, 74 Md. 326, 22 Atl. 187. (See Code, art. 33, § 28.)

### § 107. Compelling registration.

#### Cross-References.

See "Mandamus," § 74.

Original jurisdiction of courts of appellate jurisdiction to compel registration by mandamus, see "Courts," § 207.

### § 108. Correction of lists.

(a) Code 1904, art. 33, § 26, providing for the purging of registration lists, declares that in the city of Baltimore the last general registration shall be revised by the board of registry in each precinct where such election is to be held, and for that purpose a board of registry shall meet on the Tuesdays, respectively, seven, six, five, and four weeks preceding the regular election, and names may be added to the registers in the same way on sworn application as in the case of a general registration; that it shall also be the duty of the board after the close of each session to vote for erasure the names of all persons known or supposed to be dead, disqualified, or removed from the precinct; and that the board in making such list shall treat as persons suspected all persons against whom a sworn complaint is filed by any voter in the ward. *Held*, that, where officers of registration are acting under such provision, a single member of the board on the last day of the sitting could not require the board to place on the list of suspected persons any registered voter named by him without inquiry into the grounds of suspicion or belief as to the disqualifying cause. — *Wilson v. Carter*, 103 Md. 120, 63 Atl. 369. (See Code 1911, art. 33, § 27.)

(b) Under Code 1904, art. 33, § 26, an unsworn list, which did not originate with the officer of registration who produced it to the board, but was handed to such officer on the last day of the sitting of the board by a person not shown to be even a "voter of the ward," and was filed by the officer to whom it was privately handed, was insufficient to require the board of registration to

act thereon.—*Wilson v. Carter*, 103 Md. 120, 63 Atl. 369. (See Code 1911, art. 33, § 27.)

(c) Code 1904, art. 33, § 24, in relation to elections, provides that, on a petition to strike from the list of qualified voters the name of any person fictitious, deceased, or disqualified, summons shall be served at his place of residence given in the register. *Held*, that where the house in which a voter resided according to the registry had been destroyed, and there was no building there, service by laying the summons on the lot and putting a brick on it was sufficient.—*Applegarth v. Carter*, 102 Md. 341, 62 Atl. 712. (See Code 1911, art. 33, § 25.) [Cited and annotated in 21 L. R. A. (N. S.) 349, as to where process may be served under statutes providing for service by leaving at usual place of abode, etc.]

(d) Code 1904, art. 33, § 20, in relation to elections and providing for placing registered voters on the suspected list, provides that, if any voter make oath before the board of registry that he believes any person not a qualified voter, such facts shall be noted. Section 21 provides that the board of registry shall deliver to two of their number, of opposite politics, a list of registered voters whom one of the officers of registration suspects not to be qualified voters, and § 11 prescribes the oath to be taken by an officer of registration, in which he swears that he will faithfully and honestly discharge the duties of such an officer. *Held*, that a list of suspected voters was not such as contemplated by the statute, where it was merely handed to the board of registration by a party executive of the ward, and not verified by any affidavits, and not supported by the belief of one of the officers.—*Carter v. Applegarth*, 102 Md. 336, 62 Atl. 710. (See Code 1911, art. 33, §§ 11, 20, 21.)

(e) Code 1904, art. 33, § 24, in relation to elections, provides that, on a petition to strike from the list of qualified voters the name of any person fictitious, deceased, or disqualified, summons shall be served at his place of residence. *Held*, that the statute means that the summons shall be left at his place of residence.—*Carter v. Applegarth*, 102 Md. 336, 62 Atl. 710. (See Code 1911, art. 33, § 25.)

§§ 109, 110. (See Analysis.)

§ 111. Inspection of lists.

*Cross-Reference.*

See "Mandamus," § 74.

§ 112. Review by courts of proceedings of registration officers.

*Cross-References.*

See "Mandamus," § 187.

Appellate jurisdiction of courts in general, see "Courts," § 213.

(a) Under Code 1904, art. 33, § 24, declaring that any person aggrieved by the action of any board of registry in registering a disqualified person may appeal to the courts, the courts have appellate, and not original jurisdiction, and, where no action has been taken by the officers of registration on objections before them as to the registration of a disqualified person, the courts are without power to review or correct any error committed by the officers.—*Smith v. McCormick*, 105 Md. 224, 65 Atl. 929. (See Code, art. 33, § 25.)

(b) Code 1904, art. 33, § 24, declares that any person aggrieved by the action of any board of registry in refusing to register him as a qualified voter, or in erasing or misspelling his name or that of any other person on the register, or in registering or failing to register the name of any fictitious, deceased, or any disqualified person, may appeal to the Baltimore City Court, etc. *Held*, that such section only authorized an appeal from a specific judgment of the board, and not from the action of a board in refusing to place the name and address of a certain person on the list of suspected persons of the precinct "who where not qualified voters" therein.—*Wilson v. Carter*, 103 Md. 120, 63 Atl. 369. (See Code 1911, art. 33, § 25.)

(c) Act 1896, p. 341, c. 202, § 20 (Code 1904, art. 33, § 21), provides that the board of registry shall note for erasing from the register all names of persons suspected of not being entitled to remain thereon. Section 21 (§ 22) provides for notice to such persons of intended action by the board. Section 22 (§ 23) provides for the hearing of the persons interested and final revision of the registry. Section 23 (§ 24) provides that any person aggrieved by such action of the board may file a petition in court setting

forth the grounds, and ask to have the registry corrected, that the "cases shall be heard de novo," and that the costs in all "such appeal cases shall from the passage of this act be one-half of those provided for under existing law." *Held*, that an original action does not lie to require the board of registry to strike from the registry the name of a person alleged to be disqualified to vote.—*Collier v. Carter*, 100 Md. 381, 60 Atl. 104. (See Code 1911, art. 33, §§ 21, 23, 24, 25.)

(d) On appeal from the denial of a petition to strike from the registration books a voter's name on account of an error of the election officers in testing his qualifications, it will be presumed, in view of the silence of the record, that the voter established at the hearing his right to registration.—*Davis v. O'Berry*, 93 Md. 708, 50 Atl. 273.

(e) Where there is no bill of exceptions in the record, and the statement of facts has obviously been prepared by counsel after the hearing below, an appeal from the denial of a petition to strike a voter's name from the registration book will be dismissed.—*Davis v. O'Berry*, 93 Md. 708, 50 Atl. 273.

(f) Under act 1896, c. 202, § 23, providing, with reference to appeals in registration cases, that exceptions may be taken and appeals allowed as in other cases, and that "all such appeals shall be taken within five days," the bill of exceptions may be presented and signed in accordance with the general practice regulating appeals, if the appeal is taken within the five days.—*Ritter v. Etchison*, 86 Md. 206, 37 Atl. 795. (See Code, art. 33, § 25.)

(g) The provision of act 1890, c. 573, § 21, that an appeal from the officer of registration must be within one week after the last day of the October sitting, is mandatory.—*Cox v. Bryan*, 81 Md. 287, 31 Atl. 447, 852. (See Code, art. 33, § 25.)

(h) Under act 1890, c. 573, § 21, providing for appeal to the Circuit Court from the action of a registration officer if taken within one week from the last sitting of such officer, an appeal taken after the time named, the petition, by order of court and agreement of counsel, being filed nunc pro tunc to bring it within the time fixed by the statute,

is not within the jurisdiction of the court.—*Cox v. Bryan*, 81 Md. 287, 31 Atl. 447, 852. (See Code, art. 33, § 25.)

(i) In an action to have names stricken from the registry of voters, the entries in the registry are admissible to show that the register acted properly in placing the names thereon, and will be deemed to be true till their falsity is established.—*Langhammer v. Munter*, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

(j) Act 1890, c. 573, § 19, provides, among other things, that on the third Monday in October the registration officer may reinstate upon his own motion, or upon application, the names of such persons as have been stricken from the voting lists at the four-days session commencing on the first Monday in October. Section 21 provides that any person aggrieved may appeal forthwith from the decision of the officer to the Circuit Court. *Held*, that an appeal by one whose name had been stricken off, taken prior to the third Monday in October, was premature, and the Circuit Court had no jurisdiction.—*Ticer v. Thomas*, 74 Md. 342, 22 Atl. 402. (See Code, art. 33, §§ 23, 25.)

(k) No appeal lies from an order of the Circuit Court on appeal from the action of the registration officers in refusing to strike a name from the list of registered voters, unless it be taken within five days from the date the order is entered, since such limitation is expressly provided by act 1890, c. 573, § 21.—*Plummer v. Wilson*, 73 Md. 472, 21 Atl. 322. (See Code, art. 33, § 25.)

(l) Act 1890, c. 525, provides for an appeal from the officers of voting registration to the Superior Court of Baltimore City and the judges of the county circuit courts. Questions arising on such appeals are heard by the court without a jury. The act further declares that exceptions may be taken to the rulings of the court below and "appeal allowed to the Court of Appeals as in other cases." On such an appeal the only exception taken was to the order of the court directing the appellee to be registered as a voter. *Held*, that Code 1888, art. 5, § 9, providing that no question shall be considered by the Court of Appeals which does not appear by the record to have been raised

below, does not apply to this proceeding, and such exception was sufficient to bring up the whole record, and raise the question as to the legality of the order.—*Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434. (See Code 1911, art. 5, § 9; art. 33, § 25.) [Cited and annotated in 23 L. R. A. 216, on acquiring residence as voter while attending school at public institution.]

(m) Under act 1882, c. 22, providing for the registration of voters, the circuit courts in the counties, and any of the courts in Baltimore city, have jurisdiction to hear and determine an appeal from the decision of the register of voters on the application of a qualified voter to have stricken from the lists the names of persons alleged to be disqualified, after the regular November election, when the appeal has been taken before such election.—*City of Baltimore v. Fledderman*, 67 Md. 161, 8 Atl. 758. (See Code, art. 33, § 25.)

### § 113. Conclusiveness and effect in general.

(a) The fact that a person's name does not appear on the police census of registered voters of Baltimore does not prove that he is not entitled to vote in that city.—*Langhammer v. Munter*, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

### §§ 114-116. Irregularities and defects.

#### Cross-Reference.

Ground for contest, see post, § 271.

(a) Under act 1896, c. 202, § 26, amending Code 1888, art. 33, providing that, if an applicant for registration has previously been registered in another precinct, he shall produce his certificate of removal from the board of registry, the omission of the inquiries required by § 16 to be put to applicants for registration, and to register the applicant on his assertion that the statements in the affidavit indorsed on his certificate of removal were true, will not justify striking the applicant's name from the registry, if he was in fact a legally qualified voter, as such a voter cannot be disfranchised by a mistake of the election officers.—*Davis v. O'Berry*, 93 Md. 708, 50 Atl. 273. (See Code 1911, art. 33, §§ 17, 31.)

### § 117. Fraudulent or false registration.

#### Cross-Reference.

As an offense, see post, § 312.

#### Annotation.

Good faith as affecting criminal responsibility for illegal registration.—37 L. R. A. (N. S.) 1177, note.

### §§ 118, 119. (See Analysis.)

## VI. NOMINATIONS AND PRIMARY ELECTIONS.

#### Cross-References.

Bribery of member of political convention, see post, § 316.

Power to regulate, see ante, §§ 21, 22.

Constitutionality of act providing for primary elections as affected by public policy, see "Constitutional Law," § 38.

Constitutionality of primary election law, see "Constitutional Law," § 26.

Constitutionality of primary election law, delegation of legislative power, see "Constitutional Law," § 60.

Constitutionality of primary election law, violation of right of assembly, see "Constitutional Law," § 91.

Constitutionality of statute granting judicial power to special tribunal for settlements of disputes regarding nominations, see "Constitutional Law," § 80.

Constitutionality of statutes regulating nominations by political parties, denying equal protection of law, see "Constitutional Law," § 211.

Constitutionality of statutes, special legislation, see "Statutes," § 101.

Constitutionality of statutes, subjects and titles of acts, see "Statutes," § 125.

Eligibility and qualification for office, see "Officers," § 19.

False affidavit in contest for selection of party committee, see "Perjury," § 5.

Jurisdiction to compel certification of nominations, see "Courts," §§ 206, 262.

Mandamus to party officers, see "Mandamus," § 63.

Primary Election Law as adding qualification for members of Legislature, see "States," § 28.

Restraining call for convention, see "Injunction," § 94.

Validity of act requiring expenses of party caucuses to be raised by general taxation, see "Taxation," § 23.

### § 120. Constitutional and statutory provisions.

#### Cross-References.

Effect of partial invalidity of statute, see "Statutes," § 64.

Repeal of provisions of acts amended, see "Statutes," § 139.

Setting out provisions of act as amended, see "Statutes," § 141.

#### Annotation.

Constitutionality of primary election laws.—22 L. R. A. (N. S.) 1136; 41 L. R. A. (N. S.) 132, notes.

Statutory regulations of primaries.—25  
L. R. A. 484, note.

**§ 121. Party organizations and regulations.**

*Cross-References.*

Determination of objections and contests,  
see post, § 152.

Qualifications of voters and candidates at  
primary elections, see post, § 126.

Property right in office, see "Property," §  
2.

**§§ 122-124. Nominations by political parties in general.**

*Cross-References.*

Constitutionality of statutory provisions,  
see ante, § 21.

Determination of objections and contests,  
see post, §§ 149-154.

Form of ballots, see post, § 168.

**§§ 125, 126. (See Analysis.)**

*Cross-Reference.*

Repeal of statutes, see ante, § 120.

**§§ 127-135. Nomination by convention or other representatives of party.**

*Cross-References.*

Effect of irregularities, see post, § 150.

Filling vacancies, see post, § 147.

Right to use of party name and emblem  
on ballots, see post, § 168.

Restraining call for convention, see "In-  
junction," § 94.

(a) Act 1904, p. 1043, c. 603, entitled "An act to legalize primary elections in Anne Arundel county," provides for notice of the time and place of holding any primary and publication of the call therefor, and requires the supervisors of election, within seven days from the issuance of any such call, to appoint three judges and two clerks of election to conduct the primary, and provides for returning and certifying the result to the supervisors, and for the delivery of the returns by them to the chairman of the state central committee. *Held*, that where, after the Democratic state central committee of the county had issued a call for primaries and for a county convention, it appeared that all the judges and clerks were not appointed within the required time, and that since the call one of the supervisors had been removed by the Governor and another resigned, and the vacancies filled by the Governor, and that after such removal one Democratic member and the Republican member met without authority and made additional appointments of judges and clerks

of election, and that the newly appointed members had not been able to get possession of the records of the office, so that it was impossible to ascertain who were the legally and illegally appointed judges and clerks, and it was discovered that there was a resolution of the central committee requiring the primaries to be held earlier than the date fixed, there were sufficient reasons for the action of the committee in changing the date of the primaries and county convention. —*Revell v. Holladay*, 102 Md. 82, 61 Atl. 1081.

(b) Under act 1904, p. 1043, c. 603, entitled "An act to legalize primary elections in Anne Arundel county," and providing for the publication of calls for primaries, the power of the state central committee of a political party for such county to issue a call is not exhausted by the issuance of a call selecting a certain day for holding primaries and a county convention; but the committee may subsequently change the date, where the change is not intended to work any fraud upon any element or faction of the party, or made in the perpetration of any political trick or fraud. —*Revell v. Holladay*, 102 Md. 82, 61 Atl. 1081.

**§§ 136-139. Certificate of nomination by party.**

*Cross-References.*

Effect of irregularities, see post, § 158.

Nominations to fill vacancies, see post, §  
147.

Computation of time, see "Time," § 10.

(a) Code, art. 33, § 47, requiring certificates of nomination to be filed with the Secretary of State 25 days before election, was not complied with, where the election occurred on November 4th and the certificates were delivered to the secretary on October 11th, because he was not in the state on the 10th, when they were intended to be filed, and the party chairman believed they must be delivered to him personally. —*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232.

(b) Act 1896, c. 202, § 42, as amended by act 1900, c. 366, and by act 1902, c. 133, now Code, art. 33, § 47, requiring, except in cases provided for by § 51, and of special elections, that certificates of nomination be filed with the Secretary of State not less

than 25 days before election, construed with § 48, originally act 1896, c. 202, § 43, *held* mandatory.—*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232.

(c) Code, art. 33, § 47, requiring certificates of nomination for state officers to be filed with the Secretary of State not less than 25 days before election, applies to candidates nominated under act 1910, c. 741, repealing act 1908, c. 737, § 47, and enacting § 160k, and other sections which is now Code, art. 33, § 188.—*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232. (See Code [vol. 3], art. 33, § 188.)

(d) A requirement that certificates of nominations for city offices shall be filed a certain length of time before the election will not be assumed, merely because this is required in case of nominations for county offices.—*City of Annapolis v. Gadd*, 97 Md. 734, 57 Atl. 941. [Cited and annotated in 3 L. R. A. (N. S.) 383, on equity interference in matters preceding elections.]

#### §§ 140-145. Nomination by electors.

##### *Cross-References.*

Designation on official ballot, see post, § 168.

Effect of irregularities, see post, § 158.

§ 146. (See Analysis.)

#### § 147. Nomination to fill vacancies.

##### *Cross-References.*

See "Mandamus," § 74.

Computation of time, see "Time," § 9.

##### *Annotation.*

When does vacancy in party ticket occur within statute authorizing filling of vacancies.—41 L. R. A. (N. S.) 1088, note.

(a) Under Code, art. 33, § 51, a committee of the Progressive party, duly authorized by the party convention to fill vacancies amongst the party's candidates, may fill the same and certify their nominations to the Secretary of State in the manner prescribed, whose duty it thereupon becomes to certify such nominations to the supervisors of elections.—*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232.

(b) When two candidates had an equal number of votes at a primary election, a vacancy existed, which, under Primary Election Law, § 160k, should be filled by the state central committee of the county.—*Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661.

Ann. Cas. 1913E, 743. (See Code, art. 33, § 188; Id. [vol. 3], art. 33, § 188.)

(c) After votes cast at a primary election have been canvassed, the new party committeeman elected under Primary Election Law, § 160k, constitute the governing body of the party, with power to fill vacancies in nominations.—*Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661. Ann. Cas. 1913E, 743. (See Code, art. 33, § 188; Id. [vol. 3], art. 33, § 188.)

#### §§ 148-154. Objections and contests.

##### *Cross-References.*

See "Mandamus," §§ 3, 4, 74.

Determination in contest of election, see post, § 298.

(a) Defeated candidate for delegate to party convention *held* not entitled to contest in court a primary election under the Primary Election Law or Code 1904, art. 33.—*Townsend v. Crow*, 117 Md. 1, 82 Atl. 657, 660, 661. (See Code 1911, art. 33, §§ 1, et seq., 178, et seq.) (See also *Foxwell v. Beck*, 117 Md. 1, 82 Atl. 657; *Bramble v. Nicholson*, 117 Md. 1, 82 Atl. 664; *Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E, 743.)

(b) Contest over election of delegate to party convention, even if authorized by primary law, will not be continued after the convention has adjourned.—*Townsend v. Crow*, 117 Md. 1, 82 Atl. 657, 660, 661. (See Code, art. 33, §§ 178, et seq.) (See also *Foxwell v. Beck*, 117 Md. 1, 82 Atl. 657; *Bramble v. Nicholson*, 117 Md. 1, 82 Atl. 664; *Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E, 743.)

(c) Candidate defeated for nomination *held* not entitled to contest in the courts a primary election under the Primary Election Law.—*Foxwell v. Beck*, 117 Md. 1, 82 Atl. 657. (See Code, art. 33, §§ 178, et seq.) (See also *Townsend v. Crow*, 117 Md. 1, 82 Atl. 657, 660, 661; *Bramble v. Nicholson*, 117 Md. 1, 82 Atl. 664; *Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E, 743.)

(d) Code 1904, art. 33, § 128, providing that contested elections of any "officer" shall be decided by the judges of the courts, does not apply to primary election contests, since a nominee is not an "officer."—*Foxwell v.*

*Beck*, 117 Md. 1, 82 Atl. 657. (See Code 1911, art. 33, §§ 130, 178, et seq.) (See also *Townsend v. Crow*, 117 Md. 1, 82 Atl. 657, 660, 661; *Bramble v. Nicholson*, 117 Md. 1, 82 Atl. 664; *Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E, 743.)

(e) Provision of Primary Election Law, § 160h, that elections thereunder shall be held and determined as provided by Code 1904, art. 33, held not to cover election contests in the courts.—*Foxwell v. Beck*, 117 Md. 1, 82 Atl. 657. (See Code, art. 33, § 185; *Id.* [vol. 3], art. 33, § 185; act 1916, c. 160, § 1.) (See also *Townsend v. Crow*, 117 Md. 1, 82 Atl. 657, 660, 661; *Bramble v. Nicholson*, 117 Md. 1, 82 Atl. 664; *Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E, 743.)

§ 155. (See Analysis.)

#### § 156. Certification of nomination by public officers.

##### *Cross-References.*

Jurisdiction of federal court of equity to require nomination of congressman to be certified, see "Courts," § 262.

Original jurisdiction of appellate courts to compel certification, see "Courts," § 206.

(a) Act 1896, c. 202, § 42, as amended by act 1900, c. 366, and by act 1902, c. 133, now Code, art. 33, § 47, requiring, except in cases provided for by § 51, and of special elections, that certificates of nomination be filed with the Secretary of State not less than 25 days before election, construed with § 48, originally act 1896, c. 202, § 43, held mandatory, so that the Secretary of State could not be compelled to certify nominees to the supervisors of elections which were not filed within the time required.—*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232.

§§ 157-159. (See Analysis.)

### VII. BALLOTS.

##### *Cross-References.*

At primary elections, see ante, § 126.

Attaching ballots to returns, see post, § 249.

Evidence, see post, § 293.

Mode of voting by ballot, see post, §§ 216-221.

Power to regulate, see ante, § 22.

Constitutionality of statute as affected by policy and political morals, see "Constitutional Law," § 70.

Election to determine question of levying school taxes, see "School and School Districts," § 103.

Illegality of ballots as affecting contract executed as result of election, see "Municipal Corporations," § 252.

Jurisdiction of equity to compel Secretary of State to strike matter from ballots, see "Equity," § 30.

Mandamus to compel placing of name on ballot, see "Mandamus," §§ 3, 74.

Original jurisdiction of appellate courts to determine right to party name and emblem, and to determine right of candidates to place on ballots, see "Courts," § 206.

Power of county clerk to contract for printing ballots, see "Counties," § 114.

Submission of municipal charter amendments, see "Municipal Corporations," § 46.

Under local option law, see "Intoxicating Liquors," § 34.

#### §§ 160-162. Constitutional and statutory provisions.

##### *Annotation.*

Constitutionality of statute providing that ballots be numbered.—8 L. R. A. (N. S.) 888, note.

Constitutionality of provision limiting names of candidates on official ballot.—L. R. A. 1915A, 1190, note.

Constitutionality of statute providing for election by separate ballot.—44 L. R. A. (N. S.) 712, note.

§§ 163, 164. (See Analysis.)

#### § 165. Form and contents of official ballots.

##### § 166.—In general.

##### § 167.—Order and arrangement of tickets and names.

##### *Cross-References.*

Effect of irregularities, see post, § 188.

Judicial supervision, see post, § 179.

##### § 168.—Party names, emblems, or devices.

##### *Cross-References.*

Conflicting nominations in general, see ante, § 124.

Effect of irregularities, see post, § 186.

Parties or organizations entitled to nominate candidates, see ante, §§ 123, 129, 142.

##### § 169.—Independent candidates.

##### *Cross-Reference.*

See post, § 172.

##### § 170.—Blank spaces.

##### § 171.—Names and designations of offices.

##### *Cross-Reference.*

Effect of irregularities, see post, § 187.



**§ 172.— Names and designations of candidates.**

*Cross-References.*

Effect of irregularities, see post, § 188.

Erasure and insertion of names, see post, § 181.

Grounds of contest, see post, § 271.

(a) Act 1890, c. 538, adds certain sections to the Code of 1888, article 33. Section 128, provides that election ballots shall be printed at public expense, and that thereon shall be printed the names of the several candidates. Section 129 provides that nominations may be made by conventions representing an organized body which at the last general election cast 1 per cent. of the entire vote. Section 130 provides for the certification of a nomination by convention, and for the addition of a party emblem. Section 131 provides that a candidate for office may be nominated by a verified paper containing the names of a certain number of registered voters. *Held*, that, where a person is nominated by a convention as a party candidate, and by proper signatures and affidavit as an independent candidate, the name of the person so nominated should appear on the ticket, not only as a party candidate, but as an independent candidate.—*Fisher v. Dudley*, 74 Md. 242, 22 Atl. 2, 12 L. R. A. 586, (See Code 1911, art. 33, §§ 41, 42, 43.)

**§ 173.— Grouping of offices and candidates.**

*Cross-Reference.*

Names, see ante, § 172.

**§ 174.— Withdrawal, disability, or death of candidate.**

(a) Where a regular certificate of nomination for county offices, signed by more than 200 voters, is presented to the supervisors of election of that county, it is their duty, under act 1896, c. 202, § 38, to place the names of the nominees on the ballot, and a so-called "withdrawal paper," thereafter presented, signed by the signers of the original certificate, should not be considered, as there is no provision in the election laws authorizing the supervisors to receive any withdrawal except one by a nominee.—*Sterling v. Jones*, 87 Md. 141, 39 Atl. 424. (See Code, art. 33, §§ 43, 50; *Id.* [vol. 3], art. 33, § 43.)

**§ 175.— Statement of question or proposition.**

**§ 176.— Numbering.**

*Cross-References.*

As distinguishing marks, see post, § 194.

Effect of irregularities, see post, § 186.

**§ 177.— Indorsement.**

**§ 178.— Objections.**

**§ 179.— Remedies for errors and irregularities.**

*Cross-Reference.*

See "Mandamus," §§ 3, 74.

**§ 180. Indication of choice by voter.**

*Cross-References.*

Distinguishing marks, see post, § 194.

Evidence, see post, § 293.

Irregularities as affecting ballot as a whole, see post, § 186.

*Annotation.*

Does marking some but not all of the candidates on a party ticket defeat the effect of marking under the party emblem as a vote for the omitted candidates, where no votes were cast for their opponents.—28 L. R. A. (N. S.) 461, note.

(a) The fact that crosses opposite the names of candidates on an official ballot are not reproductions of the letter "X" will not invalidate them, though the statute parenthetically indicates that style of cross.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. (See Code, art. 33, §§ 68, 73.) [Cited and annotated in 32 L. R. A. (N. S.) 730, on effect of officers supplying means of identifying ballots.]

**§ 181. Erasure and insertion of names.**

*Cross-References.*

Distinguishing marks, see post, § 194.

Irregularities affecting ballot as a whole, see post, § 186.

**§ 182. Pastors.**

Repeal of statutes, see ante. § 162.

**§ 183. Two or more candidates for same office.**

*Cross-Reference.*

Effect of irregularities, see post, § 186.

(a) Where an election of county commissioners was contested, ballots on which the voters had respectively marked more names than there were persons to be elected to an office, which office, however, was other than county commissioner, were properly rejected, under Code 1888, art. 33, § 61, as

amended by act 1896, c. 202, and act 1901, c. 2, providing that the ballot shall not be counted if the voter has marked more names than there are persons to be elected to an office.—*Duvall v. Miller*, 94 Md. 697, 51 Atl. 570. (See Code 1911, art. 33, § 73. But see also, *Id.* [vol. 3], art. 33, §§ 73, 73A.)

#### § 184. Two or more distinct questions or propositions.

#### §§ 185-189. Irregularities, errors, and omissions.

##### *Cross-Reference.*

Nature of requirements, see ante, §§ 171, 172, 175-177, 180.

##### *Annotation.*

Effect of failing to number ballots.—1 L. R. A. (N. S.) 656, note.

Irregularities in taking ballots.—16 L. R. A. 754, note.

(a) Code 1888, art. 33, § 61, as amended by act 1901, c. 2, provides that the election judge holding the ballots, having first written in ink the voter's name and number upon the coupon attached to one of them, shall deliver the ballot to the voter "after having likewise written in ink his own name or initials upon the back thereof." The voter is required to so fold the ballot that the judge's initials and his own name and number may be seen. Before placing the ballot in the box, the judge receiving it is required to detach and destroy the coupon. *Held*, that the fact that an election judge indorsed his initials on the back of the coupons, so that, when the box was opened, none of the ballots therein bore his initials, would not invalidate the vote of that precinct.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. (See Code 1911, art. 33, § 73; *Id.* [vol. 3], art. 33, §§ 73, 73A.) [*Cited and annotated* in 32 L. R. A. (N. S.) 730, on effect of officers supplying means of identifying ballots.]

(b) Where the evidence in an election contest showed that one judge initialed every ballot, and another judge, who knew that such initials were required, accepted them and placed them in the box, it will be presumed that every one put in the box was an official ballot, though when the box was opened all of the ballots were found without initials, by reason of the fact that the indorsement had been made on a detachable

coupon, taken off before deposit in the box.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [*Cited and annotated*, see *supra*.]

(c) The fact that an election judge named Anthony Schriver indorses an official ballot "A. Schr."—being intended for his initials—will not invalidate it.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [*Cited and annotated*, see *supra*.]

#### § 190. Mutilation.

#### § 191. Illegality.

##### *Cross-Reference.*

Affecting contract executed as result of election, see "Municipal Corporations," § 252.

#### § 192.— In general.

#### § 193.— Variation as to material, dimensions, color, or typography.

#### § 194.— Distinguishing marks.

##### *Cross-Reference.*

Evidence, see post, § 295.

##### *Annotation.*

Effect of officers numbering or otherwise supplying means of identifying ballots.—32 L. R. A. (N. S.) 730, note.

Marking official ballot.—47 L. R. A. 806, note.

(a) The fact that an official ballot is marked in blue pencil will not invalidate it; the statute prescribing that the pencil shall be indelible, but not fixing its color.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. (See Code, art. 33, §§ 68, 73.) [*Cited and annotated* in 32 L. R. A. (N. S.) 730, on effect of officers supplying means of identifying ballots.]

(b) Where the portion of the cross-marks opposite the names of candidates on an official ballot extending beyond the lines of the squares is so slight as to be difficult of observation, and obviously not to constitute an identified mark, the ballot should be counted.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [*Cited and annotated*, see *supra*.]

(c) The fact that the pencil strokes constituting the crosses opposite candidates' names on official ballots have been repeated for emphasis will not invalidate the ballots.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [*Cited and annotated*, see *supra*.]

(d) A mark after a candidate's name on an

official ballot consisting of three lines, crossed to form a star, will necessitate the rejection of the ballot.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [Cited and annotated, see supra.]

(e) The fact that the cross opposite a candidate's name on an official ballot is incomplete, by reason of one leg not being as long as the other, will not invalidate the ballot.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [Cited and annotated, see supra.]

(f) The fact that the cross-marks opposite the candidates' names on an official ballot terminate in curls will not invalidate the ballot, the likelihood of the marks constituting identifying marks not being apparent.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [Cited and annotated, see supra.]

(g) The fact that a cross-mark has been made after the name of a candidate on an official ballot, and then erased, invalidates the ballot.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [Cited and annotated, see supra.]

(h) An official ballot marked with the letter "A," and another having the number 14 on it, are invalid.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [Cited and annotated, see supra.]

(i) An accidental blot on the back of a ballot will not invalidate it.—*Coulehan v. White*, 95 Md. 703, 53 Atl. 786. [Cited and annotated, see supra.]

(j) Code 1888, art. 33, § 50, as amended by act 1896, c. 202, and act 1901, c. 2, provides that election ballots shall be so printed as to give each voter a clear opportunity to designate his choice by a cross in a square at the right of the name of each candidate. Section 61 directs the voter to prepare his ballot by marking a cross "in the blank space provided therefor." Section 66 requires the judges to reject a ballot if there shall be any mark on it other than the cross mark in the square opposite the name of the candidate. *Held*, that, to constitute a legal ballot, the whole of the cross mark must be "within" the space provided therefor, and ballots on which any portion of the cross extended beyond the lines of that space were

properly rejected.—*Duvall v. Miller*, 94 Md. 697, 51 Atl. 570. (But see Code 1911, art. 33, §§ 55, 56, 68, 73; *Id.* [vol. 3], art. 33, §§ 55, 56, note [repealed], 73, 73A.)

§§ 195, 196. (See Analysis.)

## VIII. CONDUCT OF ELECTION.

### Cross-References.

Power to regulate, see ante, §§ 24-28.

Primary elections, see ante, § 126.

Assault in enforcing regulations, see "Assault and Battery," § 10.

County seat election, see "Counties," § 35. Election by town to grant aid to railroad, see "Towns," § 57.

Election under local option law, see "Intoxicating Liquors," § 34.

Equitable supervision, see "Equity," § 30.

Fees of sheriff or constable for attendance at and services connected with elections, see "Sheriffs and Constables," § 56.

Jurisdiction of courts of general original jurisdiction to supervise elections, see "Courts," § 126.

Mandamus to compel assistance to voter, see "Mandamus," §§ 16, 74.

Review by certiorari, see "Certiorari," § 24.

§ 197. Powers and functions of election officers in general.

§ 198. Constitutional and statutory provisions.

### Cross-Reference.

Effect of partial invalidity of act, see "Statutes," § 64.

(a) The effect of the repeal of Code 1888, art. 33, entitled "Elections," by act 1896, c. 202, and the adoption by the latter of new methods for holding elections and for registration of voters, was to nullify the former law, and render it totally inoperative; hence the registration lists and ballot boxes prepared for use under the old law are not available for use under the repealing act.—*Munroe v. Wells*, 83 Md. 505, 35 Atl. 142. (See Code 1911, art. 33, §§ 1, et seq.; *Id.* [vol. 3], art. 33.)

(b) Act 1890, c. 538, amending the provisions of Code 1888, art. 33, § 54, the general law regulating elections, is not a local or special law in contravention of Const. art. 3, § 33, though its provisions are restricted to about three-fourths of the state.—*Lankford v. Somerset County Com'rs*, 78 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491. (See Code 1911, art. 33, § 68.) [Cited and annotated in 37 L. R. A. 394, on right of

executive to sign bill after adjournment of Legislature; in 40 L. R. A. (N. S.) 31, on conclusiveness of enrolled bill.]

**§ 199. Application of requirements to special elections.**

**§ 200. Polling places.**

*Cross-References.*

Effect of irregularities, see post, § 227.

County seat election, see "Counties," § 35.

**§ 201.— Establishment and alteration in general.**

**§ 202.— Number.**

**§ 203.— Location.**

*Cross-Reference.*

Effect of irregularities, see post, § 227.

*Annotation.*

Use of public school building for voting.

—31 L. R. A. (N. S.) 592, note.

Right of municipal corporation to place polling booth in street.—4 L. R. A. (N. S.) 571, note.

**§ 204.— Residence as affecting place for voting.**

(a) Const. art. 1, § 1, provides that a male citizen of the age of 21, or upward, who has been a resident of the state for one year and of the legislative district of Baltimore, or of the county in which he may offer to vote, for six months next preceding the election, is "entitled to vote in the ward or election district in which he resides, at all elections." *Held*, that a resident of Baltimore, otherwise qualified, cannot vote in a ward in which he does not reside, though that ward be within the legislative district or county where he has his residence.—*Kemp v. Owens*, 76 Md. 235, 24 Atl. 606.

**§§ 205-214.** (See Analysis.)

**§§ 215-221. Voting by ballot.**

*Cross-References.*

Effect of irregularities, see post, § 227.

Mandamus to compel giving of assistance, see "Mandamus," §§ 16, 74.

*Annotation.*

Assisting voter.—40 L. R. A. (N. S.) 535, note.

Assistance in preparing ballots, rendered by unauthorized person, as affecting their validity.—29 L. R. A. (N. S.) 1170, note.

(a) Code 1888, art. 33, § 52, as amended by act 1896, c. 202, and act 1901, c. 2, requires election ballots to be so folded that no printing shall be visible, except that on

the back and outside, and on the coupon. Section 61 provides that the judge shall deliver the ballot to the voter after writing the voter's name on the coupon, and his own name or initials on the back thereof, and the voter, before leaving the booth or compartment, shall fold the ballot without displaying the marks thereon, and in the same way it was folded when received by him, and he shall keep the same so folded until he has voted, and so that the signature or initials of the judge, and the name and number on the coupon, but nothing else thereon, may be seen, and that no ballot without the indorsement of the name or initials of the judge shall be deposited in the ballot box. *Held*, that ballots folded so that only a blank back was exposed to view were properly rejected in the count.—*Duvall v. Miller*, 94 Md. 697, 51 Atl. 570. (See Code 1911, art. 33, §§ 68, 73; *Id.* [vol. 3], art. 33, § 73.)

**§ 222. Use of voting machines.**

*Cross-References.*

Constitutionality of statutes, see ante, § 27.

Review of acts by certiorari, see "Certiorari," § 24.

**§ 223. Challenges to voters and proceedings thereon.**

*Cross-References.*

Application of general election laws to special elections, see ante, § 199.

Evidence, see post, § 295.

**§ 224. Rejection of vote by election officers.**

*Cross-References.*

Effect of irregularities, see post, § 227.

Offenses by officers, see post, § 314.

*Annotation.*

Duty of election officer to accept sworn vote.—36 L. R. A. (N. S.) 968, note.

Personal liability of an election officer for rejecting ballots.—11 L. R. A. (N. S.) 501, note.

**§§ 225-227.** (See Analysis.)

**§ 228. Illegal acts and practices in general.**

*Cross-References.*

Ground of objection to contest, see post, § 272.

Polling places, see ante, § 200.

**§ 229. Illegal votes.**

*Cross-Reference.*

Illegal voting as an offense, see post, § 313.

**§ 230. Bribery.***Cross-References.*

As disqualifying voter, see ante, § 91.

At town election to grant aid to railroad, see "Towns," § 57.

**§ 231. Illegal expenditures and corrupt practices.****§ 232. Fraud.****§ 233. Obstruction of or interference with voters or officers.***Annotation.*

Right to damages for being prevented from voting at a public election.—31 L. R. A. (N. S.) 1106, note.

**§ 234. Intimidation and violence.***Cross-References.*

As an offense, see post, § 320.

Evidence, see post, § 295.

**IX. COUNT OF VOTES, RETURNS, AND CANVASS.***Cross-References.*

Primary elections, see ante, § 126.

Election to determine county expenditures, see "Counties," §§ 151, 178.

Election to determine creation of school district, see "Schools and School Districts," § 38.

Election to determine levy of tax by parish, see "Counties," § 192.

Election to determine question of levying school taxes, see "Schools and School Districts," § 103.

Election to determine removal of county seat, see "Counties," § 35.

Election under local option law, see "Intoxicating Liquors," § 35.

Judicial notice in criminal prosecution of number of votes cast by political party at election, see "Criminal Law," § 304.

Mandamus to compel, see "Mandamus," §§ 3, 14, 74, 77, 172.

Right of municipal officer to hold over, see "Municipal Corporations," § 149.

Town meeting elections, see "Towns," § 23.

**§ 235. Determination and declaration of result in general.**

(a) The so-called "local option law" not making any provision as to how the clerk of the Circuit Court should proclaim the result, a verbal proclamation by the clerk at the court house door, "that the local option law had carried, and that the majority of the votes were against the sale of intoxicating liquors," held sufficient.—*Mackin v. State*, 62 Md. 244.

**§ 236. Constitutional and statutory provisions.****§ 237. Number of votes necessary to choice.***Cross-References.*

Necessity of registration, see ante, § 97.

County expenditures, see "Counties," §§ 151, 178.

Levy of tax by parish, see "Counties," § 192.

Local option, see "Intoxicating Liquors," § 35.

(a) A blank ballot cannot be considered in summing up a total vote, a majority of which a candidate must receive to be elected.—*Murdoch v. Strange*, 99 Md. 89, 57 Atl. 628. [Cited and annotated in 45 L. R. A. (N. S.) 718, on counting rejected ballots in determining total vote cast.]

(b) Act 1886, c. 248, § 7, relating to the adoption of high license, after providing that "the voters of said county at the general election" shall determine by ballot upon the adoption or rejection of the provisions of the act, and after directing the form of ballots to be used, by making it the duty of the judges to "make a full return of the votes cast as aforesaid" (on which return the clerk is to proclaim the result), makes the adoption of the act dependent solely upon the votes cast for and against it.—*Walker v. Oswald*, 68 Md. 146, 11 Atl. 711. [Cited and annotated in 22 L. R. A. (N. S.) 479, 484, on basis for computation of majority essential to adoption of proposition submitted at general election.]

(c) Act 1886, c. 248, § 8, giving the act effect "if a majority of the voters of said county shall determine by their ballots" in its favor, must be read in conjunction with § 7, and, thus read, clearly means, not a majority of all the voters of the county voting upon some other subject, but a majority of all the voters of the county who vote upon this act.—*Walker v. Oswald*, 68 Md. 146, 11 Atl. 711. [Cited and annotated, see supra.]

(d) The rule that, when an election is held at which a subject-matter is to be determined by a majority of the qualified voters, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by those actually voting, applies equally where, at a general election, the measure, though receiving a majority of the votes cast on that

subject, failed to receive a majority of the votes cast upon some other subject.—*Walker v. Oswald*, 68 Md. 146, 11 Atl. 711. [*Cited and annotated, see supra.*]

### § 238. Tie votes.

#### Cross-References.

Conclusiveness of certificate of election, see post, § 267.

Right of pre-existing incumbent to hold over, see "Municipal Corporations," § 149.

#### Annotation.

Tie vote at local option election.—49 L. R. A. (N. S.) 1204, note.

Decision of tie vote at election.—47 L. R. A. 551, note.

### § 239. Votes to be counted.

#### Cross-Reference.

See ante, § 237.

#### Annotation.

Are rejected ballots to be counted in determining total vote cast.—45 L. R. A. (N. S.) 714, note.

### §§ 240-245. Count of votes.

#### Cross-Reference.

Votes to be counted, see ante, § 239.

#### Annotation.

Upon what basis majority essential to adoption of constitutional or other special proposition submitted at general election is to be computed.—22 L. R. A. (N. S.) 478, note.

### §§ 246-254. Returns.

#### Cross-References.

Criminal responsibility for making false returns, see post, § 314.

Impeaching or contradicting returns on election contest, see post, § 294.

Presumptions as to returns on election contest, see post, § 292.

Mandamus to compel return, see "Mandamus," § 74.

### § 255. Preservation or disposition of ballots.

#### Cross-References.

Evidence, see post, §§ 291, 292, 293, 295.

Pleading, see post, § 285.

Relative weight of ballots and return or certificate, see post, § 295.

#### Annotation.

Scope and effect of provisions in election law for preservation of ballots.—30 L. R. A. (N. S.) 602, note.

### § 256. Canvass of returns.

### § 257.— In general.

(a) Where two judges and one clerk of an election district refused to sign the returns and tally sheets, but made a return as required by Code, art. 38, § 75 (General Elec-

tion Law), their failure to sign the original returns and tally sheets was no ground for the refusal of the canvassing board to canvass the returns.—*Price v. Ashburn*, 122 Md. 514, 89 Atl. 410.

### § 258.— Canvassing boards or officers.

#### Cross-References.

Repeal of statute, see ante, § 236.

Retroactive effect of statutory provision, see ante, § 236.

Creation of school district, see "Schools and School Districts," § 38.

Implied repeal of special by general act, see "Statutes," § 162.

Mandamus as affected by existence of other remedy against boards of canvassers, see "Mandamus," § 3.

### § 259.— Powers and proceedings of canvassers as to returns.

(a) The duties of a canvassing board are purely ministerial, they being without any discretion or judicial power.—*Price v. Ashburn*, 122 Md. 514, 89 Atl. 410.

### § 260.— Recount of votes.

#### Cross-Reference.

On election contest, see post, § 299.

### § 261.— Compelling canvass.

#### Cross-Reference.

Mandamus to compel canvass of returns, see "Mandamus," §§ 3, 14, 74, 172.

### § 262.— Irregularities and errors.

### § 263.— Recanvass.

### §§ 264-268. Certificate of election.

#### Cross-References.

Impeaching or contradicting certificates on election contest, see post, § 294.

Presumptions as to certificates on election contest, see post, § 292.

Mandamus to compel issue of certificate, see "Mandamus," § 77.

(a) Until in some legitimate and conclusive way an election has been declared void, or its result has been changed, the certificate of the judges of election, and proclamation of the clerk, are conclusive of its validity.—*Crouse v. State*, 57 Md. 327.

## X. CONTESTS.

#### Cross-References.

Of nomination, see ante, §§ 149-154.

Supervision of canvass, see ante, § 259.

Appeals from orders of county commissioners in general, see "Counties," § 58.

Constitutionality of statute conferring power of contest on election commissioners, violation of constitutional rights, see "Constitutional Law," § 82.

Constitutionality of statute providing for constructive service, due process of law, see "Constitutional Law," § 309.

Constitutionality of statute requiring persons to testify, compelling one accused to give evidence against himself, see "Witnesses," § 293.

Constitutionality of statutes, denial of due process of law, see "Constitutional Law," § 306.

Constitutionality of statutes, encroachment by executive on judiciary in determining contests, see "Constitutional Law," § 80.

Constitutionality of statutes, scope of judicial functions, see "Constitutional Law," § 74.

Constitutional provisions, self-executing, see "Constitutional Law," § 29.

Existence of right to contest as excluding remedy by quo warranto, see "Quo Warranto," § 3.

Judgment that name of candidate be placed on ballot as bar to quo warranto to oust from office after election, see "Judgment," § 585.

Jurisdiction of appellate courts, see "Courts," §§ 206, 213, 219, 242.

Jurisdiction of chancery courts, see "Courts," § 124.

Jurisdiction of courts to enjoin proceedings in another court, see "Courts," § 480.

Jurisdiction, waiver of objections, see "Courts," § 37.

Jurisdiction where trial would be fruitless, see "Courts," § 2.

Mode of action by board of county commissioners, see "Counties," § 49.

Of clerk of court, see "Clerks of Courts," § 9.

Of election on proposition to improve highways, see "Highways," § 107.

Of election to determine parish expenditures, see "Counties," § 154.

Of election to determine removal of county seat, see "Counties," § 35.

Of election under local option law, see "Intoxicating Liquors," § 37.

Persons entitled to sue on bond by contestant to pay expenses, see "Bonds," § 122.

Place for holding sessions of court trying contested elections, see "Courts," § 74.

Prohibition to prevent appointee of court from acting, see "Prohibition," § 6.

Quo warranto as exclusive remedy for determination of election contest, see "Quo Warranto," § 5.

Right to trial by jury, see "Jury," § 25.

Validity of act creating board to try election contests, see "Courts," § 42.

## § 269. Nature and form of remedy.

### Annotation.

Provisions for testing election of city officer before city council or other municipal body as exclusive of remedies in the courts.—26 L. R. A. (N. S.) 207, note.

(a) Under Const. 1864, art. 4, § 15, referring "contested elections" to the House of

Delegates, by the term "contested elections" is meant contests between candidates, and not a dispute about the office of judge, in which one party claims by appointment of the executive, and the other by election of the people.—*Magruder v. Swann*, 25 Md. 173. (See Const. 1867, art. 4, § 12.) [Cited and annotated in 6 L. R. A. (N. S.) 756, on mandamus to Governor.]

## § 270. Constitutional and statutory provisions.

### Cross-Reference.

Self-executing constitutional provisions, see "Constitutional Law," § 29.

## § 271. Grounds.

(a) The courts should hesitate to declare elections invalid for failure to literally comply with requirements as to preliminary matters, unless such matters are made essential to the validity of the election.—*Graham v. Wellington*, 121 Md. 656, 88 Atl. 621, 89 Atl. 232.

§§ 272-274. (See Analysis.)

## § 275. Jurisdiction.

### Cross-References.

Jurisdiction of chancery, see "Courts," § 124.

Jurisdiction of courts to enjoin proceedings in another court, see "Courts," § 480.

Jurisdiction where trial would be fruitless, see "Courts," § 2.

Original jurisdiction of Supreme Court, see "Courts," § 206.

Waiver of objections to jurisdiction, see "Courts," § 37.

(a) A court of equity has no jurisdiction, either in a direct or collateral proceeding, to hear and determine the validity of a county-seat election.—*Hamilton v. Carroll*, 82 Md. 326, 33 Atl. 648.

(b) Under Code 1860, art. 35, §§ 53, 54, providing that contested election cases shall be decided "by the judges of the several circuit courts, each in his respective circuit, and by the Superior Court of Baltimore City," a circuit court has jurisdiction to decide a contest as to the election of sheriff for its county.—*Anderson v. Levely*, 58 Md. 192. (See Code 1911, art. 33, §§ 130, 131.)

(c) While, under the Constitution, the Governor has jurisdiction to hear and determine a contest for the office of Attorney General, he cannot exercise it until the Legislature clothes him with the authority and

gives him the means of so doing.—*Groome v. Gwinn*, 43 Md. 572. [Cited and annotated in 6 L. R. A. (N. S.) 756, on mandamus to Governor.]

## § 276. Organization and sessions of courts or boards.

### Cross-Reference.

Prohibition to prevent appointee from acting, see "Prohibition," § 6.

## § 277. Venue.

## § 278. Limitations.

### Cross-References.

Affecting time for filing answer or reply, see post, § 286.

Computation of time, see "Time," § 9.

## § 279. Parties.

### Cross-References.

Dismissal for defects, see post, § 296.

Persons against whom proceedings may be brought, see ante, § 274.

Persons entitled to bring proceedings, see ante, § 273.

Election for removal of county seat, see "Counties," § 35.

## § 280. Process of service of notice.

### Cross-References.

Contents of notice, see post, § 285.

Law providing for constructive service by leaving copy as constituting due process of law, see "Constitutional Law," § 309.

## §§ 281-282. (See Analysis.)

## §§ 283-289. Pleading.

### Cross-Reference.

Conclusiveness of allegations on pleader, see "Pleading," § 36.

(a) A petition contesting an election alleged that between 500 and 1,000 "legal" ballots cast for the petitioners were rejected, and that if they had been counted the result of the election would have been different. It also charged that these ballots were rejected because of several matters of fact particularly set forth, which, if true, and not sufficient to justify the judges of election in rejecting the ballots, would entitle the petitioners to the relief sought. *Held*, on demurrer, that though the averment that the ballots were "legal" might be objectionable, as being a conclusion of law, the averment would remain that "ballots" were not counted, which, in connection with the other averments, made the petition sufficiently definite to put in issue the fairness and accuracy of the returns of the judges.—*Duval v. Miller*, 94 Md. 697, 51 Atl. 570.

(b) A petition in an election contest, alleging that the returns of the board of canvassers were fraudulent in setting forth that defendant received a greater number of votes than petitioner; that, on the contrary, the petitioner received a larger number of votes than defendant; that ballots improperly marked and ballots not marked were counted for defendant, and that legal ballots cast for petitioner were rejected,—was sufficient in law as against a demurrer, where such irregularities were sufficient to change the result.—*Muir v. Beauchamp*, 91 Md. 650, 47 Atl. 821.

(c) A petition in an election contest alleging that petitioner received a plurality of all votes cast at the election for the office for which he was a candidate; that a number of ballots were wrongfully counted for defendant because improperly marked; that a number of ballots, though properly marked for petitioner, were rejected; that these errors and irregularities were sufficient in number to change the result of the election, and occurred in every district and precinct in the county,—was sufficiently definite to put in issue the fairness of the returns of the board of canvassers.—*Leonard v. Woolford*, 91 Md. 626, 46 Atl. 1025. [Cited and annotated in 30 L. R. A. (N. S.) 603, on scope and effect of election law provisions for preserving ballots.]

(d) The petition in an election contest is sufficient if signed in the name of petitioner by his attorney, without being sworn to by petitioner.—*Bragunier v. Penn*, 79 Md. 244, 29 Atl. 12.

(e) A petition alleging that petitioner and defendant were candidates for the office of county commissioner; that petitioner received 1,274 votes and defendant "not more than 1,264 votes"; that the Governor, without authority of law, issued a commission to defendant; and that petitioner claims that he, and not defendant, was elected to the office, and is entitled to hold it,—is not objectionable for failure to allege that defendant was not elected, but will sustain an inquiry as to which of the parties was elected.—*Bragunier v. Penn*, 79 Md. 244, 29 Atl. 12.



**§§ 290-295. Evidence.****Cross-References.**

Best and secondary evidence, see "Evidence," §§ 177-179, 186.

Parol evidence to show mistake in ballot, see "Evidence," § 433.

Presumption as to regularity of official acts and proceedings in general, see "Evidence," § 83.

(a) Act 1896, c. 202, § 71, which provides that, after the supervisors have received from the judges of election the sealed ballot boxes, they shall safely keep the same for six months, unless previously notified to produce the same to be used in some contested election, or judicial or legislative investigation, authorizes the use of the ballots as evidence to correct the returns.—*Leonard v. Woolford*, 91 Md. 626, 46 Atl. 1025. (See Code, art. 33, § 78.) [Cited and annotated in 30 L. R. A. (N. S.) 603, on scope and effect of election law provisions for preserving ballots.]

**§ 296. Dismissal before trial or hearing.****§ 297. Scope of inquiry and powers of court or board.****§ 298.— In general.**

(a) Code 1860, art. 35, § 53, providing that "all cases of contested elections," not otherwise provided for, "shall be decided by the judges of the several circuit courts," authorizes the judges not only to decide upon the claim of a contestant, but also to decide that the election was void and the office vacant.—*Handy v. Hopkins*, 59 Md. 157. (See Code 1911, art. 33, § 130.) [Cited and annotated in 50 L. R. A. (N. S.) 372, on provision that incumbent shall hold office until successor is elected and qualified.]

**§ 299.— Re-examination of ballots and recount.****Cross-Reference.**

Powers of canvassing boards or officers, see ante, § 260.

(a) In an election contest on a petition alleging that a number of ballots improperly marked were counted for defendant, and that a number properly marked for petitioner were rejected, an order for a recount of all the ballots was proper for the purpose of examining the ballots as evidence.—*Leonard v. Woolford*, 91 Md. 626, 46 Atl. 1025. [Cited and annotated in 30 L. R. A.

(N. S.) 603, on scope and effect of election law provisions for preserving ballots.]

**§ 300. Trial or hearing.****Cross-References.**

Conformity of findings, of court to evidence, see "Trial," § 396.

Right to jury trial, see "Jury," § 25.

**§ 301. New trial or rehearing.****Cross-Reference.**

See post, § 305.

**§ 302. Judgment.****Cross-References.**

Amendment or correction, see "Judgment," § 301.

Conformity of judgment to pleadings, see "Judgment," § 250.

Judgment that name of candidate be placed on ballot as bar to quo warranto to oust from office after election, see "Judgment," § 585.

Opening or vacating judgment in general, see "Judgment," § 345.

**§ 303.— In general.**

(a) If the court, in a contested election proceeding, thinks one of the contestants elected, he should be declared entitled to the office. If the court thinks there has been no legal election, it will be its duty to certify its decision to the Governor, in order that the vacancy may be filled according to law.—*Anderson v. Levely*, 58 Md. 192.

**§ 304.— Conclusiveness, operation, and effect.**

(a) Where a candidate for office is returned as elected, and receives his commission from the Governor, but is declared not elected by the House of Delegates, he is entitled after qualifying, to hold office only until his successor shall be elected and qualified.—*Wells v. Munroe*, 86 Md. 443, 38 Atl. 987. [Cited and annotated in 50 L. R. A. (N. S.) 372, on provision that incumbent shall hold office until successor is elected and qualified.]

(b) Under Const. art. 4, § 40, declaring that judges of the Orphans' Court shall be elected; and § 12, providing that where an election is contested, and judgment is against the one who has been returned as elected, or has been commissioned, the House of Delegates shall order a new election,—one returned as elected judge of Orphans' Court, and duly commissioned as such, is entitled to possession of the office until his successor is elected and qualified, though the House of

Delegates on contest has declared his election illegal.—*Ijams v. Duvall*, 85 Md. 252, 36 Atl. 819, 36 L. R. A. 127.

(c) Under the constitutional provision that the Legislature shall provide for all cases of contested elections of any of the officers not therein provided for, a law was passed that "all contested elections for comptroller shall be decided by the House of Delegates." *Held*, that the decision of the House on such a contest must be taken as final and conclusive, no matter what may have been the reason for such decision.—*State v. Jarrett*, 17 Md. 309. (See Const. art. 3, § 47.) [Cited and annotated in 50 L. R. A. (N. S.) 381, on death, or failure to qualify, of person elected.]

### § 305. Review.

#### Cross-References.

Appellate jurisdiction in general, see "Courts," §§ 206, 213, 219, 242.

By writ of prohibition, see "Prohibition," § 3.

Certiorari as dependent on absence of remedy by appeal, see "Certiorari," § 5. Certiorari to review dependent on judicial nature of proceeding, see "Certiorari," §§ 23, 24.

Review of orders as affected by finality, see "Appeal and Error," § 70.

Substitution of new bond on appeal, see "Appeal and Error," § 391.

(a) Under Code 1888, art. 5, § 9, providing that in no case shall the Court of Appeals decide any point which does not plainly appear by the record to have been decided by the court below, alleged errors in a contested election case will not be considered on appeal, where it cannot be determined from the record what questions were passed on by the court below.—*Muir v. Beauchamp*, 91 Md. 650, 47 Atl. 821. (See Code 1911, art. 5, § 9.)

(b) Imitation ballots not authenticated in any manner, nor certified to be copies of original ballots used in evidence in an election contest, cannot be treated as part of the record on appeal.—*Muir v. Beauchamp*, 91 Md. 650, 47 Atl. 821.

(c) In a contested election case, the original ballots examined in the lower court cannot be included in the evidence on appeal, but copies of disputed ballots should be incorporated in the record with the ruling of the court thereon.—*Leonard v. Woolford*, 91 Md.

626, 46 Atl. 1025. [Cited and annotated in 30 L. R. A. (N. S.) 603, on scope and effect of election law provisions for preserving ballots.]

(d) The Code of 1860, art. 35, §§ 53, 54, gave the Superior Court of Baltimore City special and exclusive jurisdiction in cases of contested elections, and its judgment therein was final and conclusive.—*Warfield v. Latrobe*, 46 Md. 123. (See Code 1911, art. 38, §§ 130, 131.)

### §§ 306-308. Costs.

#### Cross-References.

On appeal, see ante, § 305.

Retroactive operation or repeal, of statute, see ante, § 270.

## XI. VIOLATIONS OF ELECTION LAWS.

#### Cross-References.

Powers of Congress, see ante, § 4.

Power to disfranchise voter for violation of election laws, see ante, § 18.

As ground for removal of justices of the peace, see "Justices of the Peace," § 10. Attendance and examination of witnesses, see "Witnesses," § 21.

Conspiracy to commit unlawful act, see "Conspiracy," §§ 28, 38.

Double punishment for same offense, see "Criminal Law," § 1209.

Libelous or slanderous publications, see "Libel and Slander," § 7.

Materiality of false statements as affecting liability for perjury, see "Perjury," § 11.

Recovery of money bet on election, see "Gaming," §§ 26, 28.

Removal of officer as infringement of right to jury trial, see "Jury," § 19.

School district meeting, see "Schools and School Districts," § 50.

### § 309. Nature in general.

### § 310. Application and operation of common law.

### § 311. Constitutional and statutory provisions.

(a) Act 1912, c. 2, re-enacting Code 1904, art. 33, § 1601, as enacted in 1910 (act 1910, c. 741), which provided that the penalty prescribed by §§ 87-115 of the same article for offenses connected with general elections should apply to primary elections, *held* not to repeal the former §§ 1601 or 160n, providing a penalty for the negligence or corrupt performance of his duty by a primary election judge.—*Cochran v. State*, 119 Md. 539, 87 Atl. 400. (See Code 1911, art. 33,

§§ 89-117, 189, 191; *Id.* [vol. 3], art. 33, § 189.) [*Cited and annotated in 51 L. R. A. (N. S.) 387, on effect of excessive sentence.*]

(b) Act 1890, c. 538, providing for a change in the method of preparing and voting tickets at elections, does not repeal Code 1888, art. 33, § 55, which provides for the punishment of persons who impersonate others and attempt to vote, at elections; and persons offending against that section are subject to prosecution, the same as if the act had not been passed.—*Fleet v. State*, 74 Md. 552, 22 Atl. 624. (See Code 1911, art. 33, §§ 68, 90, 162.)

### § 312. Fraudulent registration.

#### *Cross-Reference.*

Indictment or information, see post, § 328.

(a) Under act 1882, c. 22, § 21 (Code 1888, art. 33, § 20), requiring each officer of registration to make and publish alphabetical lists of the names of persons stricken from the registry of qualified voters, and § 34 (Code 1888, art. 33, § 37), of that chapter, making it a misdemeanor punishable by fine or imprisonment or both for any such officer to do any act by that statute forbidden, or to omit to do any act which is thereby required to be done by him, it is a misdemeanor for an officer of registration knowingly to include in such list names of persons not stricken from the registry, and who are qualified voters.—*Mincher v. State*, 66 Md. 227, 7 Atl. 451. (See Code, art. 33, §§ 36, 96.)

### § 313. Illegal voting.

#### *Cross-References.*

Affecting validity of election, see ante, § 229.

Indictment or information, see post, § 328.

At school district meeting, see "Schools and School Districts," § 50.

### § 314. Offenses by officers.

#### *Cross-References.*

Defenses, see post, § 321.

Indictment or information, see post, § 328.

Instructions, see post, § 330.

Validity of statutory provisions, see ante, § 311.

### § 315. Betting on election.

#### *Cross-References.*

Indictment, see post, § 328.

Recovery of money from stakeholders, see "Gaming," § 28.

Recovery of money lost on election wager, see "Gaming," § 26.

### § 316. Bribery.

#### *Cross-References.*

Affecting validity of election, see ante, § 230.

As disqualifying voter, see ante, § 91.

Indictment or information, see post, § 328.

### § 317. Illegal expenditures and corrupt practices.

#### *Cross-References.*

Affecting validity of election, see ante, § 231.

Oath as to expenditures as qualification to taking office, see "Officers," § 86.

(a) Act 1908, c. 122, § 168, as amended by act 1910, c. 427, referring to the filing of statements of campaign expenses, does not apply to party committeemen.—*Usilton v. Bramble*, 117 Md. 10, 82 Atl. 661. (See Code, art. 33, § 170; *Id.* [vol. 3], art. 33, § 170.)

(b) Corrupt Practices Act (act 1908, c. 122) § 162, provides that a treasurer of a political committee shall include all persons appointed by any political committee to receive and disburse moneys. Section 163 requires every political committee to appoint a treasurer, and makes it unlawful to disburse money unless he is appointed, and makes it unlawful to disburse money not passing through his hands, provided a treasurer may appoint one subtreasurer for each precinct, who may expend money given him by the treasurer for lawful purposes, and shall make a written report to the treasurer, stating for what purpose the money was expended, and "to whom paid." Section 167 requires every treasurer to file an account with the clerk of the Circuit Court, which shall include the names of the persons from whom any money was received, any valuable thing given or promised, "the name of the person to whom such expenditure, gift or promise was made," and the purpose of the expenditure, and to keep accounts of all moneys received and expended, stating the "person from whom received or promised or to whom paid or promised." *Held*, that a subtreasurer of a political committee must show in his report to the treasurer appointing him the names of the persons to whom he has paid out money; it not being sufficient for his report to state that he paid it to "challengers," "watchers," etc.—*Healy v. State*, 115 Md. 377, 80 Atl. 1074. (See Code,

art. 33, §§ 164, 165, 169; *Id.* [vol. 8], art. 33, §§ 164, 169.)

### § 318. Fraud.

*Cross-Reference.*

Affecting validity of election, see ante, § 232.

### § 319. Obstruction of or interference with voters or officers.

*Cross-Reference.*

Rights of voter in general, see ante, § 233.

### § 320. Intimidation and violence.

*Cross-References.*

Affecting validity of election, see ante, § 234.

Indictment or information, see post, § 328.

### §§ 321-323. (See Analysis.)

### § 324. Criminal prosecutions.

*Cross-Reference.*

Limitation of prosecutions, see "Criminal Law," § 147.

### § 325.— Jurisdiction and venue.

### § 326.— Preliminary proceedings.

*Cross-Reference.*

Preliminary warrant, see "Criminal Law," § 207.

### § 327.— Arrest of voter at polls.

*Cross-Reference.*

See ante, § 233.

### § 328.— Indictment or information.

*Cross-References.*

See "Conspiracy," § 43.

Amendment, see "Indictment and Information," § 161.

Averments as to place of offense, see "Indictment and Information," § 86.

Consolidation, see "Criminal Law," § 619.

Duplicity, see "Indictment and Information," § 125.

Joinder of counts, see "Indictment and Information," §§ 128-130.

Language of statutes, see "Indictment and Information," § 110.

Validity of information as statement of offense at common law, see "Indictment and Information," § 112.

(a) An indictment *held* sufficient to charge an offense under Code 1904, art. 33, § 160n, as enacted by act 1910, c. 741, imposing a penalty upon any judge of election who unlawfully violated any provision of the Primary Law, or was guilty of any neglect or corrupt practice in executing the same.—*Cochran v. State*, 119 Md. 539, 87 Atl. 400. (See Code 1911, art. 33, § 191.) [*Cited and annotated* in 51 L. R. A. (N. S.) 387, on effect of excessive sentence.]

(b) In an indictment against an officer of registration, under act 1882, c. 22, § 21 (Code 1888, art. 33, § 20), for a violation of the provision of that act, requiring such officer to make and publish lists of the names of persons stricken from the registry of qualified voters, in that he published in such list the names of qualified voters not stricken from such registry, it is not necessary to allege the names so wrongfully placed on the list. There was but one offense, for which but one indictment would lie, no matter how many names were wrongfully published; and alleging the names would not aid the accused in making his defense as the evidence required would be simply a comparison of the list published with the list of registered voters.—*Mincher v. State*, 66 Md. 227, 7 Atl. 451. (See Code 1911, art. 33, § 36.)

(c) In an indictment, it is not necessary to charge that the officer acted either willfully, corruptly, or fraudulently in doing the act charged, as the section of the act which he is charged with violating imposes on him not a judicial, but merely a clerical, or ministerial function.—*Mincher v. State*, 66 Md. 227, 7 Atl. 451.

### § 329.— Evidence.

*Cross-References.*

Acts and declarations of conspirators and co-defendants, see "Criminal Law," § 423.

Admissions, see "Criminal Law," § 407.

Best and secondary evidence, see "Criminal Law," §§ 398-404.

Conflicting presumptions, see "Criminal Law," § 325.

Hearsay, see "Criminal Law," § 421.

Sufficiency of evidence in prosecution for perjury, see "Perjury," § 33.

(a) Where an indictment has been returned charging an election judge with the violation of the Primary Election Law, a sufficient *prima facie* case has been made out to justify the opening of the ballot boxes.—*Cochran v. State*, 119 Md. 539, 87 Atl. 400. [*Cited and annotated* in 51 L. R. A. (N. S.) 387, on effect of excessive sentence.]

(b) Defendants, who had been judges and clerks of election, were on trial for conspiring to count and return illegal votes cast at a municipal election, and falsely returning and counting such votes and entering on the poll books the names of persons who did not vote at said election. *Held*, that to prove

that the persons named in the indictment as having been falsely returned as voting did not in fact vote, the certified copy of the registration poll book of the precinct, kept by a challenger, in which he checked off the names of all persons voting, supported by his own testimony and that of another witness, who had charge of the books during the challenger's temporary absence, that the contents of the book were true, was competent evidence.—*Owens v. State*, 67 Md. 307, 10 Atl. 210, 302.

(c) The challenger's book should be regarded as a book of original entries, truthfully made, of the transactions while they occurred.—*Owens v. State*, 67 Md. 307, 10 Atl. 210, 302.

(d) The challenger's book is not rendered inadmissible by the fact that the witness has an independent recollection of the transactions therein referred to. If the witness swears that the entries were truthfully made, they are admissible, irrespective of his present recollection.—*Owens v. State*, 67 Md. 307, 10 Atl. 210, 302.

### § 330.— Trial.

#### *Cross-References.*

Instructions as to character of accused, see "Criminal Law," § 776.

Instructions in prosecution for perjury, see "Perjury," § 37.

### § 331.— Appeal and error.

#### *Cross-References.*

Assignment of errors, see "Criminal Law," § 1129.

Certiorari as mode of review, see "Criminal Law," § 1011.

Necessity of briefs, see "Criminal Law," § 1130.

### § 332.— Sentence and punishment.

(a) Where accused, a subtreasurer of a political committee, did not withhold for improper purposes the names of persons to whom he had disbursed moneys, but merely followed a practice in doing so which was supposed to be authorized by the corrupt practices act, the court properly imposed a merely nominal fine upon his conviction for violating the act in withholding the names.—*Healy v. State*, 115 Md. 377, 80 Atl. 1074.

## ELECTORAL COLLEGE.

#### *Cross-Reference.*

See "United States," § 25.

## ELECTORS.\*

#### *Cross-References.*

Assent to or recommendation of application for license, see "Intoxicating Liquors," § 66.

Presidential electors, see "United States," § 25.

## ELECTRIC CAR.\*

#### *Cross-Reference.*

Defects in causing injury to servant, see "Master and Servant," § 111.

## ELECTRIC COMPANIES.\*

#### *Cross-Reference.*

See "Electricity," §§ 2-8.

## ELECTRIC CONDUITS.

#### *Cross-Reference.*

Power of city to grant franchise for laying in streets, see "Municipal Corporations," §§ 680, 681.

# ELECTRICITY.\*

### *Scope-Note.*

[INCLUDES regulation of the production and use of electricity, and of machinery, structures, and apparatus employed therein, in general; supply of electricity as a motive power, or for illuminating, heating, or other purposes; and rights, duties, and liabilities incident thereto.

[EXCLUDES powers of municipalities (see "*Municipal Corporations*") ; duties and liabilities of employers (see "*Master and Servant*") ; and use of electricity in the operation of railroads (see "*Railroads*"; "*Street Railroads*") and telegraph or telephone lines (see "*Telegraphs and Telephones*").

[For complete list of matters excluded, see cross-references, post.]

\*Annotation: Words and Phrases, same title.

*Analysis.*

- § 1. Statutory and municipal regulation in general.
- § 1½ Establishment of plant by public authorities.
- § 2. Electric companies.
- § 3. ——— Incorporation and organization.
- § 4. ——— Franchises and privileges in general.
- § 5. ——— Conflicting grants of rights in streets and roads.
- § 6. ——— Rights of abutting owners.
- § 7. ——— Relative rights as to interfering currents of different lines.
- § 8. ——— Indebtedness, liens, and mortgages.
- § 9. Conductors, poles, and subways.
- § 10. Licenses and taxes.
- § 10½ Inspection and supervision.
- § 11. Supply of electricity, power, or light.
- § 12. Injuries incident to production or use.
- § 13. ——— Nature and grounds of liability.
- § 14. ——— Care required in general.
- § 15. ——— Licensees and trespassers.
- § 16. ——— Defects, acts, or omissions causing injury.
- § 17. ——— Companies and persons liable.
- § 18. ——— Contributory negligence.
- § 19. ——— Actions.
- § 20. Injuries to works, conductors, or appliances.

*Cross-References.*

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| <p>Act creating commission to adjudicate question of purchase of electric lighting plant by city as unconstitutional creation of court, see "Courts," § 42.</p> <p>Acts of servant for which master is liable, see "Master and servant," §§ 302, 305.</p> <p>Assessment of electric company for public improvement, see "Municipal Corporations," § 422.</p> <p>Assessments for improvements in lighting municipality, see "Municipal Corporations," § 419.</p> <p>Assignment of contract for installation of electric apparatus, see "Assignments," § 19.</p> <p>Assignment of contract for sale of electric power, see "Assignments," § 18.</p> <p>Assignment of contract to supply light to municipality, see "Municipal Corporations," § 251.</p> <p>Condemnation of property for production and supply of electric power or light as taking for public use, see "Eminent Domain," § 85.</p> <p>Constitutionality of statutes, electric franchise as contract protected from impairment, see "Constitutional Law," §§ 128, 134.</p> <p>Constitutionality of statute vacating street, impairing vested right of electric light company, see "Constitutional Law," § 101.</p> <p>Creation of monopolies by electric companies, see "Monopolies," § 6.</p> | <p>Department of lighting in municipalities, see "Municipal Corporations," § 206.</p> <p>Electric light company as manufacturer within license law, see "Licenses," § 12.</p> <p>Electric lighting plant as nuisance, see "Nuisance," § 3.</p> <p>Electric light wires and poles in street or highway as additional servitude, see "Eminent Domain," § 119.</p> <p>Electric railroads, see "Street Railroads."</p> <p>Electrocution as cruel and unusual punishment, see "Criminal Law," § 1213.</p> <p>Enforcement of contract made in violation of franchise, see "Specific Performance," § 55.</p> <p>Estoppel to rescind contract for supply, see "Contracts," § 262.</p> <p>Excessive damages for breach of contract, see "Damages," § 140.</p> <p>Execution against property of electric company used for public purpose, see "Execution," § 28.</p> <p>Extension of municipal works outside city limits, see "Municipal Corporations," § 277.</p> <p>Implied contract by city, see "Municipal Corporations," § 249.</p> <p>Injuries to passenger, see "Carriers," §§ 280-322.</p> <p>Jurisdiction of federal courts to enjoin shutting off supply as dependent on amount in controversy, see "Courts," § 328.</p> |
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Jurisdiction of federal court to restrain city from discontinuing to furnish power, as impairing obligation of contract, see "Courts," § 282.

Liability of city, see "Municipal Corporations," §§ 766, 768, 852.

Liability of city for injuries from construction and maintenance of works, see "Municipal Corporations," § 733.

Liability of electric company to taxation, see "Municipal Corporations," § 967; "Taxation," §§ 62, 156.

Liability of lighting company's property to mechanic's lien, see "Mechanics' Liens," § 12.

Liability of master for injuries to servant from defective electrical apparatus and structures, see "Master and Servant," § 119.

Mandamus to compel issuance of permit for laying of wires, see "Mandamus," § 98.

Negligence in maintaining places attractive to children, see "Negligence," § 23.

Power of city to aid private company, see "Municipal Corporations," § 286.

Power of city to grant franchise, see "Municipal Corporations," § 285.

Power of city to grant rights in streets, see "Municipal Corporations," § 681.

Power of electric street railway company to supply electric power to private consumers, see "Street Railroads," § 28.

Power of municipality to impose license taxes, see "Licenses," § 5½.

Power of municipality to make improvements in lighting, see "Municipal Corporations," § 272.

Prosecutions for violations of municipal ordinances, see "Municipal Corporations," § 632.

Prosecutions for violations of regulations, harmless error, see "Criminal Law," § 1170.

Recovery of overpayments under contract for supply of electricity, see "Payment," § 82.

Regulations as to cutting of wires obstructing use of street, see "Municipal Corporations," § 703.

Restraining breach of contract to furnish electricity, see "Injunction," § 59.

Restraining construction of works by city, see "Municipal Corporations," § 323.

Restraining infringement of franchise, see "Injunction," § 65.

Right of electric company, as taxpayer, to restrain municipal acts, see "Municipal Corporations," § 987.

Right of railroad companies to use electricity as motive power, see "Railroads," § 115.

Statutory action for wrongful death, see "Death," § 17.

Telegraph and telephone lines, see "Telegraphs and Telephones."

Transfer by street railroad company of its franchise to operate lighting plant, see "Street Railroads," § 48.

Uniformity of taxation, see "Taxation," § 40.

Validity of contract exempting from liability for negligence, see "Contracts," § 114.

Validity of grant to nonexistent corporation, see "Corporations," § 437.

Work of independent contractor, see "Master and Servant," § 317.

## § 1. Statutory and municipal regulation in general.

### Annotation.

Right of railroad to cut wires crossing tracks.—35 L. R. A. (N. S.) 1212, note.

Municipal regulation of poles and wires as nuisances in street.—39 L. R. A. 619, note.

Right to interfere with wires of public service corporation in moving house along street.—14 L. R. A. (N. S.) 448, note.

Municipal control over public nuisances upon streets and highways created by electrical companies.—39 L. R. A. 609, note.

Municipal regulation of nuisances relating to electricity.—38 L. R. A. 806, note.

## § 1½. Establishment of plant by public authorities.

### Annotation.

Right of municipal corporation to engage in business of supplying electrical fixtures.—31 L. R. A. (N. S.) 119, note.

Power of municipal corporation to own electric light plant.—14 L. R. A. 268; 15 L. R. A. (N. S.) 711, notes.

Right of municipality to make profit from its water or lighting plant.—24 L. R. A. (N. S.) 290, note.

## § 2. Electric companies.

### Cross-References.

Supply to consumers, see post, § 11.

Change of name, see "Corporations," § 47.

Default judgment in action against, see "Judgment," § 106.

Liability of stockholders, see "Corporations," §§ 215-280.

Power of city to grant franchise, see "Municipal Corporations," § 285.

Proceedings of municipal council, see "Municipal Corporations," § 683.

Reorganization, on sale of property and franchises, see "Corporations," § 572.

Validity of grant to nonexistent corporation, see "Corporations," § 437.

## § 3.—Incorporation and organization.

#### § 4.—Franchises and privileges in general.

##### *Annotation.*

Power of municipality, in absence of express legislative authority, to grant street franchises to electrical company.—22 L. R. A. (N. S.) 925, note.

Grant of franchise to electrical subway company.—34 L. R. A. 369, note.

Privilege of using street for poles and wires as a contract within provision against impairing obligation.—50 L. R. A. 147, note.

(a) A turnpike road is a "highway," and a portion thereof within the limits of the city of Baltimore is a "highway of Baltimore city" within Code 1904, art. 23, § 366, and Balto. City Code, Charter (act 1898, pp. 244, 272-274, 290, c. 123), §§ 6, 8, 10, 11, 37, relating to the use of highways in such city by electric light and power companies, and the granting of franchises for that purpose.—*Patapsco Electric Co. v. City of Baltimore*, 110 Md. 306, 72 Atl. 1039. (See Code 1911, art. 23, § 405; Balto. City Rev. Charter, §§ 6, 6A, 6B, 8, 10, 11, 37, 37A.)

(b) The preposition "of," as used in Code 1904, art. 23, § 366, relating to the "streets or highways of Baltimore city," and the granting of franchises for their use to electric light and power companies, is not descriptive of or relating to title or ownership, but refers to location and municipal jurisdiction; and the expression quoted embraces streets or roads within the city limits which are currently traversed without objection by its citizens, whether the municipality has or has not acquired the legal title to the land lying under them.—*Patapsco Electric Co. v. City of Baltimore*, 110 Md. 306, 72 Atl. 1039. (See Code 1911, art. 23, § 405.)

(c) Code 1888, art. 23, class 11, § 24, provides for the formation of telegraph or telephone companies and for the transaction of any business in which electricity may be applied. Act 1892, p. 662, c. 469, enacts that a certain corporation organized under the prior statute might transact any business employing electricity, and that to that end it should have in Baltimore city all the privileges mentioned in Code 1888, art. 23, § 111, which section provides for doing business by electric light companies, except in Baltimore

city; but § 254 provides that any corporation organized under § 24, class 11, shall obtain a special grant from the Assembly and the approval of the city council of Baltimore before using its streets. *Held*, that the corporation in question, having obtained the city's consent, had the right to conduct the electric lighting business in Baltimore.—*Brown v. Maryland Telephone & Telegraph Co.*, 101 Md. 574, 61 Atl. 338. (See Code 1911, art. 23, §§ 2, 150, 405.)

(d) Where a corporation was by act 1892, p. 662, c. 469, and by ordinance, authorized to do an electric light business in Baltimore city, the fact that act 1900, p. 334, c. 227, being an act to enlarge its corporate powers, and authorizing it to connect its telephone lines with those of other companies, did not mention the act of 1892, showed no abandonment of the privileges conferred thereby.—*Brown v. Maryland Telephone & Telegraph Co.*, 101 Md. 574, 61 Atl. 338.

(e) Code 1888, art. 23 (General Incorporation Act), § 111, conferred franchises on certain electric light companies, but forbade carrying on business and conducting operations in Baltimore city. Act 1890, c. 233, amending the charters of companies incorporated under Code, art. 23, authorized such corporations "to transact any business in which electricity over or through wires may be applied to any useful purpose, and to that end all the right and privileges mentioned in § 111 are hereby conferred upon said corporations in Baltimore city, as fully and to all intents and purposes as though said corporations had been formed to carry on any business in any city or town of Kent or Talbot counties." *Held*, that act 1890 merely enabled corporations therein named to become electric light companies in Baltimore, but did not give them the privilege of using the streets of that city without the consent of the mayor and council; Code, art. 23, § 254, requiring for that purpose both a special act and the consent of the mayor and council.—*Edison Electric Illuminating Co. v. Hooper*, 85 Md. 110, 36 Atl. 113. (See Code 1911, art. 23, §§ 150, 405.)

#### § 5.—Conflicting grants of rights in streets and roads.



## § 6.—Rights of abutting owners.

### Annotation.

Liability of abutting owner for mutilating trees in highway by erecting poles or stringing wires.—12 L. R. A. (N. S.) 1125; 30 L. R. A. (N. S.) 1084, notes.

Right of property owner to damages or injunction for maintenance of electric light plant in vicinity of his property.—27 L. R. A. (N. S.) 237, note.

## §§ 7, 8. (See Analysis.)

## § 9. Conductors, poles, and subways.

### Cross-References.

Rights of abutting owners, see ante, § 6.  
Notice of proceedings to revoke license, see "Municipal Corporations," § 690.  
Taxation, see "Taxation," § 62.

### Annotation.

Right to place overhead wires in highway without grant or permission from public authority.—43 L. R. A. (N. S.) 1033, note.

Power to require public service corporation to carry municipal wires on its poles.—32 L. R. A. (N. S.) 997, note.

Right to require telegraph or telephone wires to be placed underground.—31 L. R. A. 806; 14 L. R. A. (N. S.) 654, notes.

Right to place electric conduits under streets under general charter authority to enter upon the same.—9 L. R. A. (N. S.) 404, note.

(a) Code Pub. Loc. Laws, art. 4, Balto. City Code, Charter, § 6 (act 1898, p. 263, c. 123), gives the mayor and city council of Baltimore power to regulate the use of the city streets for electric light or other wires, and City Ordinance No. 107 established an electrical commission, and provided for the construction and maintenance of conduits in which all wires transmitting electricity were required to be placed, and the commission was authorized to rent space in such conduits to any applicant who should comply with the conditions prescribed by such ordinance. Section 8 of art. 4 (p. 272), authorized the mayor and city council to grant for a limited time specific franchises or rights in the streets in compliance with provisions of that article. Section 11 (p. 274), required that, when a franchise was granted in compliance with previous sections, there should be a reservation of the right to regulate the grant in all matters not inconsistent therewith; and § 37 (p. 290), required that, when an ordinance was introduced for the granting of a franchise, it should be referred to the board of estimates, which should make

inquiry as to the value of the right and adequacy of the proposed compensation to the city. *Held*, that Charter, § 6, and Ordinance No. 107 presupposed the existence of a special franchise granted according to the other sections, and an applicant who did not have such special franchise could not compel the issuance of a permit authorizing him to use the conduits on complying with the conditions of the ordinance.—*Purnell v. McLane*, 98 Md. 589, 56 Atl. 830. (See Balto. City Code, Charter, §§ 6, 8, 11, 37; *Id.* Ord. art. 9, §§ 1, et seq.; Balto. City Rev. Charter, §§ 6, 6A, 6B, 8, 11, 37, 37A, 84, 663A, et seq.) [Cited and annotated in 22 L. R. A. (N. S.) 933, on power of municipality in absence of express authority to grant street franchise.]

(b) The use of streets of a municipality for delivering electricity to the consumer is a franchise, and the manufacturer cannot make such use of the streets without the permission of the state or the municipal government, acting under legislative authority.—*Purnell v. McLane*, 98 Md. 589, 56 Atl. 830. [Cited and annotated, see *supra*.]

## § 10. Licenses and taxes.

### Annotation.

Imposing license fee on telegraph or telephone company for use of electric poles and wires.—1 L. R. A. (N. S.) 581, note.

## § 10½. Inspection and supervision.

## § 11. Supply of electricity, power, or light.

### Annotation.

Duty to adapt electrical appliances and connections to the system which supplies the current.—46 L. R. A. (N. S.) 437, note.

Right of electric supply company, in absence of contract, to discontinue service generally.—46 L. R. A. (N. S.) 1119, note.

Right of electrical company to impose penalty for failure to pay service bill promptly.—43 L. R. A. (N. S.) 63, note.

(a) The right to produce and sell electricity as a commercial product without a franchise or legislative authority is open to all.—*Purnell v. McLane*, 98 Md. 589, 56 Atl. 830. [Cited and annotated in 22 L. R. A. (N. S.) 933, on power of municipality in absence of express authority to grant street franchises.]

**§ 12. Injuries incident to production or use.**

**§ 13.— Nature and grounds of liability.**

**§ 14.— Care required in general.**

**Cross-Reference.**

See post, § 20.

Questions for jury, see post, § 19.

**Annotation.**

Duty, in stringing electric wires, to guard against danger to children.—11 L. R. A. (N. S.) 449; 25 L. R. A. (N. S.) 1220; 43 L. R. A. (N. S.) 137, notes.

Degree of care required of one furnishing electricity toward persons rightfully on premises supplied.—6 L. R. A. (N. S.) 459, note.

Duty of company maintaining electric wire over or across private property.—34 L. R. A. (N. S.) 1089, note.

Duty of electric light company with respect to wiring or fixtures installed in private property.—13 L. R. A. (N. S.) 226; 20 L. R. A. (N. S.) 816, notes.

Liability for injuries caused by wires extended over premises of others.—46 L. R. A. 97, note.

(a) Aside from contractual relation, those maintaining wires along highways must use a high degree of care commensurate with the danger to protect persons lawfully using highways.—*Walter v. Baltimore Electric Co.*, 109 Md. 513, 71 Atl. 953. [Cited and annotated in 21 L. R. A. (N. S.) 972, on riding on platform or running board of street car as negligence.]

**§ 15.— Licensees and trespassers.**

**Cross-Reference.**

Questions for jury, see post, § 19.

**Annotation.**

Liability for death or injury of one other than employee, who climbs poles bearing electric wires.—52 L. R. A. (N. S.) 1170, note.

Liability of electric railway for injury to trespasser or licensee from exposed third rail.—28 L. R. A. (N. S.) 98, note.

Measure of duty of company maintaining electric wires on another's premises, toward trespasser or licensee on such premises.—3 L. R. A. (N. S.) 988; 34 L. R. A. (N. S.) 1094, notes.

Liability for injury of employees of another company while on defendant's poles, or poles used jointly.—45 L. R. A. (N. S.) 803, note.

Duty to protect wires for safety of workmen on premises.—2 L. R. A. (N. S.) 777, note.

(a) Defendant electric company owning a cross-arm on a pole was not liable for injuries to a lineman in the employ of another company caused by the breaking of the

cross-arm, where the cross-arm was not defective when originally placed in position, and defendant had no knowledge of the defect.—*Consolidated Gas, E. L. & P. Co. v. Chambers*, 112 Md. 324, 75 Atl. 241. [Cited and annotated in 45 L. R. A. (N. S.) 306, on electricity: liability for injury of employees of another company while on defendant's poles, or poles used jointly.]

**§ 16.— Defects, acts, or omissions causing injury.**

**Cross-References.**

See ante, § 1.

Contributory negligence, see post, § 18.

Questions for jury, see post, § 19.

**Annotation.**

Duty to prevent contact of wires carrying electric current.—52 L. R. A. (N. S.) 587, note.

Liability for negligence in permitting wires to hang down, notwithstanding intervening act of third person in connection therewith.—24 L. R. A. (N. S.) 978, note.

Liability for negligence with respect to electric current as affected by concurring negligence of third person.—7 L. R. A. (N. S.) 293, note.

Violating ordinance as to electric wires as ground for private action.—5 L. R. A. (N. S.) 260, note.

Negligence as to electric wires on or in buildings.—32 L. R. A. 400, note.

Liability for injury or death of traveler coming in contact with electric wire in highway.—31 L. R. A. 566; 22 L. R. A. (N. S.) 1169; 1 B. R. C. 797, notes.

Liability of user of electricity for interference with the business or injury to the property of another resulting from induction or from use of earth as a return electric circuit.—2 B. R. C. 129, note.

(a) One permitting its electric light wires, heavily charged, to remain detached from its support and hanging so as to touch a gutter at the side of a street, from Saturday until Wednesday, is guilty of negligence and liable for death caused by electric shock on Wednesday.—*State v. Crisfield Ice Mfg. Co.*, 118 Md. 521, 85 Atl. 615.

(b) Where, in an action for the death of a lineman by contact with a live wire, the evidence showed that the cutting of the insulation on the wire had been done to test the wire, and that the insulation had been cut two weeks before the accident, there was evidence of actionable negligence, since the proof showed a lapse of time sufficient to give constructive notice of the condition of

the wire.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

(c) Where defendant electric light and power company maintained certain high-tension wires near the distributing pole of a telephone company which the latter's employees were required to climb, defendant owed such employees a legal duty to have its wires so placed and insulated as to permit them to perform their work in safety.—*Ziehm v. United E. L. & P. Co.*, 104 Md. 48, 64 Atl. 61.

(d) An electric light company which brings a high-tension wire within a few inches of a house, where it is defectively insulated, is liable to a person injured therefrom while engaged in a lawful occupation about the house; contributory negligence not being shown.—*Brown v. Edison Electric Illuminating Co.*, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442. [Cited and annotated in 34 L. R. A. (N. S.) 1091, on duty of company maintaining electric wire over private property.]

#### § 17.—Companies and persons liable. Cross-Reference.

Evidence, instructions and questions for jury, see post, § 19.

#### Annotation.

Liability of electric company for injury by wire strung by a third person to connect with its system.—39 L. R. A. (N. S.) 1046, note.

Liability of one furnishing an electrical current to be distributed by another for injury to third person after delivery.—27 L. R. A. (N. S.) 893, note.

Liability for injuries by electric wires in highway.—31 L. R. A. 799, note.

#### § 18.—Contributory negligence.

##### Cross-References.

See ante, § 16.

Questions for jury, see post, § 19.

Imputed negligence, see "Negligence," § 95.

#### Annotation.

Duty of one to ascertain if there is danger before passing under a wire strung over a highway.—22 L. R. A. (N. S.) 1189, note.

Contributory negligence by traveler coming in contact with electric wire in highway.—31 L. R. A. 589; 32 L. R. A. 403; 22 L. R. A. (N. S.) 1177; 1 B. R. C. 810, notes.

Contributory negligence of volunteer handling or testing electric wire or apparatus.—6 L. R. A. (N. S.) 290, note.

Contributory negligence in touching live wires in street.—1 L. R. A. (N. S.) 822, note.

Contributory negligence as to electric wires on or in buildings.—32 L. R. A. 403, note.

(a) A boy 11½ years old, who picked up an electric light wire, before the lights were turned on, and who was warned by two passers-by to put it down or he would be killed when the lights would be turned on, and who held the wire until the lights were turned on, when he received a fatal shock, held guilty of contributory negligence.—*State v. Crisfield Ice Mfg. Co.*, 118 Md. 521, 85 Atl. 615.

(b) In an action for the death of a lineman, evidence held not to show contributory negligence.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

(c) Where a mother, with her young child and others, went on the roof of the building in which she lived, in the nighttime, to watch a play in a theater across the street, and placed the child so that he could get hold of an electric light wire, though she knew of its presence, and warned the others against it, recovery for his injury from taking hold of it is barred by contributory negligence.—*City of Cumberland v. Lottig*, 95 Md. 42, 51 Atl. 841. [Cited and annotated in 6 L. R. A. (N. S.) 292, on contributory negligence of volunteer as to electric wire or apparatus; in 34 L. R. A. (N. S.) 1093, on duty of company maintaining electric wire over private property.]

#### § 19.—Actions.

##### Cross-References.

See ante, § 18; post, § 20.

Demonstrative evidence, see "Evidence," § 194.

Grounds for exemplary damages, see "Damages," § 91.

Nature of action in general, see "Action," § 19.

(a) Whether a boy 11½ years old, killed by electric shock by coming in contact with a broken electric light wire, was guilty of contributory negligence, held for the jury.—*State v. Crisfield Ice Mfg. Co.*, 118 Md. 521, 85 Atl. 615.

(b) To show the position or condition of a wire when an accident occurred, examinations of wires at the place in question, made

upwards of two years thereafter, were inadmissible; the wires in the meantime having been repaired along the line from time to time, and all taken down and new wires put up after a storm.—*Annapolis Gas & E. L. Co. v. Fredericks*, 112 Md. 449, 77 Atl. 53.

(c) The height of wires above the surface of the streets furnish no correct guide in determining their proper disposition on a bridge over a creek, in issue in a personal injury case, and whether they were suspended like those on another bridge had no bearing on such issue.—*Annapolis Gas & E. L. Co. v. Fredericks*, 112 Md. 449, 77 Atl. 53.

(d) In an action for injuries by contact with a live wire, evidence that plaintiff examined the wires the next morning at the place of accident, and found them in a very bad condition, was erroneously received.—*Annapolis Gas & E. L. Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534. [Cited and annotated in 22 L. R. A. (N. S.) 1173, on injuries from electric wires in highway.]

(e) A prayer that the degree of care required of persons using dangerous agencies in their business on the public highways was proportionate to the danger, and that the greater the danger to persons using the highways with due care the greater the care required in the use of such agencies to prevent injury, was too general and misleading.—*Annapolis Gas & E. L. Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534. [Cited and annotated, see supra.]

(f) In an action for alleged injuries from a falling live electric wire, evidence held sufficient to go to the jury.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606. [Cited and annotated in 22 L. R. A. (N. S.) 1181, on applicability of *res ipsa loquitur* to injury on highway due to disordered electrical appliances.]

(g) Where there was evidence that plaintiff at the time of the accident was so affected that she would have fallen if she had not been caught, and that she remained unconscious for some time, and continued in a hysterical condition after the occurrence, so that the jury might have found that the accident caused her an injury even if the hysterical condition was not caused by the

accident, a prayer that, if the hysterical condition was not caused by the accident, there was no evidence that the accident caused plaintiff any injury, and defendant should recover was properly refused.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606. [Cited and annotated, see supra.]

(h) In an action for alleged injuries from a falling live electric wire, evidence held to show negligence of defendant.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606. [Cited and annotated, see supra.]

(i) That a wire strung over a street fell on and injured a pedestrian *prima facie* shows negligence of the lighting company, placing the burden on it to show that it was not negligent.—*Walter v. Baltimore Electric Co.*, 109 Md. 513, 71 Atl. 953. [Cited and annotated in 21 L. R. A. (N. S.) 972, on riding on platform or running board of street car as negligence.]

(j) Where, in an action for the death of a lineman by contact with a live wire, the evidence showed that the insulation on the wires had been cleanly cut in the same manner on all the wires, and that the cutting had been done to test the wires, evidence of the retaping of the bare places on the wires after the accident was admissible.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

(k) Where a witness for defendant testified that he had inspected the place about two weeks before the accident, and that there were no cuts in the insulation, evidence that about a month before the accident one had observed that the insulation had been cut in places was admissible in rebuttal.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

(l) Where, in an action for the death of a lineman, the evidence showed that he had been furnished rubber gloves, but that he did not use them, proof of a general custom of linemen not to use rubber gloves was admissible on the issue of decedent's care, though proof of a special custom of the linemen of the employer in the vicinity was inadmissible.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.

(m) In an action for injuries to plaintiff, a

telephone lineman, by coming in contact with a defectively insulated electric light wire negligently permitted to remain near a telephone pole, he was required to ascend, whether plaintiff was guilty of contributory negligence, *held* for the jury.—*Ziehm v. United E. L. & P. Co.*, 104 Md. 48, 64 Atl. 61.

(n) In an action for injuries to plaintiff by coming in contact with a defectively insulated electric light wire, negligently strung near a telephone pole, evidence that defendant after the accident changed the location of its wires was inadmissible.—*Ziehm v. United E. L. & P. Co.*, 104 Md. 48, 64 Atl. 61.

(o) In an action for injuries to plaintiff by coming in contact with a defectively insulated electric light wire, evidence as to the insulation of other wires than those in use by defendant was properly disallowed.—*Ziehm v. United E. L. & P. Co.*, 104 Md. 48, 64 Atl. 61.

(p) In an action for the death of a person coming in contact with a live wire belonging to defendant, because of its contact with a telephone wire, evidence that defendant's wires were defective at other times and places is inadmissible.—*United E. L. & P. Co. v. State*, 100 Md. 684, 60 Atl. 248. [*Cited and annotated* in 52 L. R. A. (N. S.) 594, on duty to prevent contact of electric wires; in 22 L. R. A. (N. S.) 1173, 1175, on injuries from electric wires in highway; in 22 L. R. A. (N. S.) 1179, on applicability of *res ipsa loquitur* to injury on highway due to disordered electrical appliances.]

(q) In an action against a telegraph company and an electric street-car company for death by a shock from a current conducted from the railroad's feed wires through a wild wire hanging from the telegraph company's poles, where there is evidence that the wild wire had been hanging across the feed wire for at least two weeks, rubbing against the insulation, that such rubbing would render the insulation defective, and no evidence of any way by which the wild wire could be charged other than by the feed wire, it is proper to refuse to instruct, at request of either defendant, that no evidence has been produced to show that the death was caused by its negligence.—*West-*

*ern Union Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763. [*Cited and annotated* in 31 L. R. A. 572, on injuries from highways; in 52 L. R. A. (N. S.) 587, 593, on duty to prevent contact of electric wires; in 7 L. R. A. (N. S.) 294, on effect of third person's concurring negligence on liability as to electric current; in 22 L. R. A. (N. S.) 1179, on applicability of *res ipsa loquitur* to injury on highway due to disordered electrical appliances.]

## § 20. Injuries to works, conductors, or appliances.

### Cross-References.

See ante, § 19.

See "Trove and Conversion," §§ 5, 10.

Excessive damages, see "Damages," § 139.

## ELECTRIC LIGHTS.\*

### Cross-Reference.

See "Electricity."

## ELECTRIC RAILWAY.\*

### Cross-References.

See "Street Railroads."

As additional servitude in street, see "Eminent Domain," § 119.

## ELECTRIC WIRES.

### Cross-References.

See "Electricity."

Power of city to grant franchises for placing in streets, see "Municipal Corporations," §§ 680, 681.

## ELECTROCUTION.\*

### Cross-Reference.

As cruel and unusual punishment, see "Criminal Law," § 1213.

## ELECTROLYSIS.\*

### Cross-Reference.

See "Electricity," § 9.

## ELEEMOSYNARY CORPORATION.\*

### Cross-References.

See "Asylums"; "Charities," §§ 31-50; "Hospitals."

Exemption from taxation, see "Taxation," § 241.

## ELEGIT.\*

### Cross-Reference.

Writ of, see "Execution," §§ 59-105.

## ELEVATED RAILROADS.\*

### Cross-References.

As additional servitude in street, see "Eminent Domain," § 119.

Carriage of passengers, see "Carriers."

\*Annotation: Words and Phrases, same title.

Injuries from smoke, foul odors, noise or vibration as ground for compensation to abutting owners, see "Eminent Domain," § 104.  
 Injuries to persons under elevated railroad, see "Street Railroads," § 112.  
 Obstruction of light or air as ground for compensation to abutting owners, see "Eminent Domain," § 105.  
 Occupation or use of street as ground for compensation to abutting owners, see "Eminent Domain," §§ 100, 119.

### **ELEVATORS.\***

#### *Cross-References.*

Acts of servant for which master is liable, see "Master and Servant," § 302.  
 Carriage of passengers on elevators, see "Carriers."  
 Grain elevators, see "Warehousemen."  
 Injuries by operation or condition of in leased building, see "Landlord and Tenant," § 165.  
 Injuries from defective elevator hoistways and shafts, see "Negligence," § 45.  
 Injury to infant operator unlawfully employed, see "Master and Servant," § 95.  
 Letting contract for erection of, in county building, see "Counties," § 116.  
 Liability of county for injuries from defects in elevator maintained in courthouse, see "Counties," § 143.  
 Liability of master for injuries to servant from defects in elevators, see "Master and Servant," § 117.  
 Liability of owner of elevator as carrier for injuries to passengers, see "Carriers," § 280.  
 Opinion evidence as to due care and proper conduct in construction and repair, see "Evidence," § 513.  
 Power of county to maintain in public building, see "Counties," § 105.

### **ELIGIBILITY.\***

#### *Cross-References.*

For admission to bar, see "Attorney and Client," § 4.  
 Of appraisers of school property appointed to make appraisal prior to vote on change of site, see "Schools and School Districts," § 69.  
 Of assignees or trustees for benefit of creditors, see "Assignments for Benefit of Creditors," § 201.  
 Of commissioners, appraisers, or viewers in condemnation proceedings, see "Eminent Domain," § 227.  
 Of commissioners of insolvent estate, see "Executors and Administrators," § 412.  
 Of commissioners or viewers in highway proceedings, see "Highways," §§ 37, 77.  
 Of commissioners to make assessment for opening highway, see "Highways," § 138.  
 Of constables, see "Sheriffs and Constables," § 10.  
 Of coroners, see "Coroners," § 3½.  
 Of county officers in general, see "Counties," § 64.

Of county superintendent of schools, see "Schools and School Districts," § 48.  
 Of deputy officers, see "Sheriffs and Constables," § 19.  
 Of executors and administrators, see "Executors and Administrators," §§ 15, 18.  
 Of guardians, see "Guardian and Ward," § 10.  
 Of guardians ad litem or next friends, see "Infants," § 81.  
 Of guardians or committees of insane persons, see "Insane Persons," § 34.  
 Of inspectors, see "Inspection," § 4.  
 Of jurors, see "Grand Jury," § 5; "Jury," §§ 38-56.  
 Of jurors to assess compensation in condemnation proceedings, see "Eminent Domain," § 215.  
 Of members of Congress, determination by Congress, see "United States," § 14.  
 Of members of county boards, see "Counties," § 42.  
 Of members of Legislature, determination by Legislature, see "States," § 30.  
 Of members of municipal council, determination by council, see "Municipal Corporations," § 84.  
 Of municipal officers, see "Municipal Corporations," §§ 133-142.  
 Of officers in charge of jury, see "Criminal Law," §§ 850, 851.  
 Of officers in general, see "Officers," § 18.  
 Of persons to whom disputes as to performance of contracts are referred, see "Contracts," § 285.  
 Of physicians or surgeons, see "Physicians and Surgeons," §§ 3, 4.  
 Of pupils, see "Schools and School Districts," §§ 150-154.  
 Of receivers, see "Receivers," § 48.  
 Of referees, see "Reference," § 37.  
 Of school officers, see "Schools and School Districts," §§ 53, 63.  
 Of sheriffs, see "Sheriffs and Constables," § 3.  
 Of state officers, see "States," § 47.  
 Of teachers, see "Schools and School Districts," §§ 127, 130-132.  
 Of town officers, see "Towns," § 28.  
 Of trustees, see "Trusts," § 159.  
 Of trustees in bankruptcy, see "Bankruptcy," § 120.  
 Of voters, see "Elections," §§ 59-94.  
 Of voters at election of academy trustees, see "Schools and School Districts," § 6.  
 Of voters at election to determine question of levying school taxes, see "Schools and School Districts," § 103.  
 Of voters at town meetings, see "Towns," § 23.

### **ELISORS.\***

#### *Cross-Reference.*

See "Sheriffs and Constables," § 26.

### **ELOPEMENT.\***

#### *Cross-Reference.*

Of wife, ground for forfeiture of right to dower, see "Dower," § 51.

\*Annotation: Words and Phrases, same title.

**EMANCIPATION.\****Cross-References.*

Of child, see "Infants," § 9; "Parent and Child," § 16.

Of slaves, see "Slaves," § 23.

**EMBANKMENTS.\****Cross-References.*

See "Levees."

Affecting adjoining lands, in general, see "Adjoining Landowners," § 6.

Causing flowage of lands, see "Railroads," § 107; "Waters and Water Courses," § 171.

Causing obstruction or detention of water course, see "Waters and Water Courses," § 54.

Personal injuries from, see "Municipal Corporations," §§ 783-785; "Negligence," § 43.

**EMBARGO.\****Cross-Reference.*

See "War," § 5.

**EMBEZZLEMENT.\****Scope-Note.*

[INCLUDES fraudulent appropriation of personal property by one in possession thereof, to whom it has been intrusted by or for the owner, as bailee, servant, agent, trustee, public officer, etc.; nature and elements of the crimes of embezzlement, larceny by bailee, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES civil liability for conversion (see "*Trover and Conversion*"); and offenses of taking and removing, or fraudulently obtaining, property in possession of another (see "*Larceny*"; "*False Personation*"; "*False Pretenses*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature of offense in general.
- § 2. Statutory provisions.
- § 3. Elements of offenses.
- § 4. — In general.
- § 5. — Intent.
- § 6. — Nature of property.
- § 7. — Value of property.
- § 8. — Ownership of property.
- § 9. — Possession or custody of property.
- § 10. — Capacity or character in which property is received or held.
- § 11. — Conversion or appropriation of property.
- § 12. Embezzlement by particular classes of persons.
- § 13. — Servants, clerks, and employees in general.
- § 14. — Agents.
- § 15. — Partners.
- § 16. — Bailees or others having possession under agreement.
- § 17. — Attorneys.
- § 18. — Guardians, administrators, or trustees.
- § 19. — Assignees in insolvency or bankruptcy.
- § 20. — Corporate officers or employees.
- § 21. — Public officers or employees.
- § 22. Degrees.
- § 23. Defenses.

\*Annotation: Words and Phrases, same title.

- § 24. Persons liable.
- § 24½. Venue.
- § 25. Indictment or information.
- § 26. — Requisites and sufficiency in general.
- § 27. — Intent.
- § 28. — Description of property.
- § 29. — Value of property.
- § 30. — Ownership of property.
- § 31. — Possession or custody of property.
- § 32. — Capacity or character in which property was received or held.
- § 33. — Conversion or appropriation of property.
- § 34. — Against public officer.
- § 35. — Issues, proof, and variance.
- § 36. Presumptions and burden of proof.
- § 37. Admissibility of evidence.
- § 38. — In general.
- § 39. — Intent.
- § 40. — Identity and ownership of property.
- § 41. — Possession or custody of property and character thereof.
- § 42. — Incriminating circumstances.
- § 43. — Matters of defense.
- § 44. Weight and sufficiency of evidence.
- § 45. Trial.
- § 46. — Conduct in general.
- § 47. — Questions for jury.
- § 48. — Instructions.
- § 49. — Verdict.
- § 50. New trial.
- § 51. Appeal and error.
- § 52. Sentence and punishment.

#### *Cross-References.*

See "Larceny."

As offense subject to extradition, see "Extradition," § 5.

Civil liability for conversion, see "Trove and Conversion."

Distinguished from larceny, see "Larceny," §§ 14, 15.

Distinguished from receiving stolen goods, see "Receiving Stolen Goods," § 4.

Evidence as to good character in civil action therefor, see "Evidence," § 106.

Ex post facto law including embezzlement in definition of larceny, see "Constitutional Law," § 199.

Failure of justices of the peace to pay over fines collected, see "Justices of the Peace," § 30.

Felony or misdemeanor, see "Criminal Law," § 27.

Former jeopardy, see "Criminal Law," §§ 167, 182, 200.

Fraudulent breach of contract to perform services, see "Master and Servant," § 67.

Judicial notice in prosecution for, see "Criminal Law," § 304.

Jurisdiction, in general, see "Criminal Law," §§ 95-97.

Jurisdiction of preliminary proceedings, see "Criminal Law," § 207.

Liability for loss in case of embezzlement by secretary of building and loan association, see "Building and Loan Association," §§ 6, 23.

Libelous and slanderous imputations, see "Libel and Slander," § 10.

Limitation of prosecution, see "Criminal Law," §§ 147, 149, 154, 160.

Malicious prosecution, see "Malicious Prosecution," §§ 18, 20.

Misapplication, abstraction, or embezzlement of funds by national bank officers, see "Banks and Banking," § 256.

Misapplication of funds by broker, see "Brokers," § 5.

Misapplication of funds by receiver in foreclosure proceedings, see "Mortgages," § 473.



Of deposit affecting tender by debtor, see "Tender," § 25.  
 Of mail matter, see "Post Office," §§ 41, 42.  
 Of post office funds or property, see "Post Office," § 38.  
 Persons entitled to question constitutionality of act providing for punishment for embezzlement, see "Constitutional Law," § 42.  
 Pleas, see "Criminal Law," §§ 278, 292.  
 Preliminary examination, see "Criminal Law," § 238.

Receiving deposits after insolvency of bank, see "Banks and Banking," §§ 84, 85.  
 Right to civil action as affected by criminal liability, see "Action," § 5.  
 Subject and title of act relating to embezzlement, see "Statutes," § 118.  
 Summary trials, see "Criminal Law," § 251.  
 Validity of note for money embezzled, see "Bills and Notes," § 104.  
 Venue, see "Criminal Law," § 108.

## § 1. Nature of offense in general.

### Cross-Reference.

Felony or misdemeanor, see "Criminal Law," § 27.

## § 2. Statutory provisions.

### Cross-Reference.

Subject and title of act, see "Statutes," § 118.

### Annotation.

Meaning of phrase "convert to his own use," in criminal statutes.—42 L. R. A. (N. S.) 601, note.

## §§ 3-11. Elements of offenses.

### Cross-References.

Presumptions, see post, § 36.  
 Questions for jury, see post, § 47.  
 Weight and sufficiency of evidence, see post, § 44.

### Annotation.

Failure to account for fund to one jointly interested therein as embezzlement.—31 L. R. A. (N. S.) 822, note.

(a) Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, and is sometimes said to be a species of larceny.—*Baugh v. Moore*, 122 Md. 149, 89 Atl. 404, 939.

(b) To sustain a prosecution against an agent for embezzlement of his employer's money, it is necessary to show that he received and failed to pay the money with intent to defraud.—*Moneyweight Scale Co. v. McCormick*, 109 Md. 170, 72 Atl. 537.

## §§ 12-21. Embezzlement by particular classes of persons.

### Cross-References.

Admissibility of evidence, see post, §§ 37-43.  
 Allegations in indictment or information, see post, §§ 25-35.  
 Defenses, see post, § 23.  
 Instructions, see post, § 48.  
 Intent and other elements of offense, see ante, §§ 3-11.  
 Presumptions and burden of proof, see post, § 36.

Property subject to embezzlement, see ante, § 6.

Statutory provisions, see ante, § 2.

Weight and sufficiency of evidence, see post, § 44.

By army officer, see "Army and Navy," § 36.

Persons entitled to question constitutionality of act providing for punishment for embezzlement, see "Constitutional Law," § 42.

### Annotation.

Embezzlement of property while in possession of bailee, presumption and burden of proof as to negligence.—43 L. R. A. (N. S.) 1190, note.

Liability of bailee for wrongful appropriation of subject of bailment by servant.—29 L. R. A. 92, note.

Effect of fact that one is entitled to commissions out of fund upon his prosecution for embezzlement in case he retains whole fund.—13 L. R. A. (N. S.) 511, note.

May estoppel to deny authority to receive money alleged to have been embezzled be invoked against public officer charged with embezzlement.—23 L. R. A. (N. S.) 761, note.

(a) The word "agent" in Code 1904, art. 27, § 103, prohibiting embezzlement by an "agent," includes an attorney at law, "attorney," originally meaning "agent," and in its restricted sense relating to the representation of others in legal actions or demands.—*Dick v. State*, 107 Md. 11, 68 Atl. 576. (See Code 1911 [vol. 3], art. 27, § 112.)

(b) Embezzlement by the clerk of a board of county commissioners is within Code 1888, art. 27, § 75, which provides that "whosoever, being \* \* \* a clerk to any person or body corporate, \* \* \* shall fraudulently embezzle any money, \* \* \* shall be deemed to have feloniously stolen the same," since by art. 25, § 1, the county commissioners are declared to be a corporation.—*State v. Denton*, 74 Md. 517, 22 Atl. 305. (See Code 1911, art. 25, § 1; *Id.* [vol. 3], art. 27, § 112; act 1916, c. 260, p. 531.)

[For subsequent appeal, see *Denton v. State*, 77 Md. 527, 26 Atl. 1022.] [Cited and annotated in 23 L. R. A. (N. S.) 762, on estoppel of public officer charged with embezzlement to deny authority to receive money.]

(c) Code 1888, art. 27, § 80, provides that "any person holding office in this state, whether elected, or appointed by the Governor, the corporate authorities of Baltimore, or by any other authority legally authorized to make such appointments, who shall fraudulently embezzle \* \* \* money \* \* \* which he is bound to account for \* \* \* to the treasurer of the state, or to any other person by law authorized to receive the same, shall be guilty of a misdemeanor." *Held*, that this section does not apply to an embezzlement by the clerk of the board of county commissioners, who is in no sense a public officer.—*State v. Denton*, 74 Md. 517, 22 Atl. 305. (See Code 1911 [vol. 8], art. 27, § 120.) [For subsequent appeal, see *Denton v. State*, 77 Md. 527, 26 Atl. 1022.] [Cited and annotated, see *supra*.]

(d) Code 1888, art. 27, § 80, provides that any person holding office, whether elected or appointed, who shall fraudulently embezzle, or appropriate to his own use, money or evidences of debt which he is bound to account for or deliver to the treasurer of the state, "or to any other person by law authorized to receive the same," shall be guilty, etc. The title of the act, as originally enacted, was "An act to punish the fraudulent embezzlement or appropriation of money \* \* \* by persons elected to any office or holding office" under some one authorized to appoint. *Held*, that the state treasurer was punishable under the statute for fraudulently appropriating to his own use the moneys of the state.—*State v. Archer*, 73 Md. 44, 20 Atl. 172. (See Code 1911 [vol. 3], art. 27, § 120.)

(e) Code 1888, art. 27, § 75, providing that an employee embezzling money from his employer shall be deemed to have feloniously stolen the same, and fixing a punishment therefor, makes the offense larceny, and an indictment under it, which does not allege the ownership of the property embezzled, is demurrable.—*State v. Tracey*, 73 Md. 447,

21 Atl. 366. (See Code 1911 [vol. 8], art. 27, § 112.)

## § 22. Degrees.

## § 23. Defenses.

### Cross-References.

Admissibility of evidence, see post, § 43.

Instructions, see post, § 48.

Intention to make restitution, see ante, § 5.

Insanity, see "Criminal Law," § 50.

### Annotation.

Intent or offer to return, or actual return of, property as affecting charge of embezzlement or larceny.—52 L. R. A. (N. S.) 1013, note.

Illegality of transaction by which owner obtained money or other property, as a defense.—27 L. R. A. (N. S.) 415, note.

## § 24. Persons liable.

### Cross-Reference.

Prosecution of principals and accessories, see "Criminal Law," § 80.

## § 24½. Venue.

### Cross-References.

Locality of offense, see "Criminal Law," § 108.

Venue of offenses partly in one county and partly in another, see "Criminal Law," § 112.

## § 25. Indictment or information.

### Cross-References.

Bill of particulars, see "Indictment and Information," § 121.

Aider by verdict, see "Indictment and Information," § 202.

Conviction of offense included in charge, see "Indictment and Information," § 186.

Conviction under indictment for larceny, see "Indictment and Information," § 191.

Demurrer, see "Indictment and Information," § 150.

Disjunctive or alternative allegations, see "Indictment and Information," § 72.

Election between counts, see "Indictment and Information," § 132.

Failure of justices of the peace to pay over fines collected, see "Justices of the Peace," § 30.

For embezzlement of money order funds, see "Post Office," § 48.

Joinder of counts, see "Indictment and Information," § 128.

Service of copy of indictment or evidence on accused, see "Criminal Law," § 627.

Surplusage, see "Indictment and Information," § 167.

Variance between information and complaint, see "Indictment and Information," § 122.

## § 26.—Requisites and sufficiency in general.

### Cross-References.

Averments as to place, see "Indictment and Information," § 86.

Averments as to time, see "Indictment and Information," § 87.

Duplicity, see "Indictment and Information," § 125.

Following language of statute, see "Indictment and Information," § 110.

Mistakes in spelling, see "Indictment and Information," § 79.

Negating exceptions in statute, see "Indictment and Information," § 111.

Omission of essential words, see "Indictment and Information," § 75.

## § 27.—Intent.

## § 28.—Description of property.

### Cross-References.

Issues, proof and variance, see post, § 35.

Amendment, see "Indictment and Information," § 161.

Averment as to matters unknown, see "Indictment and Information," § 69.

(a) On indictment for embezzlement, a count describing the money stolen as a certain sum of "current money, a more particular description of which said jurors have not and cannot give," is too indefinite, and is properly quashed.—*State v. Denton*, 74 Md. 517, 22 Atl. 305.

## §§ 29-33.—(See Analysis.)

## § 34.—Against public officer.

(a) An indictment under act 1872, c. 329, which provides, that if any collector shall, when there is no fixed date for the payment of taxes collected by him to the state treasurer, "neglect to pay the same for the space of six months," he shall be liable to punishment, is sufficient, if it alleges that the collector failed to pay moneys into the treasury for the space of "six months after he had collected and received" the same.—*State v. Nicholson*, 67 Md. 1, 8 Atl. 817. (See Code, art. 81, §§ 33, et seq.; *Id.* [vol. 3], art. 27, § 120.) [Cited and annotated in 34 L. R. A. 670, on constitutionality of imprisonment for debt.]

(b) Under the provisions of the statute that, upon payment of the money for which the collector is in default, he shall be discharged, the collector must plead such payment as a defense, and the indictment need not aver that the money is still detained.—

*State v. Nicholson*, 67 Md. 1, 8 Atl. 817. [Cited and annotated, see supra.]

(c) In such a case the indictment need not aver that the defendant had been duly appointed collector, if it contains an averment that he was collector of state and county taxes for a certain county, and as such did collect a specified sum on account of taxes due the state.—*State v. Nicholson*, 67 Md. 1, 8 Atl. 817. [Cited and annotated, see supra.]

(d) And it is not necessary to aver that the taxes collected were levied by the county commissioners, or that the taxes were placed in the hands of the defendant for collection; these averments being implied in the averment that he was collector, and had collected a specified sum on account of taxes.—*State v. Nicholson*, 67 Md. 1, 8 Atl. 817. [Cited and annotated, see supra.]

## §§ 35, 36. (See Analysis.)

## §§ 37-43. Admissibility of evidence.

### Cross-References.

Acts and declarations of conspirators and codefendants, see "Criminal Law," §§ 423, 427.

Best and secondary evidence, see "Criminal Law," § 400.

Character of accused, see "Criminal Law," § 380.

Confessions, see "Criminal Law," §§ 517, 528.

Declarations, see "Criminal Law," § 417.

Documentary evidence, see "Criminal Law," §§ 429, 433, 434, 442, 445, 447.

Hearsay, see "Criminal Law," § 420.

Opinion evidence, see "Criminal Law," §§ 455, 456, 460.

Other offenses, see "Criminal Law," §§ 369, 371, 372.

Parol evidence, see "Criminal Law," § 447.

Privilege of witness, see "Witnesses," § 297.

Res gestæ, see "Criminal Law," § 368.

### Annotation.

Evidence of other crimes in prosecution for embezzlement.—62 L. R. A. 226, 264; 43 L. R. A. (N. S.) 774, notes.

(a) An indictment for embezzlement under Code 1888, art. 27, § 75, providing that if any clerk to any body corporate shall embezzle any money received by him for, or in the name or on account of, the employer, he shall be deemed to have stolen it, etc., charged that D., as clerk of the county commissioners, did receive for and on account of his employers, the said county commissioners, \$183.80, and did embezzle the same.

*Held*, that a tax bill for \$183.80, made out in the name of the county commissioners against a certain bank, at the bottom of which was written, "Received payment. W. D., Collector. Per D., Clerk Co. Com's,"—was admissible to show that defendant received the money as clerk of such commissioners.—*Denton v. State*, 77 Md. 527, 26 Atl. 1022. (See Code 1911 [vol. 3], art. 27, § 112.) [Cited and annotated in 23 L. R. A. (N. S.) 762, on estoppel of public officer charged with embezzlement to deny authority to receive money.] [For former appeal, see *State v. Denton*, 74 Md. 517, 22 Atl. 305.]

(b) On the trial, such receipted tax bill was admitted on the assurance by the state that it would show that the clerk was instructed to give to the collectors information of the stocks on which they were to collect taxes, and that the clerk had fraudulently neglected to do so. There was proof that the regular course of business was for the clerk to make out for each collector a book in which was entered the name of taxpayers, and of corporations from whom taxes were due on stocks; and that this rule was carried out as to all collectors, except W. D., who testified that he was not certain that he had any list, but was only told by defendant what they were, and that defendant was not authorized by him to collect the \$183.80. There was also evidence that it was a custom for defendant to collect stock taxes which were on collectors' books, but not those that were not on the books. *Held*, that it was not error to refuse to exclude such receipted bill and all other evidence tending to show the receipt of the money by defendant, on the ground that the state had not followed up their proof, as required by the court's ruling.—*Denton v. State*, 77 Md. 527, 26 Atl. 1022. [Cited and annotated, see *supra*.] [For former appeal, see *State v. Denton*, 74 Md. 517, 22 Atl. 305.]

#### § 44. Weight and sufficiency of evidence.

##### Cross-References.

See ante, § 4.

Instructions, see post, § 48.

Confessions, see "Criminal Law," § 534.

Evidence of corporate existence, see "Criminal Law," § 567.

Time of commission of offense and limitations, see "Criminal Law," § 565.

Venue of prosecution, see "Criminal Law," § 564.

#### § 45. Trial.

##### Cross-References.

Argument of counsel, see "Criminal Law," §§ 721, 724, 726, 730.

Counsel for prosecution, see "Criminal Law," § 640.

Discharge of accused for delay in prosecution, see "Criminal Law," § 576.

Election between acts, see "Criminal Law," § 678.

Grounds for arrest of judgment, see "Criminal Law," § 970.

Grounds for continuance, see "Criminal Law," § 595.

Objections to evidence, see "Criminal Law," § 695.

Order of trial of defendants separately indicted, see "Criminal Law," § 621.

Taking books to jury room, see "Criminal Law," § 858.

#### § 46.— Conduct in general.

#### § 47.— Questions for jury.

##### Cross-References.

Assumption as to facts, see "Criminal Law," § 761.

Demurrer to evidence, see "Criminal Law," § 752.

Determination of questions of law, see "Criminal Law," § 766.

Former jeopardy, see "Criminal Law," § 739.

Hypothetical statements to jury, see "Criminal Law," § 760.

Opinion of judge as to facts, see "Criminal Law," § 762.

Weight of evidence, see "Criminal Law," §§ 763, 764.

#### § 48.— Instructions.

##### Cross-References.

Abstract instructions, see "Criminal Law," § 813.

After submission of cause, see "Criminal Law," § 863.

Applicability to case, see "Criminal Law," § 814.

Argumentative instructions, see "Criminal Law," §§ 772, 789, 807.

As to admissions, see "Criminal Law," § 781.

Character of accused, see "Criminal Law," § 776.

Construction of charge as a whole, see "Criminal Law," § 822.

Credibility of accused, see "Criminal Law," § 786.

Defining accomplices, see "Criminal Law," § 792.

Definition of terms, see "Criminal Law," § 800.

Harmless error, see "Criminal Law," §§ 1172, 1173.

Requests, see "Criminal Law," §§ 824, 829.

Testimony of accomplices, see "Criminal Law," § 780.

Undue prominence of particular facts, see "Criminal Law," § 811.

**§ 49.— Verdict.***Cross-References.*

Several counts, see "Criminal Law," § 878.

**§ 50. New trial.***Cross-References.*

Application in general, see "Criminal Law," §§ 951, 956, 957.  
 Grounds in general, see "Criminal Law," § 945.

**§ 51. Appeal and error.***Cross-References.*

Decision on appeal directing judgment in lower court, see "Criminal Law," § 1188.  
 Estoppel to allege error, see "Criminal Law," § 1137.  
 Harmless error, see "Criminal Law," §§ 1169, 1170, 1170½, 1172, 1173.  
 Modification or correction of judgment on appeal, see "Criminal Law," § 1184.  
 Objection in lower court, see "Criminal Law," §§ 1036, 1044.  
 Presumptions on appeal, see "Criminal Law," § 1141.

Venue of prosecution, see "Criminal Law," § 564.

**§ 52. Sentence and punishment.***Cross-References.*

Cruel and unusual punishment, see "Criminal Law," § 1213.  
 Double punishment, see "Criminal Law," § 1209.  
 Form and requisites of judgment record, see "Criminal Law," § 995.  
 Rights of property subject of or connected with crime, see "Criminal Law," § 1221.  
 Sentence and final commitment, see "Criminal Law," § 996.

**EMBLEMMENTS.\****Cross-References.*

In general, see "Crops"; "Landlord and Tenant," § 139.  
 Rights and liabilities as between vendor and purchaser of land, see "Vendor and Purchaser," § 194.  
 Rights and liabilities of parties to mortgage, see "Mortgages," § 197.  
 Rights of purchaser at foreclosure sale, see "Mortgages," § 546.

**EMBRACERY.\****Scope-Note.*

[INCLUDES improperly influencing or attempting to influence the action of a juror, arbitrator, or referee, in respect of the verdict, award, or other decision to be rendered, by any means not constituting bribery; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES bribery of jurors (see "Bribery").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature and elements of offenses.
- § 2. Persons liable.
- § 3. Proceedings preliminary to prosecution.
- § 4. Indictment or information.
- § 5. Evidence.
- § 6. Sentence and punishment.

*Cross-References.*

Bribery of jurors, see "Bribery."  
 Confessions, see "Criminal Law," § 519.  
 Conspiracy to bribe jurors, see "Conspiracy," § 38.  
 Conspiracy to violate law in respect to summoning of jurors, see "Conspiracy," § 34.  
 Ground for new trial, see "Criminal Law," § 925.  
 Indictment, see "Indictment and Information," § 110.

Misconduct affecting jury, as contempt of court, see "Contempt," § 14.  
 Misconduct of others affecting jurors, as error at trial, see "Criminal Law," § 855; "Trial," § 305.  
 Remarks of judge at trial, see "Criminal Law," § 655.  
 Testimony of accomplices and codefendants, see "Criminal Law," § 507.

\*Annotation: Words and Phrases, same title.

**EMERGENCIES.\****Cross-References.*

Acts in emergencies, as affecting question of contributory negligence in general, see "Negligence," § 72.  
 Acts in emergencies as affecting question of contributory negligence of persons injured at railroad crossings, see "Railroads," § 334.  
 Acts in emergencies as affecting question of contributory negligence of persons injured on or near railroad tracks, see "Railroads," § 386.  
 Acts in emergencies as affecting question of contributory negligence of servants, see "Master and Servant," § 246.  
 Acts in emergencies as affecting question

of negligence, see "Negligence," § 12;  
 "Street Railroads," §§ 81, 93, 95.  
 Acts of master causing injury to servant, see "Master and Servant," § 138.  
 Acts of passengers in emergencies as bearing on contributory negligence, see "Carriers," § 338.

**EMIGRATION.\****Cross-Reference.*

See "Aliens."

**EMIGRATION AGENTS.\****Cross-Reference.*

License taxes, see "Licenses," §§ 5, 7, 8, 11.

**EMINENT DOMAIN.\****Scope-Note.*

[INCLUDES taking property from its owner for public use; nature, extent, and delegation of the power in general; constitutional and statutory provisions relating thereto; what property is subject thereto; for what uses or purposes the power may be exercised, and necessity therefor; necessity and sufficiency of compensation; proceedings for condemnation of property and for assessment of compensation; what constitutes taking of or injury to property, and rights and remedies of the owners; rights acquired by exercise of power of eminent domain, and effect of abandonment of property or of public use thereof.

[EXCLUDES voluntary dedication of property to public use (see "Dedication"); and taking or use of property for military purposes in time of war (see "War").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Nature, Extent, and Delegation of Power.**

- § 1. Nature and source of power.
- § 2. Distinction between eminent domain and other powers.
- § 3. Constitutional provisions.
- § 4. Power of state in general.
- § 5. Power of United States.
- § 6. Delegation of power.
- § 7. — Necessity of legislative authority.
- § 8. — Construction and operation of legislative acts in general.
- § 9. — To municipality.
- § 10. — To private corporation.
- § 11. — To individual.
- § 12. Public use.
- § 13. — In general.
- § 14. — Extent of use or benefit.
- § 15. — Destruction of property.
- § 16. Particular uses or purposes.
- § 17. — In general.
- § 18. — Public buildings or grounds, or other purposes of government.

\*Annotation: Words and Phrases, same title.

**I. Nature, Extent, and Delegation of Power—Continued.**

- § 19. — Highways or other roads or ways.
- § 20. — Railroads.
- § 21. — Bridges.
- § 22. — Ferries.
- § 23. — Canals.
- § 24. — Improvement of navigation.
- § 25. — Wharves, piers, or docks.
- § 26. — Chutes or booms for logging.
- § 27. — Improvement of water courses, lakes, or ponds.
- § 28. — Water supply in general.
- § 29. — Irrigation.
- § 30. — Levees or dikes.
- § 31. — Drainage of lands.
- § 32. — Sewers.
- § 33. — Development or working of mines.
- § 34. — Production and supply of oil or gas.
- § 35. — Production and supply of electric power or light.
- § 36. — Telegraphs or telephones.
- § 37. — Mills.
- § 38. — Warehouses or elevators.
- § 39. — Markets.
- § 40. — Schools.
- § 41. — Parks and reservations.
- § 42. — Cemeteries.
- § 44. Property subject to appropriation.
- § 45. — In general.
- § 46. — Public property.
- § 47. — Property previously devoted to public use.
- § 48. — Franchises.
- § 49. — Limited estates or interests.
- § 50. — Easements or other rights in real property.
- § 51. — Materials for construction of works.
- § 52. — Exemptions.
- § 53. Statutory exercise of power.
- § 54. Exercise of delegated power.
- § 55. — In general.
- § 56. — Necessity for appropriation.
- § 57. — Discretion in exercise of power.
- § 58. — Extent of appropriation.
- § 59. — Exhaustion or further exercise of power.
- § 60. Taking for private use.
- § 61. — In general.
- § 62. — Consent of owner.
- § 63. Acts constituting appropriation of property.
- § 64. Persons entitled to question power.
- § 65. Determination of questions as to validity of exercise of power.
- § 66. — Jurisdiction of courts in general.
- § 67. — Conclusiveness and effect of legislative action.
- § 68. — Conclusiveness and effect of exercise of delegated power.

**II. Compensation.****(A) NECESSITY AND SUFFICIENCY IN GENERAL.**

- § 69. Necessity of making compensation in general.
- § 70. Constitutional provisions.
- § 71. Sufficiency of statutory provisions for compensation.
- § 72. Imposition of conditions.
- § 73. Necessity of payment before taking.
- § 74. — In general.
- § 75. — Taking by state or municipality.
- § 76. — Entry on making deposit or payment into court.
- § 77. — Entry on giving security.
- § 78. — Sufficiency of remedy by judgment and execution.
- §§ 79, 80. Waiver of, or estoppel to claim, compensation.

**(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.**

- § 81. Property and rights subject of compensation.
- § 82. — Real property in general.
- § 83. — Rights in public lands.
- § 84. — Water rights.
- § 85. — Easements and other rights in real property.
- § 86. — Franchises.
- § 87. — Personal property and rights therein.
- § 88. Taking for permanent use.
- § 89. Nature of injury to property not taken.
- § 90. — In general.
- § 91. — General or special injuries.
- § 92. — Proper or improper construction or operation of works.
- § 93. — Direct or remote, contingent, or prospective consequences or losses.
- § 94. Elements of compensation for injuries to property not taken.
- § 95. — In general.
- § 96. — Taking part of tract.
- § 97. — Taking water rights.
- § 98. — Alteration of flow or discharge of water.
- § 99. — Prevention of access to navigable waters.
- § 100. — Occupation or use of street or other highway.
- § 101. — Alteration of grade of street or other highway.
- § 102. — Inconvenience in use of property.
- § 103. — Necessity for fences or crossings.
- § 104. — Effect of smoke, foul odors, noise, or vibration.
- § 105. — Obstruction of light or air.
- § 106. — Obstruction of access.
- § 107. — Interference with trade or business.
- § 108. — Interference with franchise.
- § 109. — Danger of personal injury.
- § 110. — Danger of injury to animals.
- § 111. — Danger from fire.
- § 112. — Injuries from construction or operation of works.
- § 113. — Effect on value of property of construction or operation of works.
- § 114. Temporary use.



**II. Compensation—Continued.****(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION—Continued.**

- § 116. — Use during construction of works.
- § 117. Appropriation to new or additional use.
- § 118. — In general.
- § 119. — Streets or other highways.
- § 120. — Railroad rights of way.
- § 121. Corporations and persons liable for compensation.

**(C) MEASURE AND AMOUNT.**

- § 122. Necessity of just or full compensation or indemnity.
- § 123. Sufficiency of statutory provisions as to amount.
- § 124. Time with reference to which compensation to be made.
- § 125. Nature and extent of right taken.
- § 126. — In general.
- § 127. — Streets or other highways.
- § 128. — Railroad rights of way.
- § 129. Taking entire tract or piece of property.
- § 130. — Measure of compensation in general.
- § 131. — Value of land.
- § 132. — Growing trees and crops.
- § 133. — Improvements and fixtures.
- § 134. — Value for special use.
- § 135. Taking part of tract or property.
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- § 140. — Measure of compensation in general.
- § 141. — Depreciation of value.
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- § 143. Temporary use of property.
- § 144. Deduction or set-off of benefits.
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- § 147. Limited estates or interests in property.
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**(D) PERSONS ENTITLED AND PAYMENT.**

- § 151. Persons entitled.
- § 152. — In general.
- § 153. — Vendor or purchaser.
- § 154. — Mortgagor or mortgagee.
- § 155. — Landlord or tenant.
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- § 225. Assessment by commissioners, appraisers, or viewers.
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- Appellate jurisdiction, see "Courts," §§ 219, 220, 231, 394, 399.
- Application by witness for taxation of fees in condemnation proceedings, see "Witnesses," § 27.
- Appointment of appraisers in federal court after removal of cause from state court, see "Removal of Causes," § 113.
- Appropriation of demised premises to public use as affecting liability for rent, see "Landlord and Tenant," § 191.
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- Assessment of damages as affecting duty of railroad company to maintain fences, see "Railroads," § 411.
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- Authority of city attorney to give consent of city to condemnation of municipal property, see "Municipal Corporations," § 225.
- Authorizing construction of levees by board of county commissioners as delegation of legislative power, see "Constitutional Law," § 63.
- Change of venue in condemnation proceedings, see "Venue," § 36.
- Compensation for taking land paid into court as property which may be reached by creditors' suit, see "Creditors' Suit," § 8.
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- Counterclaim in proceedings to enforce judgment lien for award in condemnation proceedings, see "Set-Off and Counterclaim," § 29.
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- Effect of alienage of person seeking to take property by eminent domain, see "Aliens," § 10.
- Effect of appropriation of demised premises, see "Landlord and Tenant," §§ 100, 191.
- Estoppel of landowner acquiescing in construction of railroad, see "Estoppel," § 93.
- Estoppel to assert title to property by accepting award, see "Estoppel," § 92.
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- Estoppel to question constitutionality of law, see "Constitutional Law," § 43.
- Exercise of power as denial of equal protection of laws, see "Constitutional Law," §§ 227, 228, 249.

- Exercise of power as deprivation of property without due process, see "Constitutional Law," §§ 280, 281.
- Exercise of power as equitable conversion, see "Conversion," § 4.
- Exercise of power as impairing obligation of contracts, see "Constitutional Law," § 118.
- Exercise of power by receiver of railroad company, see "Railroads," § 210.
- Extending time for filing petition for damages as class legislation, see "Constitutional Law," § 208.
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- Following procedure and practice of state courts in federal courts, see "Courts," § 334.
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- Identification of act amended relating to property subject to condemnation, see "Statutes," § 138.
- Implied repeal of special by general acts, see "Statutes," § 162.
- Imposing attorneys fees on railroad companies as class legislation, see "Constitutional Law," § 208.
- Jurisdiction of condemnation proceedings in general, see "Courts," § 142.
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- Jurisdiction of federal court to restrain condemnation proceedings in state court, see "Courts," § 508.
- Jurisdiction of justices' courts as affected by questions involving title to land, see "Justices of the Peace," § 36.
- Jurisdiction to try condemnation proceedings in vacation, see "Courts," § 69.
- Jurisdiction to vacate condemnation proceedings, see "Courts," § 183.
- Liens of creditor of testator on award to devisee, see "Wills," § 141.
- Limitation of proceedings to condemn land by remaindermen, see "Remainders," § 17.
- Malicious prosecution of condemnation proceedings, see "Malicious Prosecution," § 31.
- Mandamus to compel signing of report in condemnation proceedings, see "Mandamus," § 73.
- Necessity and sufficiency of record to show federal question for purpose of removal to federal Supreme Court of decision of state court in condemnation proceedings, see "Courts," § 398.
- Necessity of exercise of power of eminent domain by telegraph or telephone company to acquire right of way, see "Telegraphs and Telephones," § 8.
- Necessity of resorting to exercise of power as legislative or judicial question, see "Constitutional Law," § 70.
- Persons entitled to object to constitutionality of laws, see "Constitutional Law," § 42.
- Presentation of claim against county for award in condemnation proceedings, see "Counties," § 200.
- Proceeding for condemnation as a counterclaim, see "Set-Off and Counterclaim," § 24.
- Prohibiting proceedings, see "Prohibition," § 3.
- Protecting property pending condemnation proceedings, see "Injunction," § 38.
- Public improvements by municipalities, see "Municipal Corporations," §§ 265-588.
- Purchasers pendente lite, see "Lis Pendens," § 3.
- Relation between powers of eminent domain and taxation, see "Taxation," § 4.
- Removal of condemnation proceedings from state to federal court, see "Removal of Causes," §§ 4, 26, 30, 74, 79, 86, 113, 114, 119.
- Requiring notice to landowners as impairing obligation of contract, see "Constitutional Law," § 133.
- Reservation in grant of school lands as affecting right to compensation for appropriation of land for highways, see "Public Lands," § 51.
- Retroactive effect of repealing act, see "Statutes," § 274.
- Right to compensation as assets of decedent's estate, see "Executors and Administrators," § 49.
- Right to compensation by homestead entryman on public lands, see "Public Lands," § 35.
- Right to compensation by Indians, see "Indians," § 10.
- Right to maintain successive actions for nuisance against corporation invested with power of eminent domain, see "Nuisance," § 43.
- Special legislation, see "Statutes," § 82.
- Statutes relating to costs, expenses, and attorneys' fees in condemnation proceedings as affecting vested rights, see "Constitutional Law," § 112.
- Stay of condemnation proceedings, see "Action," § 69.
- Subject and title of act relating to appeal, see "Statutes," § 117.
- Taxation of land acquired by condemnation, see "Taxation," §§ 79, 188, 217.
- Trivial value of land as ground for denying injunction against condemnation proceedings, see "Equity," § 34.
- Uniformity of operation of general laws, see "Statutes," § 72.
- Validity of contract to relinquish right to exercise power of eminent domain, see "Contracts," § 108.
- Vested rights of landowner in damages awarded in condemnation proceedings, see "Constitutional Law," § 93.
- What law governs testamentary disposition of fund arising from condemnation proceedings, see "Wills," § 2.

## NOTE.

Statutory provisions covering the subject of Eminent Domain will be found in Code [vol. 3], art. 33A; act 1916, c. 117, p. 200.

## I. NATURE, EXTENT, AND DELEGATION OF POWER.

### § 1. Nature and source of power.

#### Cross-Reference.

Construction of statutes, see post, § 8.

(a) It is a portion of the inherent sovereignty of the state to appropriate to a public use the property of individuals, when public necessity or utility requires it, on securing to the party a just compensation for any injury he may sustain.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated in 26 L. R. A. 664, on effect of abandonment of highway; in 14 L. R. A. (N. S.) 878, 881, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee; in 22 L. R. A. (N. S.) 9, on judicial power over eminent domain; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

### § 2. Distinction between eminent domain and other powers.

#### Cross-References.

Public uses or purposes, see post, §§ 12-43.

When taking is complete, see post, § 63.

(a) The provision of act 1860, c. 7, § 12, amending the laws relating to the police and general powers of the mayor and city council of Baltimore, etc., transferring the fire alarm station houses, etc., the legal title to which was in the corporate authorities, to the new commissioners provided for by the act, is not a taking of private or city property for public uses, but a direction that property owned by the citizens, and used in one way, shall be used in the same way for the benefit of the same citizens by other managers, and so no compensation is called for.—*City of Baltimore v. State*, 15 Md. 376. (See Balto. City Rev. Charter, § 6.) [Cited and annotated in 60 L. R. A. 43, 44, on corporate taxation as affected by contract clause in federal Constitution; in 1 L. R. A. (N. S.) 513, on legislative regulation of municipal officers as infringing local self-government; in 15 L. R. A. (N. S.) 68, on boards or bodies to which power to tax delegable; in 16 L. R. A. 737, on power of courts or judges to appoint officers; in 27 L. R. A. (N. S.) 723, on constitutionality of statute

regulating appointment to office with reference to party affiliation; in 48 L. R. A. 481, on legislative power to impose burdens on municipalities and to control their local administration and property.]

(b) It is a portion of the inherent sovereignty of a state, when public necessity or utility requires it, to appropriate to public use private property, upon securing to the owner a just compensation for any injury he may receive. This is an exercise of the right of eminent domain as contradistinguished from the taxing power.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated in 26 L. R. A. 664, on effect of abandonment of highway; in 14 L. R. A. (N. S.) 878, 881, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee; in 22 L. R. A. (N. S.) 9, on judicial power over eminent domain; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

### § 3. Constitutional provisions.

#### Cross-References.

Statutory provisions relating to amount of compensation, see post, § 122.

Effect of partial invalidity of statutes, see "Statutes," § 64.

Necessity of resorting to exercise of power as legislative or judicial question, see "Constitutional Law," § 70.

Special legislation, see "Statutes," § 82.

#### Annotation.

Constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad company for spur or lateral track.—35 L. R. A. (N. S.) 646, note.

### § 4. Power of state in general.

#### Cross-References.

Nature and source of power, see ante, § 1.

Relation between powers of eminent domain and taxation, see "Taxation," § 4.

### § 5. Power of United States.

### § 6. Delegation of power.

#### Cross-Reference.

Exercise of delegated power, see post, §§ 55-59.

### § 7.—Necessity of legislative authority.

### § 8.—Construction and operation of legislative acts in general.

#### Cross-Reference.

Retroactive effect of repealing act, see "Statutes," § 274.

### § 9.— To municipality.

(a) The delegation of the power of eminent domain to a city held to require the presumption that the authority granted will not be exceeded.—*Bond v. City of Baltimore*, 116 Md. 683, 82 Atl. 978.

(b) The act of opening, widening, and closing streets is an exercise of the right of eminent domain, delegated by the state to the city, as to other corporations, to be used for the public good.—*State v. Graves*, 19 Md. 351. [Cited and annotated in 9 L. R. A. (N. S.) 1045, on municipality's power to limit control over street or other public ground as incident of acquisition; in 16 L. R. A. (N. S.) 538, on time title passes in condemnation proceedings.]

### § 10.— To private corporation.

#### Cross-Reference.

Violation of statute concerning parallel and competing lines as defense, see post, § 171.

#### Annotation.

Right of de facto corporation to exercise power of eminent domain.—2 L. R. A. (N. S.) 144; 50 L. R. A. (N. S.) 236, notes.

Right of private educational corporation to exercise power of eminent domain.—48 L. R. A. (N. S.) 491, note.

Exercise of power of eminent domain by depot and belt or terminal railway companies.—10 L. R. A. (N. S.) 909, note.

Right of foreign corporation to exercise power of eminent domain.—24 L. R. A. 327, note.

(a) A charter specifically declaring a corporation to be formed to act as a common carrier of electrical power, etc., and vesting in the public the right to apply for and demand all facilities and connections without discrimination, etc., and requiring the company to supply all applicants in like situation, etc., safeguards the rights of the public and gives the company the right to exercise the power of eminent domain and take property as for a public use under Code 1904, art. 23, § 366, as amended by act 1908, c. 240.—*Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254. (See Code 1911, art. 23, § 405.)

(b) It is only where the purposes of a corporation as set forth in its charter combine a private use with a public use in such a way that the two cannot be separated that

the power of eminent domain, otherwise incident to the corporate powers, cannot be exercised.—*Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254.

### § 11.— To individual.

### §§ 12-15. Public use.

#### Cross-References.

Allegations in complaint, see post, § 191.

Consent of owner to taking for private use, see post, § 62.

Taking under constitutions and statutes authorizing taking for private use, see post, § 61.

#### Annotation.

Property subject to appropriation for public use.—22 L. R. A. (N. S.) 6, note.

(a) Under Const. art. 3, § 40, providing that the General Assembly shall enact no law authorizing private property to be taken for public use without just compensation as agreed upon, etc., the Legislature is absolutely prohibited by implication from taking private property for private use without the owner's consent.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated in 20 L. R. A. 438, on power to condemn right of way for track to private establishment; in 1 L. R. A. (N. S.) 977, on exercise of eminent domain for mining road; in 22 L. R. A. (N. S.) 17, 24, 31, 32, 51, 56, 60, 62, 111, 123, 130, 153, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad company for spur or lateral track.]

(b) The state cannot, any more than a citizen, grant what she does not own. She may take private property for public purposes, but she cannot take from one man land to give to another.—*Hoye v. Swan*, 5 Md. 237. [Cited and annotated in 15 L. R. A. (N. S.) 1243, 1245, 1246, 1250, on necessity for color of title, not expressly made a condition by statute, in adverse possession; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

### § 16. Particular uses or purposes.

### § 17.— In general.

#### Annotation.

Constitutionality of statute authorizing the taking of more property than is intended to be used for the public purpose.—46 L. R. A. (N. S.) 1196, note.



Property taken for miscellaneous purposes.—22 L. R. A. (N. S.) 134, note.  
Combination of public and private uses in exercise of eminent domain.—21 L. R. A. (N. S.) 539, note.

(a) An ordinance enacting that the portion of a public alley between defendant's lots should be closed, and authorizing her to erect a building thereon, thus debarring the other owners of lots abutting on the alley from access to a street with which such alley connected, on her paying the expenses of the closing and the damages sustained by the other lot owners, is invalid, as being a taking of the easements of the other lot owners for private use.—*Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403. [Cited and annotated in 22 L. R. A. (N. S.) 24, 30, 51, 52, 77, 84, 112, 113, 117, on judicial power over eminent domain; in 22 L. R. A. (N. S.) 532, on power of municipality as against abutting owner to devote street or portion thereof to private purposes.]

§ 18.—Public buildings or grounds, or other purposes of government.

§ 19.—Highways or other roads or ways.

Annotation.

Property taken for roads.—22 L. R. A. (N. S.) 99, note.

(a) A landowner has the right to condemn a way of necessity to a highway.—*Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319.

(b) In view of Code, art. 23, § 278, authorizing a railroad company to condemn land for the diversion of a highway, *held*, that the railroad company which needed additional land for the expansion of its yards might use part of the land condemned to relocate a private way which ran over part of its present yards.—*Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319.

(c) The topographical map of the Annex portion of Baltimore city showing the streets as they were to be laid out and straightened, etc., by the Annex Commission of Baltimore City, showed the streets laid out at right angles, but M. avenue, which is not adopted as one of the streets, runs diagonally across

a square formed by W. avenue on the north, P. avenue on the south, E. street, formerly Tenth street, on the east, and H. street, formerly Eleventh street, on the west, and crosses E. street, and cuts off a strip at the corner of W. avenue and E. streets. N. avenue runs parallel with and is a square beyond W. avenue. Before closing M. avenue, the Annex Commissioners purchased as a public highway that part of the bed of Eleventh street from the south side of N. avenue to the north side of M. avenue, and had Eleventh street, which is wider than M. avenue, graded and macadamized. *Held*, that the closing of M. avenue was under the circumstances for a public use, even though a few owners would be benefited thereby by having the exclusive use of the bed of such avenue after it was closed.—*City of Baltimore v. Brengle*, 116 Md. 342, 81 Atl. 677; *Same v. Schetlich*, 116 Md. 342, 81 Atl. 677.

(d) Act 1910, c. 110, authorizing acquisition of land by Baltimore city for highway over Jones' Falls, *held* not a violation of Const. art. 3, § 40, prohibiting the taking of private property, except for a public purpose.—*Bond v. City of Baltimore*, 116 Md. 683, 82 Atl. 978. (See Balto. City Rev. Charter, §§ 826p, et seq.)

(e) Code 1888, art. 25, §§ 100-117, declaring that any owner of lands shall have the right to a road to and from his land to places of public worship, mills, market towns, public ferries, and courthouses, and may obtain a private road or way by application to the county commissioners, and providing certain procedure for the establishment of such road, authorized a taking of private property for private use, in violation of Const. art. 3, § 40, prohibiting the enactment of laws authorizing private property to be taken for public use without just compensation, and Decl. of Rights, art. 23, providing that no man shall be disseised, etc., but by the judgment of his peers or by the law of the land.—*Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497. (See Code 1904, art. 25, §§ 104-121; Code 1911, art. 25, § 104, note.) [Cited and annotated in 22 L. R. A. (N. S.) 24, 31, 32, 39, 41, 45, 47, 52, 54, 59, 108, on judicial power over eminent domain.]

**§ 20.—Railroads.****Cross-References.**

See post, §§ 45-47.

Identification of act amended relating to condemnation of right of way for street railroad, see "Statutes," § 138.

**Annotation.**

Delegation by legislature to railroad commission of power as to building spur tracks.—32 L. R. A. (N. S.) 654, note.  
Right of railroad to condemn right of way over or across tracks of another company for a spur track to private establishments.—5 L. R. A. (N. S.) 512, note.

Power of railroad company to condemn right of way for spur or siding to private establishment.—20 L. R. A. 434; 22 L. R. A. 181; 35 L. R. A. 636, notes.

Property taken for street railways.—22 L. R. A. (N. S.) 134, note.

(a) A mining company proposed to build a railroad, on land it sought to condemn, to begin near its mines, to run to the tracks of a railway company. The proposed railroad was to connect at both of its termini with the railway company's tracks. *Held*, that the proposed railroad would be a railroad for a public use within Code 1888, art. 23, §§ 145, 149, authorizing mining companies to condemn land for a right of way for a railroad, and the necessary means for the transportation of all persons and property that might be offered for transportation on the railroad, required by § 154, might be accomplished by traffic arrangements with the railway company.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. (See Code 1911, art. 23, §§ 246, 250, 255; *Id.* [vol. 3], art. 23, § 246.) [Cited and annotated in 22 L. R. A. (N. S.) 130, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad company for spur or lateral track.]

(b) Property may be condemned by a mining company for the construction of a railroad to be used for transportation of coal from its mines, since such a use is of a public nature.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated, see *supra*, § 15.]

(c) Act 1870, c. 80, § 6, authorizing the taking of private property for the construction of the Baltimore & Potomac Railroad,

is constitutional.—*Shipley v. Baltimore & P. R. Co.*, 34 Md. 336. (See Const. art. 3, § 40.) [Cited and annotated in 9 L. R. A. (N. S.) 836, on right to set off benefits against damages on condemnation.]

**§ 21.—Bridges.****Cross-Reference.**

Acquisition of bridges by public authorities, see "Bridges," § 26.

**Annotation.**

Property taken for bridges.—22 L. R. A. (N. S.) 135, note.

**§ 22.—Ferries.****Annotation.**

Property taken for ferries.—22 L. R. A. (N. S.) 135, note.

**§ 23.—Canals.****Cross-References.**

See "Canals," § 13.

Jurisdiction of federal courts of proceedings by the secretary of war to condemn property for canal, see "Courts," § 302.

**Annotation.**

Judicial power over the right of eminent domain for canal purposes.—61 L. R. A. 833, note.

**§ 24.—Improvement of navigation.****Annotation.**

Property taken for improvement of navigability of stream.—67 L. R. A. 847; 22 L. R. A. (N. S.) 153, notes.

**§ 25.—Wharves, piers, or docks.****Annotation.**

Property taken for wharves.—22 L. R. A. (N. S.) 135, note.

**§ 26.—Chutes or booms for logging.****Annotation.**

Property taken for booms and logging ways.—22 L. R. A. (N. S.) 151, note.

**§ 27.—Improvement of water courses, lakes, or ponds.****§ 28.—Water supply in general.****Cross-References.**

Under mill acts, see post, § 37.

Water power for production of electricity, see post, § 35.

**Annotation.**

Property taken for purveying of water for governmental and domestic consumption.—22 L. R. A. (N. S.) 156, note.

Furnishing water and water power to the public for manufacturing purposes as a public purpose justifying the exercise of eminent domain.—21 L. R. A. (N. S.) 410, note.

Exercise of power of eminent domain for water supply.—58 L. R. A. 241, note.

(a) The expropriation of land for the purpose of supplying the city of Washington with water is, in every sense, a taking of it for public use, and therefore the act of 1853, c. 179, authorizing such expropriation, is not unconstitutional.—*Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550. [Cited and annotated in 46 L. R. A. (N. S.) 1075, on right to exercise eminent domain as affected by fact that principal benefit will be derived out of state; in 58 L. R. A. 242, on acquisition of water supply by eminent domain; in 7 L. R. A. (N. S.) 52, on injunctive relief as to fences or gates; in 22 L. R. A. (N. S.) 24, 156, 157, on judicial power over eminent domain.]

### § 29.—Irrigation.

#### Annotation.

Taking property for irrigation purposes.—1 L. R. A. (N. S.) 208; 33 L. R. A. (N. S.) 807, notes.

### § 30.—Levees or dikes.

#### Cross-Reference.

Distinction between exercise of power of eminent domain and other powers, see ante, § 2.

#### Annotation.

Exercise of eminent domain to acquire rights of way for levees.—58 L. R. A. 757, note.

### § 31.—Drainage of lands.

#### Cross-Reference.

Damages from construction and maintenance of drains, see "Drains," §§ 57, 58.

#### Annotation.

Drainage of private lands as public purpose authorizing exercise of power of eminent domain.—49 L. R. A. 781; 1 L. R. A. (N. S.) 208; 22 L. R. A. (N. S.) 163, notes.

### § 32.—Sewers.

#### Annotation.

Property taken for sewers.—22 L. R. A. (N. S.) 168, note.

What property may be taken for purposes of sewer.—60 L. R. A. 198, note.

### § 33.—Development or working of mines.

#### Cross-Reference.

Railroads for mining purposes, see ante, § 20.

#### Annotation.

Right to take private property by eminent domain for a mining road.—1 L. R. A. (N. S.) 977; 22 L. R. A. (N. S.) 701, notes.

Judicial power over the right of eminent domain for mining purposes.—22 L. R. A. (N. S.) 153, note.

Property taken for production of gold.—15 L. R. A. (N. S.) 616, note.

Power to exercise eminent domain for the purpose of securing right of way for mining tunnel.—4 L. R. A. (N. S.) 106, note.

### § 34.—Production and supply of oil or gas.

### § 35.—Production and supply of electric power or light.

#### Cross-Reference.

Acquisition of electric light lamp by municipality, see "Electricity," § 1½.

#### Annotation.

Right of eminent domain for generation and diffusion of electric energy.—22 L. R. A. (N. S.) 136, note.

Generation of electricity for sale to public for the purposes of power as a public purpose.—2 L. R. A. (N. S.) 842; 19 L. R. A. (N. S.) 725, notes.

### § 36.—Telegraphs or telephones.

### § 37.—Mills.

#### Cross-Reference.

Water supply and power in general, see ante § 28.

#### Annotation.

Property taken for mill dams.—22 L. R. A. (N. S.) 140, note.

Property taken for purpose of gristmill.—18 L. R. A. (N. S.) 356, note.

### § 38.—Warehouses or elevators.

### § 39.—Markets.

### § 40.—Schools.

#### Annotation.

What property may be taken for school purposes.—48 L. R. A. (N. S.) 488, note.

Property taken for common schools.—22 L. R. A. (N. S.) 169, note.

### § 41.—Parks and reservations.

#### Cross-Reference.

Condemnation by railroad company for park, see ante, § 20.

#### Annotation.

Property taken for parks.—22 L. R. A. (N. S.) 170, note.

### § 42.—Cemeteries.

#### Annotation.

Property taken for cemeteries.—22 L. R. A. (N. S.) 171, note.

### § 43. (Omitted from the classification used herein.)

#### § 44. Property subject to appropriation.

##### Cross-Reference.

Identification of act amended relating to property subject to condemnation, see "Statutes," § 138.

#### § 45.— In general.

##### Annotation.

Property subject to appropriation for public use.—22 L. R. A. (N. S.) 6, note. Condemnation of shares of minority stockholders in American corporations.—1 L. R. A. (N. S.) 605, note.

(a) A railroad corporation authorized to have land condemned to its use may take the land of an incorporated powder manufacturing company.—*In re Bellona Co.*, 3 Bland 442. [Cited and annotated in 19 L. R. A. 685, on sole ownership of corporate stock; in 1 L. R. A. (N. S.) 612, on condemnation of shares of minority stockholders.]

#### § 46.— Public property.

##### Cross-Reference.

Location of highway over county lands, see "Highways," § 46.

##### Annotation.

Right to take other public property for purposes of water supply.—58 L. R. A. 246, note.

#### § 47. — Property previously devoted to public use.

##### Cross-References.

Necessity of appropriation in general, see post, § 56.

Location of highway over existing highway, or over railroad property, see "Highways," § 46.

##### Annotation.

Taking school lands for other public uses.—48 L. R. A. (N. S.) 489, note.

Right to condemn property previously condemned or purchased for public use, but which is not actually so used.—24 L. R. A. (N. S.) 383, note.

Condemnation of right of way for telegraph or telephone line along railroad right of way.—42 L. R. A. (N. S.) 225, note.

Power to authorize construction of telegraph or telephone line along railroad right of way, without compensation to railroad company.—29 L. R. A. (N. S.) 703, note.

What constitutes appropriation of land for right of way by one railroad company which will prevent its condemnation by another railroad company.—13 L. R. A. (N. S.) 197, note.

Right of railroad to condemn a right of way over or across the tracks of another company for a spur track to private establishments.—5 L. R. A. (N. S.) 512, note.

(a) Code 1888, art. 23, § 169 (Code 1911, art. 23, § 273), allowing a railroad company to condemn a right to occupy a street with its tracks, and § 173 (Code 1911, art. 23, § 278), giving it a right to change the location of a highway which it crosses, impliedly authorize it to condemn a right to cross a highway.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 120 Md. 128, 87 Atl. 828.

(b) That a city is vested with the supervision and control of its streets, and that its charter is a public local law, do not prevent the condemnation of a right to cross its streets by a railroad company.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 120 Md. 128, 87 Atl. 828.

(c) The statute creating the Public Service Commission and the amendments thereto have not taken away the right of a railroad company to condemn a crossing over another road.—*City & Suburban R. Co. v. Washington, W. & G. R. Co.*, 120 Md. 142, 87 Atl. 833. (See Code, art. 23, §§ 269, et seq.; art. 23, § 413, et seq.; Id. [vol. 3], art. 23, §§ 413, et seq.)

(d) The unoccupied part of a private cemetery may be condemned for railroad or other public purposes.—*St. James A. M. E. Church v. Baltimore & O. R. Co.*, 114 Md. 442, 79 Atl. 85.

(e) Where the Legislature charters a railroad company with the right to build a railroad between certain points, and it becomes necessary for the company to build their railroad across another railroad or a turnpike road, also chartered by the Legislature, such crossing may lawfully be made, and cannot be considered as a condemnation of the franchise of the owners of the turnpike road.—*Baltimore & Havre de Grace Turnpike Co. v. Union R. Co.*, 35 Md. 224, 6 Am. Rep. 397. [Cited and annotated in 1 L. R. A. (N. S.) 612, on condemnation of shares of minority stockholders.]

(f) The right to select and acquire land for the authorized purposes of a corporation is property. It is an incorporeal hereditament, not a legal title to the land itself, nor a mere capacity or a faculty to acquire land, such as every individual possesses, but a

right or privilege to acquire the legal title to the land, subjected by the grant to the will of the corporation; and no corporation, after the previous grant of such right to another, can legally acquire any such right of way over, or title to, the land over which the franchise extends, as will hinder the latter corporation in the exercise and enjoyment of its franchise.—*Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 G. & J. 1. [Cited and annotated in 61 L. R. A. 849, on construction and operation of canals; in 67 L. R. A. 834, on right to improve navigability of stream.]

#### § 48.—Franchises.

(a) Act 1894, c. 162, authorizing a street-railway company to acquire by condemnation an easement in the roadway of a turnpike company, for the operation of its railway, is not unconstitutional, in that it violates the obligation of contracts, as corporations hold their franchises subject to the right of eminent domain.—*Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. P. R. Co.*, 81 Md. 247, 31 Atl. 854. [Cited and annotated in 1 L. R. A. (N. S.) 612, 613, on condemnation of shares of minority stockholders.]

§§ 49, 50.—(See Analysis.)

#### § 51.—Materials for construction of works.

##### Annotation.

Power of railroad to condemn property to obtain construction material.—40 L. R. A. (N. S.) 793, note.

#### § 52.—Exemptions.

(a) Act 1854, c. 204, incorporating the Charles Street Avenue Company to make a road, provided that the road shall commence at the present northern termination of Charles street, "and shall run thence in a direct line with said street extended, in a direction about due north, until it reaches the northern outline" of a farm called "Clover Hill"; thence in a prescribed line to the other terminus. Power is then given the company to condemn lands to construct the road, and by § 12 it is enacted that it shall not be lawful "to lay out or extend the said road through the buildings, yards, or orchards of any farm, without consent of the owner." *Held*, that, the act being passed

for the public convenience and benefit, the prohibitory restriction contained in § 12 must be construed as requiring and authorizing a deviation or change in the location of the road at such points from the prescribed route, and not as a cessor of the corporate franchise in case the consent of the owners cannot be obtained.—*Charles Street Ave. Co. v. Merryman*, 10 Md. 536.

#### § 53. Statutory exercise of power.

#### § 54. Exercise of delegated power.

##### Cross-Reference.

Conclusiveness and effect, see post, § 68.

#### § 55.—In general.

#### § 56.—Necessity for appropriation.

##### Cross-References.

Conclusiveness and effect of exercise of delegated power, see post, § 68.

Conclusiveness of legislative determination as to necessity, see post, § 67.

Hearing and determination as to right to take, see post, § 198.

Necessity of second appropriation, see ante, § 47.

(a) That a railroad could have adopted another or other routes to have reached the termini designated in its charter did not show that no necessity existed for taking property along the route selected, since, if it had adopted another route, the owners of property along that route could have made the same contention.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 122 Md. 660, 90 Atl. 515.

(b) In the delegation to a corporation of the power of eminent domain is implied the condition that it shall only be exercised when and to the extent actually found necessary.—*Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254.

(c) The general railroad law requires that the certificate of incorporation shall state the places of the termini of the road, and the county or counties, city or cities, through which it is to pass, and provides that, whenever a company shall find it necessary to change the location or grade of any portion of its road, it shall be authorized to make such changes, not departing from the general route prescribed in the certificate. The charter of the P. & C. R. Co., incorporated under the general law, stated that the corporation was organized to construct and

operate a railroad in Maryland, beginning at a point in Allegany Co., Md., opposite to the junction of the W. Va., C. & P. Ry. Co. with the B. & O. Ry. Co., above Piedmont, W. Va., running through or near to the town of Westernport, Allegany Co., Md., to a convenient point below Keyser, W. Va., where it may cross the north branch of the Potomac, and also from a convenient point on said north branch, at or near the city of Cumberland, Allegany Co., Md., to another point adjacent thereto; all of said road passing through Allegany Co., Md. *Held*, that the road should be built from the place where it first crossed the Potomac into West Virginia, on the West Virginia side of the river, until it recrossed into Maryland, near Cumberland, that its charter was valid, and it had authority to condemn land adjacent to Cumberland.—*Piedmont & C. R. Co. v. Speelman*, 67 Md. 260, 10 Atl. 77, 293.

(d) Where a mining company seeks to condemn private property for the construction of a railroad to haul away its coal, it must show at least a reasonable degree of necessity for such condemnation.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated in 20 L. R. A. 438, on power to condemn right of way for track to private establishment; in 1 L. R. A. (N. S.) 977, on exercise of eminent domain for mining road; in 22 L. R. A. (N. S.) 17, 24, 31, 32, 51, 56, 60, 62, 111, 123, 130, 153, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad company for spur or lateral track.]

(e) Ordinance No. 15 of 1858 of the city of Baltimore, providing that in every case where it shall be necessary, in the improvement of a street, that a part only of a house and lot shall be taken and used, or destroyed, and the owner thereof shall claim to be compensated for the whole, the commissioners shall ascertain the full value thereof, as if the whole lot and improvements were necessary to be taken and used for street, and that payment shall be made to the owner of the whole of such valuation, and that the residue of the lot not necessary to be taken

and used for the street shall be sold, the proceeds derived therefrom to be appropriated to the expenses of the improvements, is not open to objection as a taking of the property of a citizen, when it is not required for public use, contrary to the Constitution and laws of the state.—*City of Baltimore v. Clunet*, 23 Md. 449. [Cited and annotated in 46 L. R. A. (N. S.) 1196, on constitutionality of statute authorizing condemnation of more property than intended to be used.]

(f) Act 1853 authorizes the city of Baltimore to take land and water for the purpose of conveying water into said city, for the use of said city. A taking in invitum of the bed of a stream and the water, and paying the damages assessed, can only be such a taking as is necessary for the above purpose, as there is no authority to take more. Therefore the owner retains the right to make any use not interfering with the above purpose.—*Kane v. City of Baltimore*, 15 Md. 240. [Cited and annotated in 22 L. R. A. (N. S.) 24, 25, 31, 51, 160, on judicial power over eminent domain.]

#### § 57.—Discretion in exercise of power.

##### Cross-References.

Discretion as to extent of taking, see post, § 58.

Review of discretion by court, see post, § 68.

#### § 58.—Extent of appropriation.

##### Cross-References.

Necessity of appropriation, see ante, § 56.

Under statutory exercise of power, see ante, § 53.

(a) Act 1910, c. 110, authorizing the city of Baltimore to construct a highway, *held* to authorize the acquisition of land merely adjacent to the highway, as an incident to the establishment of the highway.—*Philadelphia, B. & W. R. Co. v. City of Baltimore*, 121 Md. 504, 88 Atl. 263.

(b) A railway charter limiting the width of the road to 66 feet does not limit the land that may be occupied, and hence the company can condemn a strip exceeding that width.—*St. James A. M. E. Church v. Baltimore & O. R. Co.*, 114 Md. 442, 79 Atl. 35.

(c) Under Code 1904, art. 23, § 366, as amended by act 1908, c. 240, empowering certain corporations to acquire by condemnation any property right whatsoever neces-

sary for its purpose in its discretion, "either in fee simple or the use thereof in fee simple or for a less estate," etc., a corporation organized for the transmission of electrical power may take both a fee simple in property desired and also an easement to cut and trim trees which may interfere with its use of the land.—*Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254. (See Code 1911, art. 23, § 405.)

(d) Act 1904, p. 77, c. 56, was enacted to enlarge the charter powers of the Western Maryland Railroad Company. Section 2 (p. 80) of the act provides that, in addition to the special powers of condemnation conferred on the road by previous laws, "it is hereby authorized, in all cases, whether arising under this act or otherwise, to have and exercise all the powers of condemnation, and to have and exercise the same in the manner and according to the method prescribed by the general railroad incorporation laws as set out in article 23 of the Code of Public General Laws," etc. Code 1904, art. 23, § 254, provides that, whenever any railroad company heretofore incorporated, etc., shall find it necessary for the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or for other reasonable causes, to change the location or grade of any portion of its road, whether heretofore made or hereafter to be made, such railroad shall be authorized to make such changes of grade or location, not departing from the general route prescribed in the certificate of such company, and for the purpose of making such change such company shall have all the powers and privileges to enter upon and appropriate such lands and upon the same terms, and be subject to the same obligations, rules, and regulations as are prescribed by law. *Held*, that it would not be presumed that the Legislature meant to discriminate against railroads chartered by special act and in favor of those chartered under the general incorporation law, and that therefore the word "certificate" in the section must be regarded as used in the sense of charter, and the fact that the Western Maryland Railroad was chartered and under a special act empowering it to construct a road not exceeding 66 feet wide did not limit it to such width when

the necessities of the road required a greater width.—*Dolfield v. Western Maryland R. Co.*, 107 Md. 584, 69 Atl. 582. (See Code 1911, art. 23, § 272.)

(e) Act 1852, c. 304, incorporating a railroad company, by § 14 authorized it to construct a road not exceeding 66 feet wide, and gave it all the powers necessary to the construction and repair of the road, empowering it, after purchase or condemnation in the manner prescribed, to enter on and occupy any land wanted for the site of the road or the erection of warehouses or other works necessary to the road, or for any other purpose necessary or useful in its construction or repair. Act 1872, p. 102, c. 71, enlarged the rights of the company, giving it all the powers necessary or "convenient" to such construction, etc., and further provided that whenever the company should find it necessary to change the location or grade of any part of its road, whether theretofore made or thereafter to be made, it should be authorized to make such changes. *Held*, that, there being no express limitation or restriction on the width of road which might be acquired, it would be presumed that the power in respect of quantity was intended to be commensurate with the necessities of the road and the duties imposed on it for the benefit of the public, and hence the company could acquire, where necessary and convenient to the construction of the road, land in excess of the 66 feet.—*Dolfield v. Western Maryland R. Co.*, 107 Md. 584, 69 Atl. 582.

#### § 59.—Exhaustion or further exercise of power.

(a) Where a railroad company authorized by its charter (act 1831, c. 288), to condemn land for the construction and repair of its road, as it may deem necessary, not exceeding 100 feet wide, condemns a strip 70 feet wide, on which the road is constructed, its powers to condemn are not thereby exhausted; but, if its necessities require, it may afterwards condemn the additional 30 feet.—*Hopkins v. Philadelphia, W. & B. R. Co.*, 94 Md. 257, 51 Atl. 404.

(b) Under act 1831, c. 288, § 24, requiring the railroad of which said chapter is the charter to be constructed within 10 years,

no limit of time is fixed for the exercise of the right to condemn land for right of way, and such right may be exercised at any time until the limit in amount authorized has been taken.—*Hopkins v. Philadelphia, W. & B. R. Co.*, 94 Md. 257, 51 Atl. 404.

(c) Where a charter required a railroad to be completed within six months after the construction of a certain bridge, authority to condemn lands, also given in the charter, was not exhausted by the expiration of that time.—*Brown v. Philadelphía, W. & B. R. Co.*, 58 Md. 539.

### §§ 60-62. Taking for private use.

#### Cross-References.

See ante, § 19.

Necessity for public use, and decisions as to whether use is public or private, see ante, §§ 12-42.

#### Annotation.

Taking property of one person to compensate another for property taken for a public purpose.—46 L. R. A. (N. S.) 319, note.

Owner's right to compensation for improvements made by taker before condemnation without owner's consent.—5 L. R. A. (N. S.) 922, note.

(a) Under Const. art. 3, § 40, forbidding the General Assembly to enact any law authorizing private property to be taken for public use without just compensation, the Legislature is without power to authorize the taking of private property for a private use.—*Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319.

(b) Under Const. art. 3, § 40, providing that the General Assembly shall enact no law authorizing private property to be taken for public use without just compensation as agreed upon, etc., the Legislature is absolutely prohibited by implication from taking private property for private use without the owner's consent.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated, see supra, § 56.]

(c) The state cannot, any more than a citizen, grant what she does not own. She may take private property for public purposes, but she cannot take from one man land to give to another.—*Hoye v. Swan*, 5 Md. 237. [Cited and annotated in 15 L. R. A. (N. S.)

1243, 1245, 1246, 1250, on necessity for color of title, not expressly made a condition by statute, in adverse possession; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

### § 63. Acts constituting appropriation of property.

#### Cross-References.

Acts constituting exercise of power of eminent domain, see ante, § 2.

Time of passing of title or right, see post, § 320.

(a) The constitutional prohibition against taking private property for public use until compensation has been paid or tendered means the actual taking, and not the preliminary steps of surveying and assessment of damages, which do not require such tender in order to be legal.—*Steuart v. City of Baltimore*, 7 Md. 500. [Cited and annotated in 15 L. R. A. 442, on jury trial on appeal as satisfying constitutional right; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

### § 64. Persons entitled to question power.

### § 65. Determination of questions as to validity of exercise of power.

#### Cross-Reference.

Hearing and determination as to right to take, see post, § 198.

### § 66.—Jurisdiction of courts in general.

#### Annotation.

Judicial power over the right of eminent domain.—22 L. R. A. (N. S.) 1, note.

### § 67.—Conclusiveness and effect of legislative action.

### § 68.—Conclusiveness and effect of exercise of delegated power.

(a) Under act 1853, c. 376, which gives the city of Baltimore authority to take what property it may deem expedient or necessary for the purpose of conveying water into the city, its decision as to what is necessary is not conclusive on the courts.—*Kane v. City of Baltimore*, 15 Md. 240. [Cited and annotated in 22 L. R. A. (N. S.) 24, 25, 31, 51, 160, on judicial power over eminent domain.]



## II. COMPENSATION.

### (A) NECESSITY AND SUFFICIENCY IN GENERAL.

#### *Cross-References.*

Damages recoverable in action by property owner, see post, §§ 301-305.  
Evidence as to compensation, see post, §§ 199-205.

### § 69. Necessity of making compensation in general.

#### *Annotation.*

Necessity of making compensation on laying out street across railroad property.  
—24 L. R. A. (N. S.) 1226, note.

(a) A city is liable for the permanent submersion of property by the construction of a dam for the purposes of its water supply, though the dam is authorized by the Legislature.—*City of Baltimore v. Merryman*, 86 Md. 584, 39 Atl. 98. [Cited and annotated in 59 L. R. A. 856, 857, 894, 896, on liability for damming back stream.]

(b) A telegraph or telephone company is, with respect to its right to construct its lines over private property, subject to the provisions of Const. art. 3, § 4, which provides that private property shall not be taken for public use without just compensation.—*American Telephone & Telegraph Co. v. Smith*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. [Cited and annotated in 17 L. R. A. 480, on what use of street or highway is additional burden; in 36 L. R. A. (N. S.) 518, on uses to which railroad right of way may be devoted.]

(c) Act 1870, c. 115, authorized the city of Baltimore to provide for the improvement of a certain district, giving the mayor and council power to ascertain the amount of damages for which property owners ought to be compensated. An ordinance passed in pursuance of such act failed to make provision for ascertaining or awarding damages. Held, that, notwithstanding such omission, persons whose property was injured by reason of the authorized improvements were entitled to compensation.—*Gregg v. City of Baltimore*, 56 Md. 256. [Cited and annotated in 46 L. R. A. (N. S.) 1196, on constitutionality of statute authorizing condemnation of more property than intended to be used.]

(d) The right of eminent domain does not authorize the government to take private property for public uses without making compensation to the owner, even if there were no provision in the Constitution restricting it; but such appropriation, by law, without compensation, would be in conflict with Decl. of Rights, arts. 6, 21.—*Harness v. Chesapeake & O. Canal Co.*, 1 Md. Ch. 248. [Cited and annotated in 17 L. R. A. 839, on implied restrictions on power of Legislatures; in 61 L. R. A. 842, on construction and operation of canals.]

(e) The Legislature cannot authorize the taking of private property for public use without providing a fair compensation to the owner.—*Hamilton v. Annapolis & E. R. Co.*, 1 Md. Ch. 107.

### § 70. Constitutional provisions.

#### *Cross-References.*

Exercise of power as denial of equal protection of laws, see "Constitutional Law," §§ 227, 228.

Exercise of power as deprivation of property without due process, see "Constitutional Law," §§ 280, 281.

Exercise of power as impairing obligation of contracts, see "Constitutional Law," § 118.

Persons entitled to object to constitutionality, see "Constitutional Law," § 42.

Taxation according to value, see "Taxation," § 49.

### § 71. Sufficiency of statutory provisions for compensation.

#### *Cross-References.*

Imposition of conditions, see post, § 72.

Effect of partial invalidity of statute, see "Statutes," § 64.

Uniformity of operation of general laws, see "Statutes," § 72.

(a) The assessment by commissioners, with the right of appeal to the Criminal Court of Baltimore, and the assessment of benefit dues on the proprietors benefited, are both constitutional modes of providing compensation to owners of land taken for public use.—*State v. Graves*, 19 Md. 351. [Cited and annotated in 9 L. R. A. (N. S.) 1045, on municipality's power to limit control over street or other public ground as incident of acquisition; in 16 L. R. A. (N. S.) 538, on time title passes in condemnation proceedings.]

### § 72. Imposition of conditions.

§ 73. Necessity of payment before taking.

§ 74.— In general.

*Annotation.*

Right of abutting owner to damages for special injuries where street railway is not considered an additional burden.—25 L. R. A. (N. S.) 1265, note.

Injury to abutting owner by laying street railway near side of street.—43 L. R. A. 554, note.

(a) The building of abutments to be used as the approach for elevated railway tracks, in the center of the street, is not a taking of the property of abutting landowners, within the meaning of Const. art. 3, § 40, which prohibits the "taking" of private property for a public use without compensation being "first" paid or tendered, so as to entitle the landowners to enjoin the erection of the same until compensation is paid for the injury.—*Garrett v. Lake Roland El. Ry. Co.*, 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396. [Cited and annotated in 1 L. R. A. (N. S.) 132, on effect of legislative authority on liability for private nuisance; in 15 L. R. A. (N. S.) 58, on cutting off access to highway as taking; in 36 L. R. A. (N. S.) 696, 757, on abutter's right to compensation for railroads in streets.]

(b) Code 1888, art. 23, §§ 222-226, relating to telegraph companies in so far as they contain any provisions authorizing the construction of telegraph lines over private property, and requiring the property owners to seek compensation therefor afterwards by an action at law for damages, are unconstitutional, being in conflict with Const. art. 3, § 40, requiring compensation to be first paid or tendered before private property is taken for public use.—*American Telephone & Telegraph Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. (See Code 1911, art. 23, §§ 357-361.) [Cited and annotated in 17 L. R. A. 480, on what use of street or highway is additional burden; in 36 L. R. A. (N. S.) 518, on uses to which railroad right of way may be devoted.]

(c) Act 1865, c. 265, incorporating the Consolidation Coal Company, and investing it with all the rights of eminent domain in the survey, location, and construction of certain railroads, must be interpreted in subordina-

tion to the constitutional inhibition of any law authorizing private property to be taken for public use without just compensation first paid or tendered.—*State v. Consolidation Coal Co.*, 46 Md. 1. [Cited and annotated in 52 L. R. A. 371, 380, on right of corporations to consolidate.]

(d) A railroad company authorized to acquire lands must make compensation to the owners of the land before constructing a railroad over such land.—*Western Maryland R. Co. v. Owings*, 15 Md. 199, 74 Am. Dec. 563.

(e) Under the acts of the Legislature incorporating railroad and canal companies, it is not necessary that a valuation of the property taken by authority of the acts should be made, and the amount paid, before the corporations proceed to construct their works, provided such construction will not obscure the property taken, so that its value cannot be judged of; but there should be no unreasonable delay in having the valuation made.—*Compton v. Susquehanna R. Co.*, 3 Bland 386.

§ 75.— Taking by state or municipality.

*Cross-Reference.*

Discharge by accord and satisfaction, see "Accord and Satisfaction," § 10.

(a) All modes of opening, widening, and closing streets by right of eminent domain are subject to the constitutional inhibition that the Legislature shall enact no law authorizing private property to be taken for public use without just compensation, as agreed on by the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation.—*State v. Graves*, 19 Md. 351. [Cited and annotated in 9 L. R. A. (N. S.) 1045, on municipality's power to limit control over street or other public ground as incident of acquisition; in 16 L. R. A. (N. S.) 538, on time title passes in condemnation proceedings.]

(b) The constitutional prohibition against the taking of private property for public use before compensation has been made or tendered will prevent the entry on land to grade or prepare it for street purposes before damages are constitutionally ascertained and paid or tendered.—*Steuart v. City of Baltimore*, 7 Md. 500. [Cited and annotated in

15 L. R. A. 442, on jury trial on appeal as satisfying constitutional right; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

§§ 76-78.— (See Analysis.)

§§ 79, 80. Waiver of, or estoppel to claim, compensation.

*Cross-Reference.*

Discharge by accord and satisfaction, see "Accord and Satisfaction," § 10.

(a) In a proceeding in rem to condemn land for the widening of a street adjoining a harbor, together with all rights in the area necessary to be taken to widen the street, a steamboat company which held a lease of a wharf located along the street sought to be widened was not estopped thereby from asserting its rights in the waters of the harbor which it might have as an incident to its ownership of a wharf constructed along an intersecting street.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 353; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. [Cited and annotated in 25 L. R. A. (N. S.) 259, 261, on division of water front, alluvion, and flats between adjoining riparian owners; in 34 L. R. A. (N. S.) 432, on right to obstruct wharf rights in navigable waters for public purposes, without compensation.]

(b) Where a landowner granted, on the faith of a promise of exceptional privileges and advantages, a parol license giving a railroad company a right of way through his lands, and subsequently revoked the same, although the company has, at considerable expense, erected its railroad in pursuance of such license, if it has failed to fulfill its promise, a court of equity will not declare that the landowner is equitably estopped by the parol license, notwithstanding its revocation, from seeking to recover damages for the use of the right of way, and will leave the company to obtain its remedy by means of condemnation proceedings.—*Baltimore & H. R. Co. v. Algire*, 65 Md. 337, 4 Atl. 293. [Cited and annotated in 44 L. R. A. (N. S.) 566, on compensation upon revocation of license respecting realty.]

(c) Commissioners appointed by county commissioners to assess damages for a new road over the land of a certain owner verbally agreed to surrender an old road over his land to him in consideration of a release of damages for the new road; and, he having executed the release, they reported no damages to his land, and this report was adopted by the county commissioners, authorized to vacate a road only on petition. Held, that, the county commissioners subsequently reviving the old road, the owner of the land could not require the commissioners to pay damages.—*Barrickman v. Harford County Com'rs*, 11 G. & J. 50. [Cited and annotated in 26 L. R. A. 758, on mitigation of damages in eminent domain by preserving estate, rights, or easements to owner.]

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

§ 81. Property and rights subject of compensation.

*Cross-Reference.*

Reservation in grant of school lands as affecting right to compensation for appropriation of land for highways, see "Public Lands," § 51.

§ 82.— Real property in general.

(a) A city which ordered the construction of a sewer in a street under tracks of a railroad company whose easement in the street was dominant to the city's estate in such street, must compensate the company for the cost to it of strengthening the walls of the sewer in order to bear the weight of girders carrying the tracks over it, and the cost of raising the tracks to overcome the elevation of the sewer, since the construction of the sewer directly invaded a vested estate and was not a mere consequential injury entailed by the construction of street improvements.—*City of Baltimore v. Cowen*, 88 Md. 447, 41 Atl. 900, 71 Am. St. Rep. 433. [Cited and annotated in 61 L. R. A. 681, on municipal duty and liability as to drainage; in 24 L. R. A. (N. S.) 1231, 1234, 1235, on necessity and measure of compensation, upon laying out street across railway property.]

(b) The owner of a lot lying on the bed of a street which is taken for public use is entitled to a compensation for it precisely as

if no such street was opened over it.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated in 26 L. R. A. 664, on effect of abandonment of highway; in 14 L. R. A. (N. S.) 878, 881, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee; in 22 L. R. A. (N. S.) 9, on judicial power over eminent domain; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

(c) Private property taken for public use by right of eminent domain is not taken as the owner's share of contribution to a public burden, but as so much beyond his share, and special compensation is made in such case, because the government is a debtor for the property so taken.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated, see supra.]

### § 83.—Rights in public lands.

### § 84.—Water rights.

#### Cross-Reference.

Elements of compensation for injuries to property not taken, see post, §§ 97-99.

#### Annotation.

Government's right to divert water from nontidal stream without compensation to riparian owner.—37 L. R. A. (N. S.) 307, note.

Right of riparian owner to compensation for damages to his property by construction, under legislative authority, of dams or booms for floating or storing logs.—22 L. R. A. (N. S.) 641, note.

Right to acquire water supply without compensation.—58 L. R. A. 240, note.

(a) Where the owners of lots on the opposite side of a street adjoining a harbor filled out their land beyond the street into the harbor, as authorized by act 1796, c. 45; act 1801, c. 92; and act 1805, c. 94, neither the owners who had filled them out in accordance with such acts, nor their successors in title, could be deprived of their wharfage rights and privileges without their consent by the state or the city in which the harbor was located, except by condemnation proceedings under the power of eminent domain.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 353; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. [Cited and annotated in 25 L. R. A. (N. S.) 259, 261, on division of water front, alluvion, and flats between

adjoining riparian owners; in 34 L. R. A. (N. S.) 432, on right to obstruct wharf rights in navigable waters for public purposes, without compensation.]

### § 85.—Easements and other rights in real property.

#### Annotation.

Right of owner of easement of way to compensation upon its conversion into public highway.—2 L. R. A. (N. S.) 598, note.

(a) Where an abutting owner of a street in Baltimore city does not own the bed of the street, the placing of an obstruction thereon pursuant to legislative authority is not a taking of his property within the Constitution.—*State v. Burkett*, 119 Md. 609, 87 Atl. 514.

(b) A street cannot be closed even for a public use without making just compensation to abutting property owners entitled thereto.—*City of Baltimore v. Brengle*, 116 Md. 342, 81 Atl. 677; *Same v. Schetlich*, Id.

(c) A street railroad company has no right to construct its line across railroad tracks rightfully maintained in a city street, without first compensating the railroad company for damages resulting therefrom.—*Central Pass. Ry. Co. v. Philadelphia, W. & B. R. Co.*, 95 Md. 428, 52 Atl. 752. [Cited and annotated in 13 L. R. A. (N. S.) 917, on right to compensation for street railway across railroad track on street crossing.]

(d) Where a municipal corporation so located and constructed a culvert, its approaches, and guard rails on the public road as to inevitably close up a private roadway, it was liable to indemnify the owner of the right of way, though the actual construction was carefully done.—*De Lauder v. Commissioners of Baltimore County*, 94 Md. 1, 50 Atl. 427.

(e) Where a municipal corporation built a culvert across a public road, and erected guard rails to protect the approach thereto, which wholly obstructed and destroyed the use of a private right of way across the land adjoining the road, there was a "taking of property" without compensation, giving the owner a right of action for damages.—*De Lauder v. Commissioners of Baltimore County*, 94 Md. 1, 50 Atl. 427.

(f) The construction of a city sewer into which were diverted the waters of a natural stream 60 feet distant, does not make the stream and the sewer in law identical, so as to impose on estates adjacent to the sewer the burdens they sustained with reference to the stream.—*City of Baltimore v. Cowen*, 88 Md. 447, 41 Atl. 900, 71 Am. St. Rep. 433. [Cited and annotated in 61 L. R. A. 681, on municipal duty and liability as to drainage; in 24 L. R. A. (N. S.) 1231, 1234, 1235, on necessity and measure of compensation, upon laying out street across railway property.]

(g) The liability of a city for changing street grades is immaterial in an action for damages for an invasion of a dominant estate in a street by constructing a sewer therein.—*City of Baltimore v. Cowen*, 88 Md. 447, 41 Atl. 900, 71 Am. St. Rep. 433. [Cited and annotated, see *supra*.]

#### § 86.—Franchises.

##### *Cross-Reference.*

Measure and amount of compensation, see post, § 139.

#### § 87.—Personal property and rights therein.

(a) A portable schoolhouse of a city, movable from place to place as the exigencies require, is not a "building" within Balto. City Code 1906, Charter, § 828, providing for the filing of a map which in case of opening streets shall show the course of the proposed street and the lots and buildings thereon which shall be "taken or destroyed," especially where the schoolhouse was placed within the limits of a proposed street after the filing of the map, and was simply to be moved by the school authorities, and they could not claim compensation for moving the house, they having notice of the proposed street in consequence of the filing of the map.—*Whiteley v. City of Baltimore*, 113 Md. 541, 77 Atl. 882. (See Balto. City Rev. Charter, § 828.)

#### § 88. Taking for permanent use.

#### § 89. Nature of injury to property not taken.

#### § 90.—In general.

##### *Annotation.*

Casting water upon opposite bank by raising bank of a stream, as a taking or

damaging of property within constitutional provisions.—48 L. R. A. (N. S.) 994, note.

#### § 91.—General or special injuries.

##### *Cross-Reference.*

General or special benefits, see post, § 146.

#### § 92.—Proper or improper construction or operation of works.

##### *Cross-Reference.*

Elements of compensation, see post, § 113.

(a) Code 1888, art. 23, § 198, providing that if a railroad company injures any stock, or if injury is occasioned by fire from its engines, it shall be responsible for such injuries, unless it can prove that the injury complained of was committed without negligence on the part of the defendant or its agents, merely changes the burden of proof in such cases, and does not require an allegation of negligence on the part of a railroad in a suit for damages to property by the construction of tunnels and the operation of trains therein adjacent to the property.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654. (For subsequent appeal, see *Same v. Same*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.) (See Code 1911, art. 23, § 307.)

(b) Where property is damaged beyond a mere incidental inconvenience, which unavoidably follows the exercise of charter powers by the construction of tunnels and the operation of railroad trains therein, property owners affected are entitled to recover the damages without proof of negligence of the railroad, though the construction of the tunnel and operation of the trains therein were under the direct authority of the Legislature of the state and the city wherein the tunnels were constructed.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654. (For subsequent appeal, see *Same v. Same*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.)

#### § 93.—Direct or remote, contingent, or prospective consequences or losses.

##### *Cross-Reference.*

See post, §§ 94-113.

(a) Damages may be recovered for injury to property by construction of a railroad

whether they result from direct invasion or from consequential injuries.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654. (For subsequent appeal, see *Same v. Same*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.)

(b) Speculative profits out of the future enjoyment of land appropriated for public use cannot be taken into consideration in estimating damages for such taking.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479.

#### § 94. Elements of compensation for injuries to property not taken.

##### *Cross-References.*

See ante, § 93.

Depreciation of value, see post, § 113.

Damages from construction and maintenance of drains, see "Drains," §§ 57, 58.

Malicious prosecution of condemnation proceedings, see "Malicious Prosecution," § 31.

#### § 95.—In general.

##### *Cross-Reference.*

See post, § 100.

(a) Act 1904, c. 87, § 8, p. 147, provides that the burnt district commission of Baltimore, whenever exercising the power of eminent domain, shall ascertain whether any and what amount in value of damage will be caused to the owner of any right or interest in any ground or improvement, taking into consideration all advantages and disadvantages for which such owner ought to be compensated. Section 9, p. 149, declares that when, in the commission's judgment, a part of the whole of the improvements of any lot can be taken without destroying the whole, the commission shall only condemn the part necessary, and shall award such damages and assess upon the remainder such benefits as in their judgment shall be right and proper. *Held*, that, though the words "any right or interest in any ground or improvement" in § 8 referred only to the ground or improvement taken, the commission nevertheless was bound, in estimating the damages for the taking, to consider injuries to other property not taken.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 353; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. (See Balto. City Code 1906, App'x A, §§ 8, 9.) [Cited and anno-

tated in 25 L. R. A. (N. S.) 259, 261, on division of water front, alluvion, and flats between adjoining riparian owners; in 34 L. R. A. (N. S.) 432, on right to obstruct wharf rights in navigable waters for public purposes, without compensation.]

(b) On the condemnation by the city of Baltimore of land in Baltimore county, required for a conduit to convey water into the city, in proceedings under 2 Code 1860, Pub. Loc. Laws, art. 4, tit. "City of Baltimore," subtit. "Water," such conduit to be so constructed as to pass through the land at a distance below the surface of from 79 to 120 feet, in which proceedings the jury, by their inquisition, make a condemnation in perpetuity of the land, "so far as may be necessary to construct, maintain, and use under the same an underground conduit 12 feet in internal diameter for the conveyance of water, without any opening on such land," and without the right to enter upon or disturb the surface, except to clear away timber on the surface necessary to give an unobstructed view for engineering purposes during the construction of such conduit, the damages proper to be assessed are not for the estimated value of the land at the surface, but the jury, in estimating the damages, should look to the purposes for which the land is to be condemned, and the mode and manner in which it is to be used and occupied.—*Taylor v. City of Baltimore*, 45 Md. 576. (See Balto. City Rev. Charter, § 6, sub § 30.)

#### § 96.—Taking part of tract.

##### *Cross-Reference.*

See ante, § 95.

#### § 97.—Taking water rights.

##### *Cross-Reference.*

Property and rights subject to compensation, see ante, § 84.

#### § 98.—Alteration of flow or discharge of water.

(a) The invasion of property by water and sand, due to a public improvement, is a taking within the meaning of the constitutional prohibition.—*City of Cumberland v. Willison*, 50 Md. 138. [Cited and annotated in 21 L. R. A. 606, on rights as to flow of surface water; in 61 L. R. A. 693, on municipal duty and liability as to drainage.]

(b) Under a charter conferring upon a railroad company power to acquire land, by condemnation, for the construction of its road, the company has the right to divert a stream of water flowing across the line of its road. This right does not depend upon an express grant, to be made and specified in the inquisition, but may be acquired by condemnation of the land duly confirmed, payment or tender of the damages awarded, and proof, dehors the inquisition, that the attention of the jury of inquest was directed to the intended diversion at the time of taking and before they signed the same. If the attention of the jury was thus directed to such diversion, and the same was made within the lines of the land condemned for the construction of the road, the owner of the land through which the road passes has no remedy, either at law or in equity, for any injury that may result therefrom.—*Baltimore & P. R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310.

**§ 99.—Prevention of access to navigable waters.**

**§ 100.—Occupation or use of street or other highway.**

*Cross-References.*

See ante, § 95.

Appropriation to new or additional use, see post, § 119.

*Annotation.*

Right of abutting owner to damages for special injuries where street railway is not considered an additional burden.—25 L. R. A. (N. S.) 1265, note.

(a) The right of access is the test of an abutter's right of action for occupation of a street by a railroad.—*Webb v. Baltimore & O. R. Co.*, 114 Md. 216, 79 Atl. 193.

(b) Where a company, incorporated for the purpose of affording terminal facilities, condemns a section of a parcel of land, and compensation is assessed, not only for the value of the section taken, but also for the other damages which the owner would sustain by the taking of it, the owner cannot claim further damages for injuries alleged to be caused by the laying of the tracks on the sidewalk and bed of the street upon which the property abuts, for the purpose of connecting with the line of a railroad company, if the land was acquired for the

purpose of laying a track upon it, and making the connection which was afterwards effected.—*Phipps v. Western Maryland R. Co.*, 66 Md. 319, 7 Atl. 556. [Cited and annotated in 14 L. R. A. 381, on injury to abutter's easements by railroad; in 15 L. R. A. (N. S.) 54, on cutting off access to highway as taking; in 36 L. R. A. (N. S.) 685, 694, 702, on abutter's right to compensation for railroads in streets.]

(c) An inquest of damages for the location of a railroad precludes the owner of the land from claiming additional damages for the same original location upon the occasion of a change in the location.—*Baltimore & S. R. Co. v. Compton*, 2 Gill 20. [Cited and annotated in 36 L. R. A. 512, on right to relocate railroad.]

(d) A railroad company, having constructed its road through plaintiff's land, condemned for that purpose, was authorized, by an act of the Legislature, to alter the location of the road between two points. Upon the reconstruction, that part which had run through plaintiff's land was abandoned. Held, that the authority derived from the Legislature to alter the location did not exempt the company from liability for the loss sustained by plaintiff by reason of such abandonment.—*Baltimore & S. R. Co. v. Compton*, 2 Gill 20. [Cited and annotated, see supra.]

**§ 101.—Alteration of grade of street or other highway.**

*Annotation.*

Liability of a municipal corporation for injury to abutting property from changing the grade of a street under a constitutional provision against "damaging" private property for public use without compensation.—36 L. R. A. (N. S.) 1194; L. R. A. 1915A, 382, notes.

Liability of municipality for injury to abutting property from bringing street to the grade established in the first instance, under constitutional provision against "damaging" private property for public use without compensation.—7 L. R. A. (N. S.) 108, note.

Liability of railroad company to abutting owner for damages from change of grade of highway necessary to carry it across tracks.—26 L. R. A. (N. S.) 226, note.

(a) The construction of an approach to a viaduct in such a manner as to cut off all access to the dwelling of an owner of abut-

ting property, and to render the first floor thereof uninhabitable, amounts to a taking of his property.—*Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128.

(b) The rule that damages to adjacent lands, occasioned by a lawful change in the grade of a highway, are not recoverable does not apply where a part of the abutting land is being condemned for the highway.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(c) Even though Baltimore City Code, Charter (act 1898, c. 123), § 6, requires a lot owner to construct a sidewalk in front of his premises, such owner can recover from the city the cost of regrading a strip taken from him for a street, and upon which he is required to construct a sidewalk.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057. (See Balto. City Rev. Charter, § 6.)

(d) The owner of an abutting lot is entitled to recover for an injury to the residue of his property occasioned by the lowering of the street, which injury consists in the impairment of the availability of his lot for convenient and beneficial use with respect to the pre-existing street.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(e) Where the owner of a lot, part of which is taken for street improvement, seeks to recover for the cost of regrading the remainder to conform to the new street level, the question whether such a change in the lot grade is reasonably required is a legitimate inquiry.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(f) Where the county commissioners, in empowering a railway to construct its tracks upon a public road and to change the grade thereof, did not exceed their authority, and there was no allegation that the work was carelessly done, an adjoining owner was not entitled to recover consequential damages from them, his land not having been actually invaded.—*Offutt v. Commissioners of Montgomery County*, 94 Md. 115, 50 Atl. 419.

(g) The law casts upon the county commissioners not only the right, but the duty, to protect the public roads from injury and keep them in repair, and individual rights

must be held in subordination to those of the public; and therefore if, by reasonable or necessary improvements to a highway, a party suffers consequential damages, no right of action accrues therefor.—*Tyson v. Baltimore County Com'rs*, 28 Md. 510.

## § 102.—Inconvenience in use of property.

### Annotation.

Right to compensation for interference with switch connections or other shipping facilities.—52 L. R. A. (N. S.) 192, note.

## § 103.—Necessity for fences or crossings.

## § 104.—Effect of smoke, foul odors, noise, or vibration.

### Cross-Reference.

Pollution of stream by sewage, see ante, § 97.

### Annotation.

Right, under constitutional provision against "damaging" private property for public use without compensation, to compensation for consequential damages to property, no part of which is taken from smoke incident to ordinary operation of railroad.—17 L. R. A. (N. S.) 1054; 40 L. R. A. (N. S.) 48, notes. Allowance for noise in proceedings to condemn railroad right of way.—38 L. R. A. (N. S.) 497, note.

## § 105.—Obstruction of light or air.

### Annotation.

Right of property owner to compensation for interference with light or air by railroad structure on company's own property.—20 L. R. A. (N. S.) 1061, note.

## § 106.—Obstruction of access.

### Annotation.

Right of property owner whose access from one direction is shut off or interfered with by closing of adjoining street or portion of street on which he is situated.—52 L. R. A. (N. S.) 889, note.

Cutting off access to a highway as a taking or injury.—15 L. R. A. (N. S.) 49, note.

Right of landowner to damages for obstruction of street or highway by railroad not adjacent to his property.—9 L. R. A. (N. S.) 496; 46 L. R. A. (N. S.) 615, notes.

(a) The charter of a turnpike company (act 1804, c. 51, § 17), required it to so construct its road as to secure, as nearly as the materials would permit, an even surface "so nearly level in its progress as that it shall in no place rise or fall more than will



form an angle of four degrees with a horizontal line." The act also provided for compensation to property owners for damages caused by the road passing through their lands. Acts 1809, c. 2, and 1811, c. 202, relieved the company from this requirement, which had not been complied with. *Held*, that the company could change the grade of its road, as it had existed for 60 years, so as to make it conform to the charter requirements, without compensating an abutting property owner who was deprived thereby of ingress to and egress from his property.—*Green v. City & Suburban Ry. Co.*, 78 Md. 294, 28 Atl. 626. [Cited and annotated in 36 L. R. A. (N. S.) 722, 801, 820, on abutter's right to compensation for railroads in streets.]

#### § 107.—Interference with trade or business.

##### *Cross-Reference.*

Admissibility of evidence, see post, § 203.

##### *Annotation.*

Interruption of business, as element of damages for laying out street across railroad property.—24 L. R. A. (N. S.) 1231, note.

Loss of profits from suspension of business while moving as element of damages.—17 L. R. A. (N. S.) 124, note.

Loss of customers as element of damages from obstruction of highway.—13 L. R. A. (N. S.) 253, note.

#### §§ 108-111.—(See Analysis.)

#### § 112.—Injuries from construction or operation of works.

##### *Cross-Reference.*

Proper or improper construction or operation, see ante, § 92.

#### § 113.—Effect on value of property of construction or operation of works.

##### *Cross-Reference.*

Proper or improper construction of operation of works, see ante, § 92.

(a) A lot owner on an ungraded and unimproved street dedicated to the city, but never accepted by it, may recover from a railroad company for so excavating the street as to render it impassable, thereby depriving the lot owner of its use and benefit, and depreciating the value of his property.—*Baltimore Belt R. Co. v. McColgan*, 83 Md. 650, 35 Atl. 59. [Cited and anno-

tated in 36 L. R. A. (N. S.) 797, on abutter's right to compensation for railroads in streets.]

(b) Under Code 1888, art. 23, § 169, providing that, where tracks are laid upon a public street, the company shall be responsible for injuries done by such location to private property lying upon or near the street, an elevated railway company, whose road is located on a street on which leased premises front, but terminates 12 feet before reaching such premises, is liable to the lessee for the diminution in the usable value of the premises, caused by the building and operation of the road.—*Lake Roland El. Ry. Co. v. Webster*, 81 Md. 529, 32 Atl. 186. (See Code 1911, art. 23, § 273.) [Cited and annotated in 36 L. R. A. (N. S.) 757, 776, on abutter's right to compensation for railroads in streets.]

(c) The depreciation in value of property caused by laying railroad tracks in the street on which it abuts, which, however, do not interfere with access to the property, is not a taking of private property for public use, for which compensation must first be made, as required by Const. art. 3, § 40, and the owner, who has no interest in the fee of the street, cannot have an injunction to restrain the laying of the tracks, as Code 1888, art. 23, § 169, giving a right of action for such injury, provides an adequate remedy at law.—*O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126. (See Code 1911, art. 23, § 273.) [Cited and annotated in 1 L. R. A. (N. S.) 56, 70, on effect of legislative authority on liability for private nuisance; in 36 L. R. A. (N. S.) 696, on abutter's right to compensation for railroads in streets.]

#### §§ 114-116. Temporary use.

##### *Cross-Reference.*

Measure and amount of compensation, see post, § 143.

#### § 117. Appropriation to new or additional use.

#### § 118.—In general.

#### § 119.—Streets or other highways.

##### *Cross-Reference.*

Occupation or use of street in general, see ante, § 100.

**Annotation.**

What use of a street or highway constitutes an additional burden.—17 L. R. A. 474, note.

Nature of damages recoverable by abutting owner on account of railroad in street.—36 L. R. A. (N. S.) 760, note.

Street railway as additional burden.—17 L. R. A. 477; 36 L. R. A. (N. S.) 709, notes.

Interurban trolley road as additional burden.—4 L. R. A. (N. S.) 202; 40 L. R. A. (N. S.) 254, notes.

Telegraph and telephone poles and wires in street as additional burden on easement.—17 L. R. A. 480; 24 L. R. A. 721, notes.

Telephone or telegraph as additional servitude on highway.—3 L. R. A. (N. S.) 323; 7 L. R. A. (N. S.) 87, notes.

Electric power or light line in street or highway as an additional burden.—36 L. R. A. (N. S.) 185; 52 L. R. A. (N. S.) 760, notes.

(a) The use of streets by an electric railway does not impose a new servitude upon the streets so as to entitle abutting lot owners to additional compensation; and hence they may not restrain the construction of such road, the company being liable at law, under the express terms of Code 1904, art. 23, § 255, for any injury arising in constructing or operating the road.—*Jeffers v. City of Annapolis*, 107 Md. 268, 68 Atl. 361. (See Code 1911, art. 23, § 273.) [Cited and annotated in 36 L. R. A. (N. S.) 730, on abutter's right to compensation for railroads in streets.]

(b) Although the fee of streets in cities and towns is in the abutting owners, it is subject to the paramount right of the public for all proper street uses which include the laying of gas and water pipes; but the only right the public acquires in ordinary country highways is the easement of passage and its incidents, and the laying of gas and water pipes therein is an additional servitude.—*Baltimore County Water & Electric Co. v. Dubreuil*, 105 Md. 424, 66 Atl. 439, 9 L. R. A. (N. S.) 684; *Same v. Gordon*, Id.

(c) The construction and operation of an electric railway upon a county highway does not impose an additional burden or servitude on the fee, for which the adjoining owner is entitled to compensation, pending which he may enjoin the construction of the tracks.—*Lonaconing, M. & F. Ry. Co. v. Consolidation Coal Co.*, 95 Md. 630, 53 Atl.

420. [Cited and annotated in 4 L. R. A. (N. S.) 204, on interurban trolley road as additional burden; in 36 L. R. A. (N. S.) 725, 729, on abutter's right to compensation for railroads in streets.]

(d) The laying by a street-railway company of a double track along a street so narrow that there will not be room for vehicles between the track and the curb will not be an additional servitude where the value of abutting property will be increased.—*Poole v. Falls Road Electric Ry. Co.*, 88 Md. 533, 41 Atl. 1069. [Cited and annotated in 1 L. R. A. (N. S.) 55, on effect of legislative authority on liability for private nuisance; in 25 L. R. A. (N. S.) 1268, on right of abutter to damages for special injuries where street railway not considered additional burden; in 36 L. R. A. (N. S.) 682, 725, 824, on right to compensation for railroads in streets.]

(e) On an issue as to whether the construction of a street railway will subject the street to a new use, the question is whether there will be an appropriation of the reversionary interest of the abutting owners in the bed of the street, and not whether there will be consequential damages to such owners.—*Poole v. Falls Road Electric Ry. Co.*, 88 Md. 533, 41 Atl. 1069. [Cited and annotated, see *supra*.]

(f) The use of a street for an electric railway does not impose an additional burden or servitude to that implied by the dedication.—*Green v. City & Suburban Ry. Co.*, 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288. [Cited and annotated in 36 L. R. A. (N. S.) 722, 801, 820, on abutter's right to compensation for railroads in streets.]

(g) Since act 1870, c. 370, confers upon the council of Baltimore full power to authorize the use of electricity for propelling street cars, and since this use does not impose a new servitude upon the streets, so as to entitle abutting owners to additional compensation, an injunction will not lie to restrain the said use.—*Koch v. North Ave. Ry. Co.*, 75 Md. 222, 23 Atl. 463. (See Balto. City Rev. Charter, § 6.) [Cited and annotated in 17 L. R. A. 477, 478, on what use of street or highway is additional burden; in 36 L. R.

A. (N. S.) 723, 804, on abutter's right to compensation for railroads in streets.]

(h) An ordinance of the city of Baltimore, giving a telephone company the right to maintain its poles in the footway adjoining plaintiff's warehouse, does not enlarge the authority conferred upon the company by Code 1888, art. 23, §§ 224, 232, which provide that telephone companies may construct their lines upon any streets, provided their poles and fixtures "do not interfere with the convenience of any landowner more than is unavoidable," and that said companies shall be responsible for any damage resulting from the erection or continuance of such fixtures.—*Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219. (See Code 1911, art. 23, §§ 359, 367.) [Cited and annotated in 24 L. R. A. 721, on telegraph or telephone as additional burden on highway.]

(i) Const. art. 3, § 40, provides that "the General Assembly shall enact no law authorizing private property to be taken for public use without just compensation \* \* \* being first paid or tendered." Code 1888, art. 23, §§ 224, 232, provide that telephone companies may construct their lines upon any streets, provided their poles and fixtures "do not interfere with the convenience of any landowner more than is unavoidable," that said companies shall be responsible for any damage resulting from the erection or continuance of such fixtures, and that the company may elect in any action for damages to have included the damages for allowing said fixtures permanently to remain; but no person is entitled to sue until after he has notified the company to remove the same. *Held*, that neither the rights of an abutter, nor those of one owning a fee in the roadbed, are abridged by said statutes, and that a telephone company must compensate for damages thereto resulting from the erection of its poles.—*Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219. (See Code 1911, art. 23, §§ 359, 367.) [Cited and annotated, see supra.]

(j) A horse-railway company being authorized by the Legislature to lay and operate their railway in a public street, an adjoining lot owner has no right to compensation as

for the taking of his property for a new and additional servitude.—*Hiss v. Baltimore & H. Pass. Ry. Co.*, 52 Md. 242, 36 Am. Rep. 371. [Cited and annotated in 17 L. R. A. 477, on what use of street or highway is additional burden; in 36 L. R. A. (N. S.) 719, on abutter's right to compensation for railroads in streets.] *Hodges v. Baltimore Union Pass. Ry. Co.*, 58 Md. 603. [Cited and annotated in 36 L. R. A. (N. S.) 719, 720, on abutter's right to compensation for railroads in streets.]

(k) A statute authorizing the use and occupation of a portion of a turnpike road for the purposes of a passenger railway does not create a new and distinct servitude, entitling the owners of land along the line of such turnpike, who have already been compensated for the condemnation of their property, to fresh compensation for such use.—*Peddicord v. Baltimore, C. & E. M. Pass. R. Co.*, 34 Md. 463. [Cited and annotated in 4 L. R. A. (N. S.) 204, on interurban trolley road as additional burden; in 36 L. R. A. (N. S.) 720, on abutter's right to compensation for railroads in streets.]

(l) The construction of a railroad track upon a portion of the bed of a turnpike road, in such a way as to leave abundant room for the vehicles of travelers who do not use the railroad, is not a new use, but only a modification of the old one.—*Peddicord v. Baltimore, C. & E. M. Pass. R. Co.*, 34 Md. 463. [Cited and annotated, see supra.]

(m) An alteration in the grade of a turnpike road, so as to permit the laying of a railroad track thereon, does not entitle the owners of land abutting on such road to compensation for damages resulting from such alteration, when damages were awarded and paid to them at the time the turnpike was first laid out and graded, and the alteration of grade is within the limitations of the original charter of the turnpike company.—*Peddicord v. Baltimore, C. & E. M. Pass. R. Co.*, 34 Md. 463. [Cited and annotated, see supra.]

(n) An act authorizing a turnpike corporation to make a turnpike road over an existing highway, and to occupy and grade the same, is constitutional and valid, although no provision is made for compensation to the

owners of the land over which the road passes; and the corporation is not liable in an action of trespass to such an owner, except for acts unnecessary and improper, for such occupation and grading.—*Douglass v. Boonsborough Turnpike Road Co.*, 22 Md. 219, 85 Am. Dec. 647.

## § 120.—Railroad rights of way.

### Annotation.

Damages to abutting owner for right to run interurban cars over the tracks of a street railway company.—15 L. R. A. (N. S.) 531, note.

(a) Where a telegraph line is constructed in good faith by some one in connection with a railroad company, or by the company itself, over its right of way, and for its use and benefit in the operation of its road, and is reasonably necessary for that purpose, such use of the right of way is within the scope of the original easement of the company, and the landowners are not entitled to additional compensation; but, where it is not constructed for this purpose, it will be considered a new easement, putting a new burden on the land, for which the landowner will be entitled to additional compensation.—*American Telephone & Telegraph Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. [Cited and annotated in 17 L. R. A. 480, on what use of street or highway is additional burden; in 36 L. R. A. (N. S.) 518, on uses to which railroad right of way may be devoted.]

(b) Casting an additional burden on land already subject to an easement, such as constructing a telegraph line along the right of way of a railroad company, is as much a taking for a public use as was the taking of it for the original easement, and courts of equity have jurisdiction to prevent it, by injunction, until compensation is paid or tendered.—*American Telephone & Telegraph Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. [Cited and annotated, see supra.]

(c) At the time a railroad company between Baltimore and Delta, in Pennsylvania, was completed, it had a telegraph line, constructed by D., under a contract to construct and maintain a line of telegraph and telephone along the company's right of way, for its use in the operation of its road. This line was still in operation, having been trans-

ferred to the railroad company, and was performing all its necessary work, when the company made a contract with defendant, a telegraph company organized for the purpose of establishing lines of communication at long distances by telegraph and telephone. By the contract defendant was granted the privilege of erecting and maintaining a telegraph and telephone line along the company's right of way, the company issuing no privileges that it did not have in the original contract with D., over the line built by him. Defendant placed along the right of way unnecessarily large poles, its preparations being much more extensive than was necessary for the business purposes of the railroad company. Held, that the construction of the new line of telegraph by defendant imposed an additional burden on the land through which the right of way passed, and the landowners were entitled to compensation.—*American Telephone & Telegraph Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. [Cited and annotated, see supra.]

(d) Rev. St. U. S. § 5263 (U. S. Comp. St. 1913, § 10072), providing that telegraph companies shall have the right to construct telegraph lines over military and post roads, and § 3964 (U. S. Comp. St. 1913, § 7456), declaring all the railroads in the county to be post roads, do not give telegraph companies the right to construct their lines over the right of way of railroad companies without first obtaining the consent of the owners of the right of way, or condemning the same for telegraph purposes, and making compensation therefor.—*American Telephone & Telegraph Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. [Cited and annotated, see supra.]

## § 121. Corporations and persons liable for compensation.

### Cross-Reference.

Liability to ascertain by property owner, see post, § 285.

### (C) MEASURE AND AMOUNT.

### Cross-Reference.

Measure and amount of damages recoverable in action by property owner, see post, §§ 301-305.

## § 122. Necessity of just or full compensation or indemnity.

**§ 123. Sufficiency of statutory provisions as to amount.**

*Cross-Reference.*

Nominal or substantial damages, see post, §§ 149, 203.

**§ 124. Time with reference to which compensation to be made.**

*Cross-Reference.*

Necessity of payment before taking, see ante, §§ 74-78.

(a) The measure of damages for the taking of land under the right of eminent domain is the actual selling value of the property at the time of its appropriation.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated in 42 L. R. A. 388, 393, on view by jury; in 61 L. R. A. 844, 845, on construction and operation of canals; in 9 L. R. A. (N. S.) 836, on right to set off benefits against damages on condemnation.]

**§§ 125-128. Nature and extent of right taken.**

*Annotation.*

Right to obstruct or destroy wharf rights in navigable waters for public purposes, without compensation.—34 L. R. A. (N. S.) 423, note.

Right to obstruct or destroy wharf rights in navigable waters for railroad without compensation.—34 L. R. A. (N. S.) 428, note.

Necessity of making compensation on laying out street across railroad property.—24 L. R. A. (N. S.) 1226, note.

What lands are to be deemed part of the tract damaged by taking a portion thereof under eminent domain.—57 L. R. A. 932, note.

**§ 129. Taking entire tract or piece of property.**

**§ 130.— Measure of compensation in general.**

**§ 131.— Value of land.**

*Cross-Reference.*

Instructions, see post, § 222.

(a) The true rule for assessing compensation to the owner of a lot lying on the bed of an unopened street is to value the land taken for the street precisely as if no such street was to be opened over it.—*McCormick v. City of Baltimore*, 45 Md. 512. [Cited and annotated in 14 L. R. A. (N. S.) 884, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee.]

(b) In an easement of damages for opening a street, the true rule is to value the lot

taken precisely as though no street was to be opened.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated in 26 L. R. A. 664, on effect of abandonment of highway; in 14 L. R. A. (N. S.) 878, 881, on effect on grantee's rights of call in deed for street or alley owned by grantor in fee; in 22 L. R. A. (N. S.) 9, on judicial power over eminent domain; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

(c) In determining the value of property condemned for public use, the jury should give the proprietor what, in their judgment, it would actually at the time sell for, and not what it might bring, or perhaps what it ought to bring, at some future time.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated in 42 L. R. A. 388, 393, on view by jury; in 61 L. R. A. 844, 845, on construction and operation of canals; in 9 L. R. A. (N. S.) 836, on right to set off benefits against damages on condemnation.]

**§ 132.— Growing trees and crops.**

*Cross-References.*

Crops on property not taken, see post, § 140.

Trees on property not taken, see post, § 141.

**§ 133.— Improvements and fixtures.**

*Cross-References.*

Water and gas plants, see ante, § 126.

When part of tract is taken, see post, §§ 136, 138.

*Annotation.*

Right to allowance for improvements made with knowledge that property would be required for public use.—36 L. R. A. (N. S.) 273, note.

Value of improvements made by one taking property by eminent domain, as an element of damages.—16 L. R. A. 805, note.

(a) Act 1817, c. 148, § 16, providing "that no person shall be entitled to damages for any improvement unless the same shall have been made or erected before the laying out or locating of such street," is unconstitutional and void because it denies to the owner the use of his land without compensation, and is in fact an act of confiscation.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated, see supra, § 131.]

### § 134.— Value for special use.

#### Cross-References.

Water rights, see ante, § 126.

Where part of tract is taken, see post, § 136.

#### Annotation.

Special value of property for the purpose for which it is taken, as an element of compensation in condemnation proceedings.—11 L. R. A. (N. S.) 996; 46 I. R. A. (N. S.) 392, notes.

Compensation allowable in eminent domain proceedings as affected by adaptability of property for uses other than that to which it is applied by owner.—15 L. R. A. (N. S.) 679, note.

Right to consider value of property as a part of a natural water power, in fixing compensation in eminent domain.—3 L. R. A. (N. S.) 912, note.

### § 135. Taking part of tract or property.

#### Cross-Reference.

Elements of compensation for injuries to part not taken, see ante, § 96.

### § 136.— In general.

(a) The just compensation required by the Constitution for property taken for public use includes the value of the part condemned and a due allowance for injury to the remainder.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(b) Damages for the occupation of land by a railroad for the construction of its tracks cannot be confined to the rental value of the land at market rates to other parties.—*Baltimore & O. R. Co. v. Boyd*, 73 Md. xiii, memorandum case, 20 Atl. 902, full report.

### § 137.— Land constituting single tract.

### § 138.— Injuries to part not taken.

(a) The measure of consequential injury to the residue of land not taken for public use is the difference in its value produced by the appropriation of the separated portion.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(b) A statute providing for the assessment of the value of land taken in condemnation proceedings will be held to include damages to the remainder as well.—*Ridgely v. City of Baltimore*, 119 Md. 567, 87 Atl. 909.

(c) Under Const. art. 3, § 40, providing that private property shall not be taken without compensation, and act 1912, c. 117, providing for appraisal of the value of prop-

erty described in the petition with the right of exception and to trial by jury, held not invalid as permitting the taking of property described in the petition without awarding compensation to other land injured by the taking.—*Ridgely v. City of Baltimore*, 119 Md. 567, 87 Atl. 909. (See Code [vol. 3], art. 33A.)

### §§ 139-142. Injuries to property not taken.

#### Cross-References.

Elements of compensation, see ante, §§ 95-113.

Right to compensation dependent on nature of injury, see ante, §§ 90-93.

#### Annotation.

Compensation for depreciation of land not taken on condemnation of land for school purposes.—48 L. R. A. (N. S.) 488, note.

(a) In determining the difference in value occasioned by the lowering of a street grade, the most reliable measure is the cost of restoring the remainder of the lot to its relative position with the street for advantageous use.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(b) The measure of damages to abutting property by the occupation of a street by a railroad is the diminution in the market, not the rental, value.—*Webb v. Baltimore & O. R. Co.*, 114 Md. 216, 79 Atl. 193.

(c) A proper method of ascertaining damage resulting to abutters by obstruction of access to their property through occupation of a street by a railroad was to ascertain what it would cost to restore the means of access by devoting part of the property to that purpose.—*Webb v. Baltimore & O. R. Co.*, 114 Md. 216, 79 Atl. 193.

(d) In an action by the owner of a lot abutting on an ungraded and unimproved street, dedicated to the city, but never accepted by it, to recover from a railroad company for excavating the street so as to render it impassable, the measure of damages is the difference between the value of the land with the railroad cut and its value with the street in its original state, without any power in plaintiff to grade, curb, or pave except in front of his own property.—*Baltimore Belt R. Co. v. McColgan*, 83 Md. 650, 35 Atl. 59. [Cited and annotated in 36 L. R. A. (N. S.)

797, on abutter's right to compensation for railroads in streets.]

(e) Where, in an action against an elevated railway company for damages to abutting property, it appeared that the property was used for, and adapted solely to the purposes of, a livery stable, plaintiff was entitled to an instruction that, if the value of his property as a livery stable was depreciated by the construction of the railway, he should be given damages therefor.—*Birch v. Lake Roland El. Ry. Co.*, 83 Md. 362, 34 Atl. 1013.

#### § 143. Temporary use of property.

*Cross-References.*

Nominal or substantial damages, see post, § 149.

Right to compensation for temporary use, see ante, § 114.

#### § 144. Deduction or set-off of benefits.

*Cross-References.*

Evidence as to benefits in action by property owner, see post, § 299.

Evidence as to benefits in condemnation proceedings, see post, § 204.

Instructions, see post, § 222.

Liability of property damaged by public improvement to assessment therefor, see "Municipal Corporations," § 441.

#### § 145.— In general.

*Annotation.*

Right to set off benefits against damages in eminent domain proceedings.—9 L. R. A. (N. S.) 781, note.

(a) In determining the damage to a lot occasioned by the lowering of a street grade, where the benefits to the land are separately assessed against the damages, the increase of value which will accrue from the improvement must be disregarded.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(b) In estimating the value of a lot to be condemned in proceedings for the opening of a street, the circumstances of the opening of the street should not be considered, but the owner of a lot lying on the bed of the street which is taken for public use should be awarded compensation for it, precisely as if no such street was opened over it.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated, see supra, § 131.]

#### § 146.— General or special benefits.

*Cross-Reference.*

General or special injuries, see ante, § 91.

(a) General benefits from construction of a railroad cannot be set off against damages to property from such construction, but only such benefits as are peculiar to the property.—*Lake Roland El. Ry. Co. v. Frick*, 86 Md. 259, 37 Atl. 650. [Cited and annotated in 9 L. R. A. (N. S.) 840, on right to set off benefits against damages on condemnation.]

#### § 147. Limited estates or interests in property.

*Cross-Reference.*

Nominal or substantial damages, see post, § 149.

(a) In an action by a lessee against an elevated railroad company for damages to the premises from the building and operation of defendant's road, an instruction that, if the jury shall find that the rental value of the premises has been diminished by the construction and use of defendant's road, plaintiff is entitled to recover, "and the measure of damages is the amount which the jury shall find said rental value has been so diminished," is not objectionable as charging that plaintiff might recover the damages suffered by his landlord.—*Lake Roland El. Ry. Co. v. Webster*, 81 Md. 529, 32 Atl. 186. [Cited and annotated in 36 L. R. A. (N. S.) 757, 776, on abutter's right to compensation for railroads in streets.]

(b) Where the landlord is under no covenant to repair, and the portion condemned is the front part of a house taken to widen the street, whereby an elevator necessary to the use of the building was also destroyed, the tenant should be allowed the cost of putting in a new front door and elevator.—*Gluck v. City of Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 550.

(c) The condemnation of a portion of leased land does not operate to abate any portion of the rent reserved, nor will it apportion the rent, and therefore the tenant should be allowed damages for the decreased rental value of the premises.—*Gluck v. City of Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 550.

(d) The measure of damages for injuries to a leasehold is the difference between the fair market value of the lessee's interest be-

fore and after the opening of the street.—*City of Baltimore v. Rice*, 73 Md. 307, 21 Atl. 181.

(e) In an action for injury to a leasehold interest by the opening of a street through the leased land the jury may consider the probability of a removal of plaintiff's term, where the evidence shows that this circumstance increased its market value.—*City of Baltimore v. Rice*, 73 Md. 307, 21 Atl. 181.

#### § 148. Interest as element of compensation.

##### *Cross-References.*

Attorney's fees, see post, § 265.

Interest on award, see post, § 247.

Time with reference with which computation to be made, see ante, § 124.

#### § 149. Amount awarded.

(a) Where the purchaser of a lot condemned for purposes of a street acquired by his purchase merely the naked fee, subject to an easement in the public, he can claim only nominal damages for its condemnation upon the opening of the street.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated, see supra, § 181.]

(b) Where a purchaser of a lot acquired the right to use a street in front of the lot as a street, a subsequent purchaser from the same vendor of the lot upon the bed of the street can claim only nominal damages on the opening of the street, because he acquired only a naked fee, subject to an easement for right of way, not only in a prior purchaser, but in the public.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276. [Cited and annotated, see supra.]

#### § 150. Inadequate or excessive compensation.

##### *Cross-Reference.*

Inadequate or excessive damages in action by property owner, see post, § 305.

#### (D) PERSONS ENTITLED AND PAYMENT.

##### *Cross-References.*

Nature of right to compensation awarded, see post, § 245.

Necessity of payment before taking, see ante, §§ 74-78.

Parties complainant or petitioners, see post, § 176.

Persons entitled to sue where property has been taken or injured, see post, § 284.

Right to compensation awarded, see post, § 245.

Indians, see "Indians," § 10.

Lien of creditor of testator on award to devisee, see "Wills," § 841.

Money in court as property which may be reached by creditors' suit, see "Creditors' Suit," § 8.

What law governs testamentary disposition of fund arising from condemnation proceedings, see "Wills," § 2.

#### § 151. Persons entitled.

#### § 152.— In general.

##### *Annotation.*

Rights of tenants and reversioners of property taken by eminent domain.—21 L. R. A. 212, note.

(a) Commissioners appointed by county commissioners to assess damages for a new road over the land of a certain owner verbally agreed to surrender an old road over his land to him in consideration of a release of damages for the new road; and, he having executed the release, they reported no damages to his land, and this report was adopted by the county commissioners, authorized to vacate a road only on petition. Held, that, the county commissioners subsequently reviving the old road, the owner of the land could not require the commissioners to pay damages.—*Barrickman v. Harford County Com'rs*, 11 G. & J. 50. [Cited and annotated in 26 L. R. A. 758, on mitigation of damages in eminent domain by preserving estate, rights, or easements to owner.]

#### § 153.— Vendor or purchaser.

##### *Cross-Reference.*

Purchasers pendente lite, see "Lis Pendens," § 3.

#### § 154.— Mortgagee or mortgagee.

##### *Cross-Reference.*

See post, §§ 155, 158.

##### *Annotation.*

Rights of mortgagee of premises taken by eminent domain.—18 L. R. A. 113, note.

(a) A mortgagee is within the protection of a provision of a city charter requiring the street commissioners, in condemning land, to ascertain the damages for which the owner or occupant of "any right or interest claimed in any ground or improvements" ought to be compensated.—*City of Hagerstown v. Groh*, 101 Md. 560, 61 Atl. 467.



### § 155.— Landlord or tenant.

#### Cross-References.

Measure and amount of tenant's compensation, see ante, § 147.

Appropriation of demised premises to public use as affecting liability for rent, see "Landlord and Tenant," § 191.

#### Annotation.

Right of tenant of property to compensation.—11 L. R. A. 839; 21 L. R. A. 217, notes.

(a) Where a city lot having a frontage of 28 feet and a depth of 123 feet was taken for public use, except the rear 33 feet thereof, which lot was subject to an irredeemable ground rent of \$300, under a lease for 99 years, renewable forever, and it appeared that the value of the ground rent on the entire lot, ascertained by capitalizing the \$300 at 3 per cent., was \$10,000, and that the value of the ground rent on the land not taken, ascertained by capitalizing it at 4 per cent., was \$7,500, and that the value of the remaining lot after the construction of the improvement for which the land was taken would be \$15,000, the ground rent should be apportioned, and the owners of the rent charge awarded such part of damages for the land taken as represented the capitalized rental value of the land taken.—*City of Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203; *Latrobe v. City of Baltimore*, Id.

(b) Where a portion of a city lot subject to an irredeemable ground rent under a lease for 99 years, renewable forever, was taken for public use, the fact that the portion not taken was sufficient security for the rent charge did not establish that the owners of the ground rent were not entitled to compensation.—*City of Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203; *Latrobe v. City of Baltimore*, Id.

(c) An advertisement of sale of land, which certain trustees had platted, recited as to a portion of the land that "the beds of streets included in the said 6 acres will be sold with the house, and the streets are to be held by the purchaser, until the same are legally opened." This portion was sold at private sale, and the deed described the land by outlines, and did not mention a certain street included therein, but recited that the land was conveyed "subject to the right of the purchasers of the other portions of the

trust estate, to the use of all the streets \* \* \* in any manner intersecting or bounding upon the above-described parcel of land, whenever the same shall be legally condemned and opened." A subsequent deed conveyed the land subject to the same reservations. A lease of the land by the last grantees, which referred to streets as boundaries, recited that it was not intended to dedicate the streets to the public, but that they were referred to for purposes of description merely. Held, that the lessees acquired no easements under the lease in the bed of the streets which would deprive the owners of the land of their right to compensation when the streets should be opened, or which would reduce the amount of their damages.—*Pitts v. City of Baltimore*, 73 Md. 326, 21 Atl. 52.

(d) The charter of a railroad corporation provided that the corporation or its agents might agree and contract with the owner or owners of any land, earth, timber, gravel, etc., and that, if the parties could not agree, a jury should be impaneled to assess damages and make condemnation; and, further, that the inquisition should describe the property taken, or the bounds of the land condemned, and the quantity or duration of the interest in the same, valued for the company. Held, that in the word "owner" is included every person having any interest capable of being injured by the construction of the road; that a lessee for years had such interest, which could not be affected by a subsequent agreement between his lessor and the company made without his assent; and that, in such case, the compensation must be apportioned, the lessor and lessee each to receive his separate award of damages upon a separate inquiry, upon his own complaint.—*Baltimore & O. R. Co. v. Thompson*, 10 Md. 76. [Cited and annotated in 18 L. R. A. 115, on right of mortgagee in eminent domain cases; in 21 L. R. A. 219, on right of tenants and reversioners of property taken by eminent domain.]

### § 156.— Executors, administrators, devisees, or heirs.

#### Cross-Reference.

Right to compensation as assets of estate, see "Executors and Administrators," § 49.

### § 157. Apportionment.

#### *Cross-Reference.*

Requisites of award, see post, § 234.

(a) Where, pending proceedings to condemn part of two lots belonging to B. for a street, the lots were conveyed, one to the intestate of plaintiff, and the other to defendant, and one of the lots prior to the opening of the street was a back lot without any outlet on an established street, while the other abutted on one of the principal streets of the city, plaintiff and defendant were entitled to share the damages awarded to B. in gross for the land taken opposite both lots, and were chargeable with the benefits assessed on the same principle and in the same proportion that it should have been originally awarded to them had they owned the land taken and the lots appurtenant thereto when the proceedings were instituted, viz., the value of the land taken less the benefits accruing to the adjacent land from the opening of the street.—*Clark v. Meyerdirck*, 107 Md. 63, 68 Atl. 141.

### § 158. Determination of conflicting claims.

#### *Cross-Reference.*

Estoppel to deny title of defendant by bringing proceedings to condemn, see "Estoppel," § 68.

(a) In a suit by a mortgagee to establish his claim to the damage fund awarded in condemnation proceedings affecting the property, the mortgagor is a necessary party, especially where the extent of the mortgagee's claim depends upon the state of accounts between him and the mortgagor.—*City of Hagerstown v. Groh*, 101 Md. 560, 61 Atl. 467.

(b) A mortgagee who is satisfied with the award made in condemnation proceedings affecting the property may file a bill in equity to establish his claim against the proceeds of the fund awarded as damages.—*City of Hagerstown v. Groh*, 101 Md. 560, 61 Atl. 467.

(c) Under act 1892, c. 165, Balto. City Charter, § 827, providing that when property shall have been condemned for the city, and in consequence of conflicting claims, refusal to accept, or any other cause, the money cannot be safely paid to any person, the

mayor and city council may file a bill in equity, and the court may decree that the money be paid into court, the court has jurisdiction of a bill showing that defendant claimed that a tract owned by him and condemned extended into a street, and included a portion of such street which the city claimed, and that he refused to accept the sum awarded for so much of such tract as was not in the street.—*Gardiner v. City of Baltimore*, 96 Md. 361, 54 Atl. 85. (See Balto. City Rev. Charter, § 827.)

(d) Where property claimed adversely by different persons is condemned by a city for a street, the title to the property passes to the city; and an action to determine which of such claimants is entitled to the award therefor is not an action to determine title to land, and may be prosecuted in equity.—*Gardiner v. City of Baltimore*, 96 Md. 361, 54 Atl. 85.

(e) Evidence in an action to determine conflicting claims to money awarded for condemnation of a tract of land for a street examined, and held to justify a finding that a certain portion of the tract had previously been dedicated as a street, and that defendant had no right thereto.—*Gardiner v. City of Baltimore*, 96 Md. 361, 54 Atl. 85.

### §§ 159-162. Duties as to payment.

#### *Annotation.*

Distribution of award in condemnation of land subject to an assessment for public improvements.—45 L. R. A. (N. S.) 451, note.

### § 163. Requisites and sufficiency of payment.

### § 164. Operation and effect of payment.

#### *Cross-References.*

As defense to action by property owner, see post, § 281.

Estoppel to assert title to property, see "Estoppel," § 92.

### § 165. Recovery of payments.

## III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

#### *Cross-References.*

Right of property owner to compel proceedings to assess compensation, see post, § 269.

Consolidation of actions, see "Action," § 57.

Following procedure and practice of state courts in federal courts, see "Courts," § 334.

Statutory provisions as denial of equal protection of laws, see "Constitutional Law," § 228.

Statutory provisions as deprivation of property without due process of law, see "Constitutional Law," § 281.

Stay of proceedings, see "Action," § 69.

## § 166. Nature and form of proceeding.

### Cross-Reference.

Statutory provisions, see post, § 167.

(a) The transaction of estimating damages for condemnation of part of a lot for a street, including the damage to the part left, and that of assessing the benefits to the part left from the improvement, though in the same proceeding, are separate and distinct.—*City of Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331.

(b) A condemnation proceeding for the acquisition of private property for public use is a proceeding at law, contemplating a judgment in rem; and act 1912, c. 117, regulating the procedure for the condemnation of private property and providing a jury trial, did not change the proceeding to an equitable one.—*Ridgely v. City of Baltimore*, 119 Md. 567, 87 Atl. 909. (See Code [vol. 3], art. 33A.)

## § 167. Statutory provisions and remedies.

### Cross-References.

Effect of partial invalidity of statute, see "Statutes," § 64.

Requirement of trial by jury, see "Jury," § 19.

(a) Act 1912, c. 117, §§ 3-5, relating to condemnation proceedings is constitutional.—*Ridgely v. City of Baltimore*, 119 Md. 567, 87 Atl. 909. (See Code [vol. 3], art. 33A, §§ 3-5.)

(b) Statutes conferring powers to be exercised for the public benefit as condemnation statutes held to be construed liberally and in the light of the Constitution to promote the public interest as well as to secure a just compensation for property taken.—*Ridgely v. City of Baltimore*, 119 Md. 567, 87 Atl. 909. (See Code [vol. 3], art. 33A.)

(c) Act 1912, c. 117, providing for condemnation, is not unconstitutional.—*Pitznogle v. Western Maryland R. Co.*, 119 Md.

673, 87 Atl. 917, 46 L. R. A. (N. S.) 319. (See Code [vol. 3], art. 33A.)

## § 168. Right to institute proceedings.

### Cross-References.

Allegations in complaint, see post, § 191.

Delegation of power of state, see ante, § 10.

Effect of alienage of person seeking to take property by eminent domain, see "Aliens," § 10.

Evidence as to right to take, see post, § 196.

Filing map, plan or survey as condition precedent, see post, § 186.

(a) As act 1904, c. 56, empowering the Western Maryland Railroad Company to construct bridges across the Chesapeake & Ohio Canal, and providing for condemnation of property of canal company, authorizes the railroad company "to condemn all such easements of crossings," it should be permitted to institute appropriate condemnation proceedings, without interference from the trustees appointed by the Circuit Court having control of said canal.—*Chesapeake & O. Canal Co. v. Western Maryland R. Co.*, 99 Md. 570, 58 Atl. 34.

## § 169. Conditions precedent in general.

(a) Though under Code, art. 23, §§ 413-468, the Public Service Commission has the right to determine the method of railroad crossings, yet before such determination, under an order of the Commission giving it general authority to construct, a railroad could condemn a crossing, and the Commission could afterwards determine the character of its construction.—*City & S. R. Co. v. Washington, W. & G. R. Co.*, 122 Md. 655, 90 Atl. 521.

## § 170. Inability to agree with owner.

### Cross-References.

Allegations in complaint, see post, § 191.

Authority of city attorney to give consent of city to condemnation of municipal property, see "Municipal Corporations," § 225.

## § 171. Defenses and objections.

### Annotation.

Fraud in proceedings for opening or extending highway as defense to proceedings to acquire property for that purpose.—7 L. R. A. (N. S.) 639, note.

(a) A city cannot object to condemnation proceedings by a railroad company for a right of way across its streets, on the ground

that the Public Service Commission has not granted permission for the construction of the entire road, where the commission has permitted the construction of the part running through the city.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 120 Md. 128, 87 Atl. 828.

## § 172. Jurisdiction.

### Cross-References.

Concurrent and conflicting jurisdiction, see "Courts," §§ 472, 475, 489, 493.

Courts invested with original jurisdiction, see "Courts," § 142.

Jurisdiction of federal courts of condemnation proceedings by the secretary of war, see "Courts," § 302.

Jurisdiction of justices' courts as affected by questions involving title to land, see "Justices of the Peace," § 36.

Removal of cause from state to federal court, see "Removal of Causes," §§ 4, 26, 30, 74, 79, 86, 113, 114, 119.

## § 173. Venue.

### Cross-Reference.

Change of venue, see "Venue," § 36.

## § 174. Time for application.

### Annotation.

Time within which power to condemn land and water rights must be exercised.—58 L. R. A. 258, note.

## §§ 175-178. Parties.

### Cross-References.

Persons entitled to compensation, see ante, §§ 152-156.

Waiver of service, see ante, §§ 79, 80.

## § 179. Process or notice.

### Cross-Reference.

Statute requiring notice to landowners as impairing obligation of contract, see "Constitutional Law," § 133.

### Annotation.

Notice in proceedings to establish drains and sewers.—60 L. R. A. 209, note.

Notice in proceedings to acquire water supply.—58 L. R. A. 253, note.

## § 180.—Necessity.

### Annotation.

Necessity of providing for notice of hearing on question of damages or compensation.—4 L. R. A. (N. S.) 169, note.

(a) Code 1888, art. 23, § 167, provides that, if a railroad company cannot agree with the owner of land needed for the construction of its road, a jury of 20 shall be summoned to meet on the premises, when the owner and the company shall each strike off 4 names, and the remaining 12 shall determine the amount of damages the owner is entitled to.

*Held*, that the statute implies that notice shall be first given by the company.—*Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. 74. (See Code 1911, art. 23, §§ 269, et seq.) [Cited and annotated in 4 L. R. A. (N. S.) 172, on necessity for provision for notice of hearing as to damages or compensation in condemnation.]

(b) Under the statutes regulating the condemnation of land for the construction of a railroad, no notice is required to be given to the landowner, either of the original application to the justice of the peace by the company seeking the condemnation, or of the application of the court for a new inquisition after the first has been set aside.—*George's Creek Coal & Iron Co. v. New Central Coal Co.*, 40 Md. 425. (See Code, art. 23, §§ 269, et seq.)

## § 181.—Form, requisites, and sufficiency.

(a) If there is a substantial conformity between the notice of an application to condemn land and open a street, and the ordinance subsequently passed, the notice is sufficient.—*Baltimore v. Little Sisters of the Poor*, 56 Md. 400.

## § 182.—Service.

(a) The notice must be of such reasonable time as will allow the owner an opportunity to offer such evidence as may be necessary on the question of damages.—*Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. 74. [Cited and annotated in 4 L. R. A. (N. S.) 172, on necessity for provision for notice of hearing as to damages or compensation in condemnation.]

(b) The street law of Baltimore county (act 1876, c. 399), which provides that the examiner for the opening of a thoroughfare shall "give at least ten days' notice," by publication in two or more newspapers, that application has been made to open the street and that he shall give 15 days' notice in two or more newspapers that the statement of benefits and damages and an explanatory plat of the work are ready for examination, and that he will hear objections thereto at a designated time and place, requires, in terms, but one publication of each notice in each of the newspapers, and it is discretion-

ary with the examiner whether any additional publication shall be made.—*Philadelphia, W. & B. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1.

### §§ 183-185. (See Analysis.)

### § 186. Maps, plans, or surveys.

#### Cross-References.

Description of property in process or notice, see ante, §§ 179-184.

Filing as constituting taking of property, see ante, § 63.

Necessity of description of route in articles of incorporation, see ante, § 168.

### § 187. Possession and use pending proceedings.

#### Cross-References.

Effect of award or judgment as to right to possession, see post, § 244.

Necessity for payment of compensation before taking, see ante, §§ 73-78.

Time of passing of title or right, see post, § 320.

Protection of property pending condemnation proceedings, see "Injunction," § 38.

### § 188. Bond or deposit as security.

#### Cross-References.

Entry on giving security, see ante, § 77.

Entry on making deposit or payment into court, see ante, § 76.

### §§ 189-195. Pleading.

#### Cross-References.

Description of property in process or notice, see ante, §§ 179-184.

Conclusiveness of allegations, see "Pleading," § 36.

(a) In condemnation proceeding, wherein a railroad sought to condemn an easement over a city street, the answer of the city contesting the railroad's right to condemn, and the fact that the proceedings had been in court for over 18 months, was sufficient to show that the parties were unable to agree.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 122 Md. 660, 90 Atl. 515.

(b) In proceedings to condemn a tract of land bordered on the south by an avenue and on the west by a street, the tract was described as beginning at a point (on the south boundary) where the railroad company's line crossed the dividing line between the tract and the land of another person, and running thence "with said dividing line" to the street. The westerly, northerly, and easterly lines were then described; the calls going to a point on the line between the

tract and the lands of the other person, and thence "with said line" to the beginning. The description thus treated the avenue as belonging to such other person. *Held*, that the owner's reversionary interest to the center of the avenue was not included.—*Shipley v. Western Maryland Tidewater R. Co.*, 99 Md. 115, 56 Atl. 968.

(c) A demurrer to a plea that counts on the rescission of the order of the county commissioners confirming the examiner's award on the opening of a street, and that also sets out the petition on which the rescinding order was made, does not admit an allegation in the petition that the notice of application for the opening of the street had not been sufficiently published.—*Philadelphia, W. & B. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1.

### § 196. Evidence as to right to take.

(a) In condemnation proceedings by a railroad seeking to condemn an easement over a city street wherein the city contested the right of the railroad to condemn because its charter was invalid in that it failed to properly designate termini within the state, the court properly permitted the officers of the railroad company to explain the route and to give the approximate distances between the different points designated.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 122 Md. 660, 90 Atl. 515.

### § 197. Dismissal before hearing.

### § 198. Hearing and determination as to right to take.

(a) Whether it is necessary for a railroad to condemn any particular property is for the court and not the jury, excepting in so far as the Public Service Commission may pass upon that question under Code, art. 23, § 438.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 122 Md. 660, 90 Atl. 515.

(b) Where a mining company seeks to condemn land for a railroad to transport its coal, the question whether there is a reasonable necessity for such condemnation is one for the court.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated in 20 L. R. A. 438, on

power to condemn right of way for track to private establishment; in 1 L. R. A. (N. S.) 977, on exercise of eminent domain for mining road; in 22 L. R. A. (N. S.) 17, 24, 31, 32, 51, 56, 60, 62, 111, 123, 130, 153, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad for spur or lateral track.]

### § 199. Evidence as to compensation.

#### Cross-Reference.

Evidence as to right to take, see ante, § 196.

### § 200.— Presumptions and burden of proof.

#### Cross-Reference.

On trial de novo on appeal, see post, § 261.

### § 201.— Admissibility in general.

(a) In proceedings to condemn land for a street, evidence that, prior to the opening thereof, the whole tract was assessed for taxes, but after it was opened the assessment was removed from the bed of the road, but increased as to the remainder of the land, held irrelevant.—*City of Baltimore v. Yost*, 121 Md. 366, 88 Atl. 342.

(b) In condemnation of a part of a lot for street improvement, the notices requiring a regrading and repaving of the sidewalk in front of the premises, which was already owned by the city, are admissible to show the proposed grade to which the part to be taken will be reduced.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

### § 202.— Value of property.

#### Cross-References.

On question of damages, see post, § 203.  
Admissions in valuing property for taxation, see "Evidence," § 215.

Evidence of price paid for adjoining property, see "Evidence," § 142.

Hearsay evidence as to price or value of property in general, see "Evidence," §§ 317, 323.

Opinion evidence in general, see "Evidence," §§ 488, 524.

Relevancy of evidence of value or market price of property in general, see "Evidence," § 113.

#### Annotation.

Evidence as to price paid for other property by party seeking to condemn property for public use.—43 L. R. A. (N. S.) 985, note.

### § 203.— Damages.

#### Cross-References.

On question of value, see ante, § 202.

Opinion evidence in general, see "Evidence," §§ 497, 501, 533.

(a) The effect on lots theretofore suitable for dwelling houses, of the construction in a street of an elevated railroad, cannot be shown by its effect on business property several blocks distant.—*Lake Roland El. Ry. Co. v. Frick*, 86 Md. 259, 37 Atl. 650. [Cited and annotated in 9 L. R. A. (N. S.) 840, on right to set off benefits against damages on condemnation.]

### § 204.— Benefits.

#### Cross-Reference.

See ante, § 203.

### § 205.— Weight and sufficiency.

(a) Where, in a proceeding to condemn certain dock and wharf rights, compensation was allowed for loss of claimant's right to dock or moor vessels in front of the portion of its wharf taken before the condemnation proceedings, it was not error for the court to refuse to allow compensation for loss of emoluments to arise from wharfage; there being no evidence that claimant had ever received revenues from such source.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 439; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. [Cited and annotated in 25 L. R. A. (N. S.) 259, 261, on division of water front, alluvion, and flats between adjoining riparian owners; in 34 L. R. A. (N. S.) 432, on right to obstruct wharf rights in navigable waters for public purposes, without compensation.]

### § 206. Mode of assessment of compensation.

### § 207.— In general.

### § 208.— Arbitration.

#### Cross-Reference.

Proceedings on arbitration, see post, § 212.

### § 209.— Trial by jury.

#### Cross-References.

Proceedings on assessment by jury, see post, §§ 214-223.

Trial by jury on appeal from award of commissioners, see post, § 269.

General constitutional right to trial by jury, see "Jury," §§ 19, 28, 31, 35.

(a) The Legislature in exercising the right of eminent domain cannot fix the compensation to be paid; but such compensation, in case of disagreement between the parties, must be awarded by jury.—*Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 60 Md. 263. [Cited and annotated in 52 L. R. A. (N. S.) 853, on constitutionality of statute empowering public board to determine compensation in condemnation proceedings.]

**§ 210.—Assessment by commissioners, appraisers, or viewers.**

*Cross-Reference.*

Proceedings on assessment by commissioners, appraisers or viewers, see post, §§ 225-239.

**§ 211.—Trial by court or reference.**

*Cross-Reference.*

Proceedings on assessment, by court or referee, see post, § 240.

**§ 212. Arbitration and award.**

*Cross-Reference.*

Conclusiveness and effect of judgment, see post, § 243.

**§ 213. Assessment by jury.**

*Cross-References.*

Implied repeal of special by general act relating to juries of freeholders, see "Statutes," § 162.

Number of peremptory challenges, see "Jury," § 136.

Trial in vacation, see "Courts," § 69.

**§ 214.—Application and proceedings thereon.**

**§ 215.—Qualifications of jurors.**

*Annotation.*

Interest which will disqualify one to serve as commissioner or juror in eminent domain proceedings.—47 L. R. A. (N. S.) 151, note.

**§ 216.—Summoning and impaneling jurors.**

*Cross-References.*

Constitution of jury as denial of right to trial by jury, see "Jury," § 33.

Review of proceedings dependent on prejudicial nature of error, see "Appeal and Error," § 1045.

(a) Under act 1912, c. 117, providing that condemnation proceedings shall be before a jury in court instead of a sheriff's jury, the jury need not be part of the venire drawn for regular jury terms, but may be drawn by the sheriff, between jury terms.—*Pitz-*

*nogle v. Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319. (See Code [vol. 3], art. 33A, § 6.)

(b) The expression "jury" used in Const. art. 3, § 40, providing that private property shall not be taken for public use without just compensation, as agreed upon by the parties or awarded by the jury, does not necessarily refer to the regular jury drawn during jury terms, but means any jury duly summoned to hear the special proceedings, this being obviously true in view of the infrequency of jury terms in county districts.—*Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319.

(c) In condemnation proceedings, where a special jury was summoned, because a jury term was distant, the sheriff's return, merely stating that he had summoned the jurors as commanded, will not invalidate it or affect the eligibility of the jurors because not containing their names; it not appearing that the defendant demanded the names of the jurors summoned.—*Pitznogle v. Western Maryland R. Co.*, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319.

(d) An inquisition in a condemnation proceeding which had been taken and returned to the Superior Court was set aside by an order of that court which directed a new inquisition to be taken in the manner prescribed by plaintiff's charter, and directed the sheriff to summon a jury to meet on the land described in the original application and warrant thereto attached. Plaintiff applied anew to a justice of the peace to issue his warrant to the sheriff to summon a jury, etc., and the justice issued his warrant requiring the sheriff to proceed just as the court's order directed, using substantially the same language. The inquisition recited that it was taken on the application of plaintiff to the justice of the peace, while the sheriff's return certified that "in obedience to the foregoing warrant he summoned the jurors," etc. Plaintiff's charter provided for an application to a justice of the peace, who was required to issue his warrant to the sheriff, directing him to summon and impanel the jury, take the inquisition, and return it to the clerk of the court. *Held*, that, as the sheriff's return showed that he

had done all that the order of court directed him to do, the jurisdiction of the court was not ousted because the sheriff's return and the inquisition erroneously referred to the warrant and application, instead of the order of court, as authority, nor because an unnecessary second application was made to the justice.—*Textor v. Baltimore & O. R. Co.*, 107 Md. 221, 68 Atl. 493.

(e) Under the above facts the sheriff having both the warrant and the order, the court could have authorized him to amend his return so as to refer to the order of court.—*Textor v. Baltimore & O. R. Co.*, 107 Md. 221, 68 Atl. 493.

(f) In proceedings by a mining company to condemn land for a railroad, the circuit judge directed the sheriff to summon a jury of 20 persons "above the age of 21 years and qualified to act as jurors under the laws of this state," who were not related to either of the parties, nor interested in the land, nor stockholders in either of the corporations interested, the direction quoted being a requirement of Code 1888, art. 23, § 167, as amended by act 1896, p. 240, c. 151, whereas Code 1888, art. 23, § 248, relating to condemnation by mining companies and similar corporations, provides merely that the judge shall direct the sheriff to summon a jury of 20 persons not related to the owner of the land, nor interested therein, nor stockholders in the company. There was nothing to show that any juror summoned was disqualified under § 248. *Held*, that the defect in the warrant for the jury was no such jurisdictional defect as would deprive the court of jurisdiction to ratify the inquisition of the jury summoned.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. (See Code 1911, art. 23, §§ 269, 399.) [Cited and annotated in 22 L. R. A. (N. S.) 130, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad for spur or lateral track.]

(g) Where, in proceedings by a mining company to condemn land for a railroad, the jurors for the inquisition were irregularly summoned, the remedy of a party was by a challenge to the array before the jurors

were sworn, and, on the overruling of the challenge, by exceptions to the ratification of the inquisition based on that ground.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. [Cited and annotated, see supra.]

(h) A party to proceedings by a mining company to condemn land for a railroad, who participated in the impaneling of the jury by striking off four names and by entering no challenge, waived any irregularity in the summoning and impaneling of the jury.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. [Cited and annotated, see supra.]

(i) That the sheriff who summoned the jury to assess damages for property taken for public use may have been prejudiced in favor of one of the parties to the controversy is not per se sufficient to set aside the inquisition, if it appears that no injustice has been done.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated in 42 L. R. A. 388, 393, on view by jury; in 61 L. R. A. 844, 845, on construction and operation of canals; in 9 L. R. A. (N. S.) 836, on right to set off benefits against damages on condemnation.]

#### § 217.—Oath of jurors.

(a) Under act 1825, c. 180, § 13, providing that the sheriff shall summon 18 jurors to make inquisition of the value of property taken for a canal, and that he shall administer an oath to every jurymen who shall appear and shall return the inquisition to the clerk, it need not expressly state that an oath was administered to each one who appeared, if it appears generally by the return that they were sworn substantially in compliance with the statute.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra, § 216.]

#### § 218.—Compensation of jurors.

#### § 219.—Conduct of proceedings in general.

#### § 220.—View.

##### *Cross-Reference.*

Instructions on effect of view as evidence, see post, § 222.

(a) On the question of damages from condemnation of part of a lot for a street, a



view by the jury, under Balto. City Code 1906, Charter, § 179, is entitled to considerable effect, especially where the part of the lot left is of a peculiar shape and position.—*City of Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331. (See Balto. City Rev. Charter, § 179.)

(b) In assessing damages in condemnation proceedings the jury can view the premises, and draw their conclusions from their own observations, as well as from the testimony offered.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see *supra*, § 216.]

### § 221.— Questions for jury.

#### Cross-References.

On hearing and determination as to right to take, see *ante*, § 198.

On trial de novo on appeal, see *post*, § 261.

Trial by jury on appeal from award of commissioners, see *post*, § 239.

(a) Evidence, in proceedings to determine damages from condemnation of part of a lot for a street, *held* sufficient to go to the jury as to damages to the remainder of the lot, by reason of the taking.—*City of Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331.

### § 222.— Instructions.

(a) An instruction as to measure of benefits to part of a lot, the balance of which had been condemned for a street, *held* not to limit the jury to benefits from acquisition of title by the city, independent of its using the land for opening a street.—*City of Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331.

(b) An instruction as to damages from condemnation of part of a lot for a street *held* proper.—*City of Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331.

(c) In view of other instructions, *held*, there was no prejudice from an instruction stating nothing as to measure of damages, except that the jury should award, in addition to the fair market value of the part of the lot condemned, any damages to the remainder of the lot from the taking.—*City of Baltimore v. Megary*, 122 Md. 20, 89 Atl. 331.

(d) It is the duty of the court to inform the jury what is the proper rule by which the damages in condemnation proceedings shall

be fixed.—*Ridgely v. City of Baltimore*, 119 Md. 567, 87 Atl. 909.

(e) In an action against an elevated railway company for damages to abutting property, plaintiff being entitled to recover for damages to the rental as well as to the fee value, it was error to refuse to charge that the measure of plaintiff's damages was the difference between the rental value of the premises before the construction of the railway and its rental value as affected by the railway.—*Birch v. Lake Roland El. Ry. Co.*, 83 Md. 362, 34 Atl. 1013.

(f) An instruction that reasonable damages for occupation of land by a railroad for construction of its tracks would be the fair rental value of the ground during the time and for the purpose it was occupied is not misleading when coupled with further instructions not to include damages for the original construction of the roadbed, nor damages for the fee-simple value of the land, nor to consider the peculiar value of the land to the railroad company, nor its necessity as part of its line, nor the profits derived from its use.—*Baltimore & O. R. Co. v. Boyd*, 73 Md. xiii, memorandum case, 20 Atl. 902, full report.

### § 223.— Verdict and findings.

#### Cross-Reference.

Affidavits of jurors to impeach verdict, see "Trial," § 344.

(a) In conformity to Code 1888, art. 23, § 167, the jury, in railroad condemnation proceedings, was sworn to value the damages which the landowner would sustain by the occupation of a tract bordering on a street, and so described as to omit the reversionary interest which the owner had to the center of the street. The jury assessed "the said damages" for the use "of said parcel of land." The owner's bill for an injunction alleged that the line of railroad would cross the street on an embankment so high as to destroy its use as a thoroughfare, and cut off his easement of access to the remainder of his premises, which were not condemned. *Held*, that the assessment by the jury did not include damages for the taking of the street.—*Shipley v. Western Maryland Tidewater R. Co.*, 99 Md. 115, 56 Atl. 968. (See Code 1911, art. 23, § 269.)

(b) Under Code 1888, art. 23, § 167, relating to condemnation proceedings by railroad companies, and providing that the inquisition shall in all cases describe the property taken, or the bounds of the land condemned, and the quality or duration of interest in the same, valued for the company, proceedings to condemn land bordering on a street will not include the owner's reversionary interest to the center of the street, unless it is affirmatively described.—*Shipley v. Western Maryland Tidewater R. Co.*, 99 Md. 115, 56 Atl. 968. (See Code 1911, art. 23, § 269.)

(c) An inquisition in condemnation proceedings required the railroad seeking to condemn the land to pay a certain sum of money and to build a trestle, such as was then on the condemned land, for the landowner's use, and connect it with its own and another railroad, and, in case of noncompliance with this condition, to pay an additional sum of money. *Held*, in an action upon this inquisition, that, although the jury could only award a money compensation without the assent of the parties, yet such an award as this was valid if assented to or ratified by the parties, and it made no difference that the structure to be erected was not to be wholly on the condemned land.—*Pennsylvania R. Co. v. Reichert*, 58 Md. 261. [Cited and annotated in 26 L. R. A. 756, on mitigation of damages in eminent domain by preserving estate, rights, or easements to owner.]

(d) In a proceeding to condemn land for a canal, under act 1825, c. 180, § 13, which provides for an inquisition to value the lands taken, which the jury of inquisition shall describe and ascertain the bounds of, where the description is uncertain, the court, on hearing of objections to the affirmance of the inquisition, cannot, without consent, correct such description, nor can it be effected by tender of a deed correcting it without the assent of the adverse party.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated in 42 L. R. A. 388, 393, on view by jury; in 61 L. R. A. 844, 845, on construction and operation of canals; in 9 L. R. A. (N. S.) 836, on right to set off benefits against damages on condemnation.]

(e) Under act 1825, c. 180, § 13, providing

for an inquisition to ascertain the value of lands taken for a canal and "all damages the owner shall sustain," an inquisition finding the entire value of the fee in the present proprietor is not invalidated by a failure to value the damage to outstanding or expectant estates.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

(f) Under act 1825, c. 180, § 13, providing that an inquisition shall be taken to value the land taken for a canal and find "all damages the owner shall sustain," a finding of the entire damage in the owner of the fee, and an indorsement on the inquisition of the estimated value of existing terms for years therein by consent of the parties, is a valid finding of the value of such terms, and is available to the owners.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

(g) Under act 1825, c. 180, § 13, requiring that an inquisition taken by the sheriff on the value of lands taken for public use in constructing a canal shall be returned "Signed" by the sheriff and at least 12 of the jurors, where the purported inquisition was returned signed by the requisite jurors, and following the names was a certificate, signed by the sheriff, authenticating the signatures of the jurors and the inquisition, and at the same time was also filed a signed return of the warrant of inquest and proceedings thereunder, both papers are to be construed together, and, as such, indicate a substantial signing of the inquisition by the sheriff.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

(h) Under act 1825, c. 180, § 13, providing that a warrant shall issue from a justice of the peace to the sheriff to summon a jury of inquisition to value lands taken for a canal, and that, having taken such inquisition, the sheriff shall return the same to the clerk, it is unnecessary for the inquisition to set out the warrant to the sheriff and the precise facts showing the jurors to have been competent and legally qualified, or that they were duly sworn, and especially so where a paper filed with the inquisition returned, and constructively a part thereof, exhibits such

facts.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

(i) Where other persons than the particular proprietor in the case have an interest in the land condemned, it is not a valid objection that such interest does not appear on the face of the inquisition.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

(j) The description by the jury in their inquisition of the first line of a parcel of land as "beginning at the lands of H. S., and running thence down the canal, and parallel thereto," no natural boundary, plat, or diagram being referred to, as designating the spot at which the starting point on the land was situated, was sufficient.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

#### § 224. Setting aside verdict and new trial.

(a) Under the act regulating the condemnation of lands for the construction of railroads, the power of the court to direct another inquisition to be taken after the first has been set aside may be carried out by an order directed directly to the sheriff. A warrant is not essential.—*George's Creek Coal & Iron Co. v. New Central Coal Co.*, 40 Md. 425. (See Code, art. 23, §§ 269, et seq.)

(b) Conduct of the sheriff who impaneled a jury to view and assess compensation for property taken for a public use, as required by act 1825, c. 180, tending to influence the award made, will not be ground for setting aside the inquisition, where it appears that no harm was wrought thereby.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra, § 223.]

(c) Under act 1825, c. 180, relating to public improvements, canals, etc., and providing for an inquisition to ascertain the damages resulting from the appropriation of private property and for a return thereof to the clerk of the county to be affirmed by the court, the court may, on hearing a motion to vacate the inquest and objections to its affirmance, hear, as cause against the affirmance of the inquisition, evidence not presented to the jury, and which might have actu-

ated them to a different finding.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

(d) The objection that a juror is related to the parties, or interested in the land to be condemned, should be taken by way of challenge before he is sworn, and comes too late upon a motion to vacate the inquisition.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see supra.]

#### § 225. Assessment by commissioners, appraisers, or viewers.

##### Cross-References.

Appointment and removal in federal court after removal of cause from state court, see "Removal of Causes," § 113.

Mandamus to compel signing of report, see "Mandamus," § 73.

##### Annotation.

Interest which will disqualify one to serve as commissioner or juror in eminent domain proceedings.—47 L. R. A. (N. S.) 151, note.

(a) Where the owner of land taken for a new road agreed that the commissioners appointed to assess the damages might report no damages if the county commissioners would surrender to him the old road, to which the county commissioners assented, and the report and surrender were made accordingly; it was held, that the formal report of no damages could not be controlled by evidence of the verbal arrangement in pursuance of which the report was made, and that such arrangement was void; the county commissioners having no authority to close and surrender the old road, there being no petition of citizens therefor.—*Barrickman v. Harford County Com'rs*, 11 G. & J. 50. [Cited and annotated in 26 L. R. A. 758, on mitigation of damages in eminent domain by preserving estate, rights, or easements to owner.]

§§ 226-233.—(See Analysis.)

#### § 234.—Report and findings or award.

(a) Where the owner of land taken for a new road agreed that the commissioners appointed to assess the damages might report no damages if the county commissioners would surrender to him the old road, to which the county commissioners assented, and the report and surrender were made accordingly, it was held, that the formal report

of no damages could not be controlled by evidence of the verbal arrangement in pursuance of which the report was made, and that such arrangement was void; the county commissioners having no authority to close and surrender the old road, there being no petition of citizens therefor.—*Barrickman v. Harford County Com'rs*, 11 G. & J. 50. [Cited and annotated, see *supra*, § 225.]

### § 235.— Objections and exceptions.

(a) Under act 1825, c. 180, § 13, relating to the taking of lands for a canal, and requiring the sheriff, on a warrant therefor, to summon a jury of inquisition to meet and value the lands taken and make a return of such inquisition to the clerk, to be affirmed by the court, it is not too late on hearing by the court to raise objections to the validity of the inquisition on the ground of misconduct and partiality of the sheriff in the election of the jurors.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see *supra*, § 223.]

### § 236.— Recommittal.

### § 237.— Confirmation or setting aside of report or award.

#### Annotation.

Power of court to set aside award for misconduct of commissioners or jurors.—27 L. R. A. (N. S.) 567, note.

(a) Under Pub. Loc. Laws, art. 3, § 226, applicable to Baltimore county, which provides that if no appeal is taken within a specified time to the Circuit Court from the award of damages and benefits assessed by the examiner, and filed by him with the county commissioners, it shall be the duty of the commissioners to confirm the award as returned by the examiner, the county commissioners have no authority to revoke their order confirming the examiner's award.—*Philadelphia, W. & B. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1.

(b) That a railroad company is without power to take land by condemnation, or that the land is not liable to condemnation, must be urged by way of objection to the confirmation of the inquisition.—*Cumberland & P. R. Co. v. Pennsylvania R. Co.*, 57 Md. 267.

(c) Where the owner of land taken for a new road agreed that the commissioners ap-

pointed to assess the damages might report no damages if the county commissioners would surrender to him the old road, to which the county commissioners assented, and the report and surrender were made accordingly, it was held, that the formal report of no damages could not be controlled by evidence of the verbal arrangement in pursuance of which the report was made, and that such arrangement was void; the county commissioners having no authority to close and surrender the old road, there being no petition of citizens therefor.—*Barrickman v. Harford County Com'rs*, 11 G. & J. 50. [Cited and annotated, see *supra*, § 225.]

(d) A canal company, having attempted to acquire lands by condemnation, may object to the affirmance of the award of damages made, where the description of the lands taken is uncertain, even though the defective description was one given inadvertently by its own agent.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated, see *supra*, § 223.]

### § 238.— Review by court in general.

#### Cross-Reference.

General constitutional right to jury trial, see "Jury," § 17.

(a) Where an appeal from an award to an infant in condemnation proceedings was taken by him, and the petition showed that he was the real party in interest, and was proceeding by his mother as next friend, an amendment of the body of the petition for appeal so as to make it read that the mother was acting entirely as next friend of the infant and not in her own right was not objectionable as adding a new party in violation of Code, art. 75, § 41.—*City of Baltimore v. Yost*, 121 Md. 366, 88 Atl. 342.

(b) An order allowing an amendment of a petition for an appeal from an award of damages in condemnation proceedings in the exercise of the trial court's discretion is not reviewable.—*City of Baltimore v. Yost*, 121 Md. 366, 88 Atl. 342.

(c) Where, in a proceeding to condemn land for the widening of a street, the judge's enumeration of the different elements of damage appearing in the inquisition included all the elements of advantage and

disadvantage proper to be considered in the case, claimant was not prejudiced by the refusal of a prayer that in determining the claimant's damages the court should consider claimant's injury by the taking of wharfage and dock rights which had not been condemned.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 353; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. [Cited and annotated in 25 L. R. A. (N. S.) 259, 261, on division of water front, alluvion, and flats between adjoining riparian owners; in 34 L. R. A. (N. S.) 432, on right to obstruct wharf rights in navigable waters for public purposes without compensation.]

(d) Where claimant for many years had been in possession and use of waters of a portion of the dock in question as tenant of the city of Baltimore from year to year, and claimant's lease did not estop the city in a condemnation proceeding from asserting any rights it had appurtenant to a city street wharf, a prayer that there was no sufficient evidence that the city had ever asserted any claim or right to moor vessels in the dock lying immediately east of L. street and south of P. street, which would interfere or conflict with any of claimant's rights, was properly refused.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 353; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. [Cited and annotated, see supra.]

(e) The statutory provisions investing the Circuit Court with the powers of reviewing, and of confirming or setting aside, an inquisition of condemnation, conferred a special and limited jurisdiction, entirely distinct and independent of its common-law powers; and, since no appeal was expressly given from its decision in such a case, none lies to any other tribunal.—*Chappell v. Edmondson Ave., C. & E. C. Electric Ry. Co.*, 83 Md. 512, 35 Atl. 19.

(f) In condemnation proceedings, the two months within which application for writ of error must be made run from date of the order confirming the award, and not of the order overruling objections thereto.—*Moore v. Bel-Air Water & Light Co.*, 79 Md. 391, 29 Atl. 1033. [Cited and annotated in 58 L. R.

A. 243, on acquisition of water supply by eminent domain.]

(g) Irregularities in an inquisition of condemnation can be reviewed only by the tribunal to which such inquisition is to be returned for ratification or ejectment.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated in 20 L. R. A. 438, on power to condemn right of way for track to private establishment; in 1 L. R. A. (N. S.) 977, on exercise of eminent domain for mining road; in 22 L. R. A. (N. S.) 17, 24, 31, 32, 51, 56, 60, 62, 111, 123, 130, 153, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad for spur or lateral track.]

(h) An appeal will lie from a decision of the Baltimore City Court in proceedings on an appeal to that court from the commissioners for opening streets.—*Page v. City of Baltimore*, 34 Md. 558.

(i) The valuation made by the commissioners of highways for damages in opening a road cannot be questioned where the owner did not resort to the provision made by the statute for an inquisition by a jury.—*Worthington v. Bicknell*, 1 Bland 186, note.

### § 239.—Trial by jury on appeal.

#### Cross-References.

Trial de novo on appeal from judgment, see post, § 261.

Demand for jury, see "Jury," § 25.

(a) A verdict on appeal from the report of commissioners for opening streets, that certain benefits would accrue to a lot owner from regrading the street, did not prevent the jury from assessing as damages the cost of regrading the lot in an amount in excess of the benefits.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(b) Under Balto. City Code 1906, Charter (act 1898, c. 123), § 179, allowing a review of damages and benefits on appeal from commissioners for the opening of streets, the city is not prejudiced by a verdict on such appeal which adds the cost of regrading the lot to the amount of the damage instead of deducting it from the amount of the

benefit.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057. (See Balto. City Rev. Charter, § 179.)

(c) Under the statute allowing appeals from the Baltimore commissioners for opening streets, and providing that the assessment for benefits and damages may be increased or reduced, an instruction which refers to the award of the commissioners is not erroneous.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057. (See Balto. City Rev. Charter, § 179.)

#### § 240. Assessment by court or referee.

*Cross-Reference.*

Mode of assessment, see ante, § 211.

#### § 241. Requisites and entry of judgment.

(a) In view of act 1912, c. 117, adding art. 33A, § 5, to Code 1904, providing that the titled acquired by condemnation shall be a fee simple unless otherwise specified in the judgment, the order of the court in proceedings by a railroad company to condemn a right of way across a highway should limit the right to the purpose of crossing subject to the right of the public.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 120 Md. 128, 87 Atl. 828. (See Code 1911 [vol. 3], art. 33A, § 5.)

#### § 242. Collateral attack.

(a) An injunction will not be granted by a court of equity to restrain a railroad company from taking land condemned, when the inquisition of condemnation has been ratified by a tribunal expressly appointed by statute to do so, and from whose decision no appeal is given.—*Brown v. Philadelphia, W. & B. R. Co.*, 58 Md. 539.

(b) Where land was condemned for the use of the Annapolis & Elk Ridge Railroad, under act 1826, c. 123, § 15, and the inquisition returned to, and duly confirmed by, the proper county court, the propriety of the condemnation and use of the property cannot be drawn in question in an accidental or collateral proceeding.—*Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107. [Cited and annotated in 17 L. R. A. 839, on implied restrictions on power of Legislature.]

(See also *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553.)

#### § 243. Conclusiveness and effect of award or judgment in general.

*Cross-References.*

Appropriation of demised premises to public use as determination of tenancy, see "Landlord and Tenant," § 100.

Assessment of damages in proceedings for adoption of grade crossings, see "Railroads," § 99.

Award of damages as affecting duty of railroad company to maintain fences, see "Railroads," § 411.

Condemnation of land as extinguishing charge created by will, see "Wills," § 825.

Condemnation of land as revoking will, see "Wills," § 194.

Decisions of state courts as authority in federal courts, see "Courts," § 366.

Exercise of power as equitable conversion, see "Conversion," § 4.

Parol evidence as to damages included in judgment or award, see "Evidence," § 386.

(a) In a proceeding to condemn land for a canal, under act 1825, c. 180, § 13, where, on an inquisition on the condemnation of lands in perpetuity, the jury gave damages as for the entire fee, but only life tenant in possession was notified, the reversioner or remainderman is nevertheless bound, and may apply to chancery for a distribution of the award.—*Tide Water Canal Co. v. Archer*, 9 G. & J. 479. [Cited and annotated in 42 L. R. A. 388, 393, on view by jury; in 61 L. R. A. 844, 845, on construction and operation of canals; in 9 L. R. A. (N. S.) 836, on right to set off benefits against damages on condemnation.]

(b) Where commissioners appointed under act 1768, c. 14, to lay out ground in Baltimore and to agree with the owner thereof for a purchase or to issue warrants for a jury of freeholders to value the damages shown by their return and inquisition taken before them and a plat and explanation by which it appeared that a certain amount of land was laid out, but did not show that the statute was complied with as to the agreement or the jury, etc., the proceedings were not evidence that the title had vested in the justices of the county as provided by the act.—*Levy Court of Baltimore County's Lessee v. Gwynn*, 4 H. & J. 227.

**§ 244. Effect of award or judgment as to right to possession of property.**

*Cross-References.*

In action by owner of property, see post, § 309.  
Possession pending proceedings, see ante, § 187.  
Restraining taking possession for failure to pay compensation, see post, § 274.

(a) While the inquisition of condemnation is being reviewed by the Circuit Court, the use of the property remains in the owner.—*New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537. [Cited and annotated, see supra, § 238.]

**§ 245. Right to compensation awarded.**

*Cross-References.*

Persons entitled, payment, proceedings for determination of conflicting claims, and recovery of payments made, see ante, §§ 151-165.  
Right as affected by dismissal of proceedings, see post, § 246.  
Liens against land as transferred to fund paid into court, see "Conversion," § 21.  
Limitations, see "Limitation of Actions," § 102.  
Vested right of landowner in damages awarded, see "Constitutional Law," § 93.

**§ 246. Effect of abandonment or dismissal of proceedings.**

*Cross-References.*

Dismissal as remedy for enforcement of award, see post, § 249.  
Dismissal before hearing, see ante, § 197.  
Right to costs, fees, and expenses on abandonment or dismissal, see post, § 265.

*Annotation.*

What damage or loss is within provision for payment of damages upon discontinuance of proceedings in eminent domain.—52 L. R. A. (N. S.) 262, note.  
Right of condemning party to dismiss condemnation proceedings after award or verdict and before confirmation or judgment.—28 L. R. A. (N. S.) 91, note.

(a) A municipal corporation may abandon any proposed improvement and repeal the ordinance authorizing it; and, where that is done, the landowner cannot recover the amount of the assessment.—*Black v. City of Baltimore*, 50 Md. 235, 33 Am. Rep. 320.

(b) In the case of the condemnation of land by a city for a contemplated public improvement, the notice to M. that his land would be condemned was given seven months be-

fore the condemnation and the fixing of the value of his property. M. acquiesced in the assessment, but other parties appealed, and all of these appeals had not been finally disposed of before the ordinance was repealed. Held, that there was no such unauthorized delay on the part of the city in abandoning the work as would give M. a cause of action on that ground.—*City of Baltimore v. Musgrave*, 48 Md. 272.

(c) The acquisition of private property for public use is not complete until the proprietor has been paid or tendered the value of his property, as ascertained by the inquest or assessment. No preliminary step, prior to actual payment or tender, so fixes the corporation as to prevent an abandonment of the condemnation or of the enterprise.—*Graff v. City of Baltimore*, 10 Md. 544. [Cited and annotated in 58 L. R. A. 253, on acquisition of water supply by eminent domain; in 16 L. R. A. (N. S.) 539, on time title passes in condemnation proceedings.] *State v. Graves*, 19 Md. 351; *Merrick v. City of Baltimore*, 43 Md. 219. [Cited and annotated in 9 L. R. A. (N. S.) 1045, on municipality's power to limit control over street or other public ground as incident of acquisition; in 16 L. R. A. (N. S.) 538, on time title passes in condemnation proceedings.]

**§ 247. Interest on award or judgment.**

(a) Where a jury condemns certain land on January 22, 1874, and the inquisition is confirmed by the court, and judgment entered, a payment by the city condemning the land on December 4, 1874, is sufficient, without interest.—*Norris v. City of Baltimore*, 44 Md. 598. [Cited and annotated in 16 L. R. A. (N. S.) 539, on time title passes in condemnation proceedings; in 28 L. R. A. (N. S.) 55, on interest on unliquidated damages.]

(b) Where viewers award damages to a landowner, he is entitled to interest on the award from the date of the final confirmation of their report.—*Harness v. Chesapeake & O. Canal Co.*, 1 Md. Ch. 248. [Cited and annotated in 28 L. R. A. (N. S.) 55, on interest on unliquidated damages; in 35 L. R. A. (N. S.) 103, on payment by commercial paper.]

**§ 248. Lien of award or judgment.***Cross-Reference.*

Enforcement of lien, see post, § 266.

**§ 249. Enforcement of award or judgment.***Cross-References.*

By independent action, see post, § 270.

Execution and enforcement of judgment, see post, § 312.

Counterclaim in enforcement of judgment lien, see "Set-Off and Counterclaim," § 29.

Prohibiting enforcement, see "Prohibition," § 3.

**§ 250. Appeal.***Cross-References.*

Costs on appeal or error, see post, § 265.

Review of report or award of commissioners, appraisers, or viewers, see ante, §§ 238, 239.

Estoppel to question constitutionality of act providing for appeal, see "Constitutional Law," § 43.

Payment of judgment as estoppel preventing appeal, see "Appeal and Error," § 158.

**§ 251.— Nature and form of remedy.****§ 252.— Appellate jurisdiction.***Cross-Reference.*

Appellate jurisdiction of courts, see "Courts," §§ 220, 231.

**§ 253.— Decisions reviewable.***Cross-Reference.*

Review of orders as dependent on finality, see "Appeal and Error," § 69.

(a) The action of the Circuit Court in condemnation cases is final, and unless it exceeded its jurisdiction, as by affirming a condemnation for an unauthorized purpose, an appeal does not lie, since the proceeding is a special and limited statutory one in which no appeal is provided.—*St. James A. M. E. Church v. Baltimore & O. R. Co.*, 114 Md. 442, 79 Atl. 35.

(b) Where the charter of a railroad company empowered it to acquire land necessary and convenient to the construction of the road, and provided for the confirmation by the Circuit Court of the inquisition in condemnation proceedings, but gave no appeal therefrom, the Court of Appeals would not review the finding of the Circuit Court that the acquisition of certain land by the road was necessary.—*Dolfield v. Western Maryland R. Co.*, 107 Md. 584, 69 Atl. 582.

(c) In condemnation proceedings by a railroad company, where an appeal is not given by its charter or any general provision of statute, no appeal lies from an order confirming an inquisition, if the court had jurisdiction to decide the question.—*Textor v. Baltimore & O. R. Co.*, 107 Md. 221, 68 Atl. 493.

(d) The decision of the Circuit Court, in confirming the inquisition in proceedings by a mining company to condemn land for a railroad, that the railroad sought to be constructed is a railroad within Code 1888, art. 23, §§ 145, 149, authorizing mining companies to condemn land for a railroad, is a decision on a question within the exclusive jurisdiction of the court, and is not reviewable by the Court of Appeals.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. (See Code 1911, art. 23, §§ 246, 250; *Id.* [vol. 3], art. 23, § 246.) [Cited and annotated in 22 L. R. A. (N. S.) 130, on judicial power over eminent domain; in 35 L. R. A. (N. S.) 647, on constitutionality of statute conferring power of eminent domain on private person or corporation other than railroad for spur or lateral track.]

(e) The decision of the Circuit Court, in confirming the inquisition in proceedings by a mining company to condemn land for a railroad, that there is a necessity for the condemnation, is a decision within the exclusive jurisdiction of the court, and is not reviewable by the Court of Appeals.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. [Cited and annotated, see supra.]

(f) The Court of Appeals has no authority to review the judgment of the Circuit Court confirming the inquisition in proceedings by a mining company to condemn land for a railroad, if pronounced on a subject-matter within its jurisdiction.—*New York Min. Co. v. Midland Min. Co.*, 99 Md. 506, 58 Atl. 217. [Cited and annotated, see supra.]

(g) Where a Circuit Court has confirmed the inquisition in proceedings by a railroad company to condemn lands, the action of such court is exclusive and final, and appeal or error does not lie to the Court of Appeals, if the railroad company had any right at all to make the condemnation.—*Hopkins v.*



*Philadelphia, W. & B. R. Co.*, 94 Md. 257, 51 Atl. 404.

(h) The statutory provision investing the Circuit Court with the powers of reviewing, and of confirming or setting aside, an inquisition of condemnation, conferred a special and limited jurisdiction, entirely distinct and independent of its common-law powers; and, since no appeal was expressly given from its decision in such a case, none lies to any other tribunal.—*Chappell v. Edmondson Ave., C. & E. C. Electric Ry. Co.*, 83 Md. 512, 35 Atl. 19.

(i) An appeal does not lie to the Court of Appeals from a judgment of the Circuit Court on appeal from an order of the county commissioners dismissing a petition for the abatement of an assessment.—*Gadd v. Commissioners of Anne Arundel County*, 82 Md. 646, 33 Atl. 433.

(j) The action of the Circuit Court in confirming the award of a jury in proceedings to condemn a water right is conclusive, as Code 1888, art. 23, §§ 248-253, confer special jurisdiction on the Circuit Court over such proceedings, without expressly giving a right of appeal.—*Moores v. Bel-Air Water & Light Co.*, 79 Md. 391, 29 Atl. 1033. (See Code 1911, art. 23, §§ 399-404.) [Cited and annotated in 58 L. R. A. 243, on acquisition of water supply by eminent domain.]

(k) No appeal will lie from an order of the county court confirming an inquisition of damages in condemnation proceedings.—*Brown v. Philadelphia, W. & B. R. Co.*, 58 Md. 539; *George's Creek Coal & Iron Co. v. New Central Coal Co.*, 40 Md. 425; *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553. (See Code [vol. 3], art. 33A.)

(l) No appeal lies from the decision of the county court on an inquisition condemning land for the use of a railroad.—*Cumberland & P. R. Co. v. Pennsylvania R. Co.*, 57 Md. 267. (See Code [vol. 3], art. 33A.)

(m) An appeal will lie from a decision of the Baltimore City Court in proceedings on an appeal to that court from the commissioners for opening streets.—*Page v. City of Baltimore*, 34 Md. 558.

(n) No appeal lies from the decision of the

county court in confirming or setting aside an inquisition.—*Wilmington & S. R. Co. v. Condon*, 8 G. & J. 443.

(o) The jurisdiction given to the county courts of Maryland to review, confirm, or set aside inquisitions had under the law authorizing the Wilmington & Susquehanna Railroad Company to condemn land for the construction of its road, is special and limited, and no appeal lies from its decisions.—*Wilmington & S. R. Co. v. Condon*, 8 G. & J. 443.

#### § 254.—Right of review.

(a) By Const. 1851, art. 3, § 46, it is declared that the Legislature shall enact no law for the taking of private property for public use without just compensation, agreed upon or awarded by a jury, being first paid or tendered to the owner. *Held*, that if an owner neglects to appeal from the decision of the commissioners, and voluntarily receives a portion of the damages by applying the same to the payment of benefits assessed, he will be considered to have acquiesced in the assessment of the commissioners.—*Steuart v. City of Baltimore*, 7 Md. 500. (See Const. 1867, art. 3, § 40.) [Cited and annotated in 15 L. R. A. 442, on jury trial on appeal as satisfying constitutional right; in 36 L. R. A. (N. S.) 278, on allowance for improvements made with knowledge that property required for public use.]

§§ 255, 256.—(See Analysis.)

#### § 257.—Taking and perfecting appeal.

*Cross-Reference.*

Record, see post, § 259.

(a) In condemnation proceedings, the two months within which application for writ of error must be made run from date of the order confirming the award, and not of the order overruling objections thereto.—*Moores v. Bel-Air Water & Light Co.*, 79 Md. 391, 29 Atl. 1033. [Cited and annotated in 58 L. R. A. 243, on acquisition of water supply by eminent domain.]

#### § 258.—Effect of appeal and supersedeas.

*Cross-Reference.*

On right of condemning party to take possession of property, see ante, § 244.

**Annotation.**

Effect of appeal in condemnation proceedings.—2 L. R. A. (N. S.) 313, note.

**§ 259.—Record.****Cross-References.**

Taking and perfecting appeal, see ante, § 257.

Necessity and sufficiency of record to show federal question for purpose of review by federal Supreme Court of decision of state court, see "Courts," § 398.

**§ 260.—(Omitted from the classification used herein.)****§ 261.—Trial de novo.****Cross-Reference.**

Trial by jury on appeal from award of commissioners, appraisers or viewers, see ante, § 239.

**§ 262.—Review.****Cross-References.**

In proceedings for impaneling jury, see "Appeal and Error," § 1045.

Scope of review by federal Supreme Court of decisions of state courts, see "Courts," § 399.

(a) In condemnation proceedings by a railroad against a city, error, if any, in refusing to permit defendant to amend its answer so as to plead an order of the Public Service Commission was harmless, where it was later permitted to file the order.—*Mayor and Common Council of Hyattsville v. Washington, W. & G. R. Co.*, 122 Md. 660, 90 Atl. 515.

(b) Error in an instruction in condemnation proceedings, which authorized the jury to allow recovery for any other damage the owner might suffer aside from the special elements mentioned, was harmless, where the verdict was for less than the evidence showed the owner to be entitled to.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(c) Where the commissioners for opening streets made no allowance for the cost of regrading the remainder of a lot not taken, an instruction that the jury might allow for such cost if the commissioners did not was not prejudicial to the city.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(d) Error in admitting evidence as to the cost of constructing a sidewalk upon a portion of the land already owned by the city was harmless in proceedings to condemn

land, where the instructions limited the recovery to the portion of the sidewalk constructed upon the land taken.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(e) Where the evidence showed that the estimated work for regrading a portion of a lot not taken was reasonably necessary, error in an instruction which did not confine the award for regrading to such work as was necessary was harmless.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(f) Error in admitting testimony of a witness who was not qualified as to the quality of the soil which would have to be removed was harmless, where there was other competent, uncontradicted testimony to the same fact.—*City of Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057.

(g) Where, in a proceeding to condemn certain wharf rights and land for the widening of a street, it was admitted that claimant's improvements on its L. street wharves practically consisted of continuous frame structures and sheds, it could not be presumed, in the absence of a specific statement to that effect, that the trial judge, in making an allowance for loss of improvements erected on L. street, intended to allow damages only for the portion of the improvements on the condemned part of the property and to exclude the remainder.—*City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 65 Atl. 353; *Baltimore & Philadelphia Steamboat Co. v. City of Baltimore*, Id. [Cited and annotated in 25 L. R. A. (N. S.) 259, 261, on division of water front, alluvion, and flats between adjoining riparian owners; in 34 L. R. A. (N. S.) 432, on right to obstruct wharf rights in navigable waters for public purposes, without compensation.]

**§ 263.—Determination and disposition of cause.****§ 264. Review on certiorari.****Cross-Reference.**

Right to remedy as dependent on absence of remedy by appeal or writ of error, see "Certiorari," § 5.

(a) Certiorari will not lie to review proceedings at inquisition for the purpose of trying the power of plaintiff to condemn the property, since such obligation should be

urged against the confirmation of the inquisition.—*Baltimore & H. G. Turnpike Co. v. Northern Cent. Ry. Co.*, 15 Md. 193.

#### § 265. Costs, fees, and expenses.

##### *Cross-References.*

Application by witness for taxation of fees, see "Witnesses," § 27.

Statute imposing attorney's fee on railroad companies, as class legislation, see "Constitutional Law," § 208.

Statute relating to costs, expenses and attorney's fees as affecting vested rights, see "Constitutional Law," § 112.

##### *Annotation.*

Liability for costs on appeal from award in condemnation proceedings.—36 L. R. A. (N. S.) 624, note.

### IV. REMEDIES OF OWNERS OF PROPERTY.

##### *Cross-References.*

Determination of conflicting claims to award, see ante, § 158.

Presentation of claim against county, see "Counties," § 200.

#### § 266. Nature and grounds in general.

##### *Cross-References.*

Action for additional damages, see ante, § 243.

Effect of former adjudication, see post, § 283.

Consolidation of actions, see "Actions," §§ 55-59.

#### § 267. Statutory provisions and remedies.

##### *Cross-References.*

Statutory provisions and remedies for taking property, see ante, § 167.

Effect of partial invalidity of statute, see "Statutes," § 64.

Special remedy to landowner as special privilege, see "Constitutional Law," § 205.

#### § 268. Recovery of possession of property.

#### § 269. Compelling proceedings to assess compensation.

##### *Cross-Reference.*

Right of owner to institute proceedings, see ante, § 168.

##### *Annotation.*

Right of one whose property has been taken for public use without condemnation proceedings, to maintain action for compensation or for permanent damages.—28 L. R. A. (N. S.) 968, note.

(a) If the courts will not coerce a corporation to adopt the condemnation of property, for public use, at the instance of proprietors,

who are unwilling vendors, they will not at the instance of purchasers buying an imperfect title with full knowledge of the facts.—*State v. Graves*, 19 Md. 351. [Cited and annotated in 9 L. R. A. (N. S.) 1045, on municipality's power to limit control over street or other public ground as incident of acquisition; in 16 L. R. A. (N. S.) 538, on time title passes in condemnation proceedings.]

#### § 270. Recovery of compensation.

##### *Cross-References.*

Enforcement in condemnation proceedings of award or judgment therein, see ante, § 249.

Foreclosuse of lien, see ante, § 266.

(a) An inquisition in condemnation proceedings required the railroad seeking to condemn the land to build a trestle for the landowner's use. *Held*, in an action upon the inquisition, that the declaration was sufficiently specific, though not defining the land on which the trestle was to be built otherwise than by reference to a plat contained in the condemnation proceedings, which were set out at length, and was not faulty because not averring readiness to permit entry by defendant on plaintiff's land to perform the work; there being a general averment of performance of everything on his part to be done.—*Pennsylvania R. Co. v. Reichert*, 58 Md. 261. [Cited and annotated in 26 L. R. A. 756, on mitigation of damages in eminent domain by preserving estate, rights, or easements to owner.]

#### § 271. Recovery of damages.

##### *Cross-References.*

Grounds for denying relief, see post, § 280. Malicious prosecution of condemnation proceedings, see "Malicious Prosecution," § 31.

##### *Annotation.*

Right under constitutional provision against "damaging" private property for public use without compensation, to compensation for consequential damages to property, no part of which is taken, from smoke, noise, dust, etc., incident to ordinary operation of railroads.—17 L. R. A. (N. S.) 1054; 40 L. R. A. (N. S.) 48, notes.

(a) Continuous discharge of water from railroad roundhouse on adjoining property held a taking of such property within the constitutional provision, entitling the ad-

joining owner to damages.—*Northern Cent. Ry. Co. v. Oldenburg & Kelley*, 122 Md. 236, 89 Atl. 601.

(b) A city, by condemnation proceedings on the application of a railroad company, opened a street across plaintiff's lots, and received from the company the money for damages assessed, but did not pay or tender it to plaintiff, nor invest it in city stock, as provided by act 1878, c. 143, until the plaintiff had begun suit against the company for trespass. *Held*, that the city had acquired no right of entry on the land by the condemnation proceedings, even though they were regular, and that the investment of the money by the city after the beginning of the suit did not defeat plaintiff's right to recover for the trespass prior thereto.—*Baltimore & O. R. Co. v. Boyd*, 63 Md. 325. (See Balto. City Rev. Charter, § 185.) [Cited and annotated in 30 L. R. A. (N. S.) 256, on necessity and character of title or possession to sustain action of trespass.]

(c) In estimating the value of land condemned for the use of the Chesapeake & Ohio Canal Company in the construction of its works, it is the right and the province of the jury of inquest to take into consideration all damages which the owner of the land would sustain by an appropriation of it to such use, whether the same were immediate, remote, or contingent; and the legal presumption is that the jury awarded damages to the extent of their authority, and to all persons who might be affected by their finding. An action of trespass cannot, therefore, be sustained by an owner of land for such damages; he having already received an adequate remuneration.—*Chesapeake & O. Canal Co. v. Grove*, 11 G. & J. 398. [Cited and annotated in 61 L. R. A. 845, on construction and operation of canals.]

## § 272. Injunction.

### Cross-References.

As remedy for recovery of compensation, see ante, § 270.

As remedy for recovery of damages, see ante, § 271.

Grounds for refusing injunction, see post, § 279.

Permanent injunction or alternative relief, see post, § 306.

Preliminary or interlocutory injunction, see post, § 292.

Prohibiting proceedings, see "Prohibition," § 3.

Requirement of bond as denial of equal protection of law, see "Constitutional Law," § 249.

Trivial value of land as ground for denying relief, see "Equity," § 34.

## § 273.— Grounds of relief in general.

(a) Continuous discharge of water from railroad roundhouse on adjoining property held a taking of such property within the constitutional provision, entitling the adjoining owner to an injunction.—*Northern Cent. Ry. Co. v. Oldenburg & Kelley*, 122 Md. 236, 89 Atl. 601.

(b) Where a railroad company had, by its charter, a right to acquire a right of way by condemnation, but dispensed with proceedings for that purpose because of the owner's consent to the construction of the road, and went on and built the road, equity would enjoin action by the owner pending proceedings for condemnation.—*Baltimore & H. R. Co. v. Algire*, 63 Md. 319. [Cited and annotated in 28 L. R. A. 519, on licensee's possession to defeat trespass after revocation of license; in 49 L. R. A. 520, on revocability of license to maintain burden on land, after expense is incurred.]

(c) When a company neglects or refuses to pay for the land condemned for their use, the owner has a right to call upon the court of chancery to protect, by injunction, his property from injury until the money is paid.—*Harness v. Chesapeake & O. Canal Co.*, 1 Md. Ch. 248. [Cited and annotated in 28 L. R. A. (N. S.) 55, on interest on unliquidated damages; in 35 L. R. A. (N. S.) 103, on payment by commercial paper.]

## § 274.— Restraining taking of or injury to property.

### Cross-Reference.

See post, § 275.

(a) The Circuit Court has jurisdiction of a bill to enjoin a corporation from condemning lands, where such power is expressly denied by its charter, and the exercise thereof is averred to be void ab initio.—*Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254.

(b) Injunction will lie to restrain the taking of private property by a railroad com-

pany, which is not covered by its proceedings to condemn adjoining land.—*Shipley v. Western Maryland Tidewater R. Co.*, 99 Md. 115, 56 Atl. 968.

(c) Under Const. 1851, art. 3, § 46, providing that: "The Legislature shall enact no law authorizing private property to be taken for public use without just compensation," etc., it is sufficient ground for an injunction to prevent a railroad company from entering on land that they have not paid or secured the damages.—*Western Maryland R. Co. v. Owings*, 15 Md. 199, 74 Am. Dec. 563. (See Const. 1867, art. 3, § 40.)

#### § 275.—Restraining construction of works.

##### *Cross-Reference.*

See ante, § 274.

(a) Where the construction of a street railway is authorized by competent authority, and there is no invasion of, or physical interference with, the property of an abutting owner, there is no taking without due process of law, within the meaning of the Constitution, and therefore injunction will not lie to prevent consequential injuries resulting therefrom.—*Poole v. Falls Road Electric Ry. Co.*, 88 Md. 533, 41 Atl. 1069. [Cited and annotated in 1 L. R. A. (N. S.) 55, on effect of legislative authority on liability for private nuisance; in 25 L. R. A. (N. S.) 1268, on right of abutter to damages for special injuries where street railway not considered additional burden; in 36 L. R. A. (N. S.) 682, 725, 824, on abutter's right to compensation for railroads in streets.]

#### § 276.—Restraining operation of works.

(a) Pollution of atmosphere by railroad roundhouse held an incidental or consequential injury to nearby property, and not a taking thereof, and hence the operation of the roundhouse could not be enjoined.—*Northern Cent. Ry. Co. v. Oldenburg & Kelley*, 122 Md. 236, 89 Atl. 601.

(b) A railroad company erected on a part of the land which belonged to complainant, and which the company had caused to be condemned for railroad purposes, a house for the accommodation of passengers waiting the arrival of cars, which house was sometimes used for a tavern or store, where

intoxicating liquors were sold. *Held*, that, if any individual sustains special damages by any illegal act of the company, the court will grant redress for the past, and, if possible, prevent future repetition of similar acts, but complainant was not entitled to an injunction restraining the use of such property by the company.—*Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553.

#### § 277. Conditions precedent to action.

#### §§ 278-283. Defenses.

##### *Cross-References.*

Adverse possession, see post, § 288.

Estoppel of landowner acquiescing in construction of railroad, see "Estoppel," § 93.

(a) A court of equity will not lend its aid to an assignee of a lease of land through which a railroad company seeks to condemn a right of way, and enjoin it from so doing, when it is shown that the assignee is the president of a rival road, and denies the power of the first company to condemn the land under its charter, but will leave him to his remedy at law.—*Piedmont & C. Ry. Co. v. Speelman*, 67 Md. 260, 10 Atl. 77, 293.

#### § 284. Persons entitled to sue.

##### *Cross-References.*

Parties plaintiff, see post, § 289.

Persons entitled to compensation, see ante, § 151.

Effect of alienage of person, see "Aliens," § 10.

#### § 285. Corporations or persons liable.

##### *Cross-Reference.*

Parties defendant, see post, § 289.

(a) Where the construction of an approach of a viaduct under an agreement between the city and the railroad company to abolish a grade crossing amounts to a taking of property, the city and the railroad company are jointly liable for the damages.—*Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128; *Same v. City of Baltimore*, Id.

(b) The fact that a city delegated to a railroad company the construction of a viaduct, which amounted to a taking of property, does not relieve the city of its liability for the damage.—*Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128; *Same v. City of Baltimore*, Id.

(c) Even where the owner of property abutting on a street suffers some particular inconvenience, as by a change in the grade of the street, he cannot recover for his damage from the municipal corporation.—*Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128; *Same v. City of Baltimore*, Id.

### § 286. Jurisdiction.

#### Cross-References.

Of courts of limited or inferior jurisdiction of suit to vacate proceedings, see "Courts," § 183.

Power of federal court to restrain condemnation proceedings in state court, see "Courts," § 508.

(a) Where the objection that a railroad company is without power to take land by condemnation, or that the land is not liable to condemnation, is not urged against the confirmation of the inquisition, an equity court has no jurisdiction to interfere by injunction with the exclusive jurisdiction of the Circuit Court to determine all objections that might be urged to the ratification of such inquisition.—*Cumberland & P. R. Co. v. Pennsylvania R. Co.*, 57 Md. 267.

(b) The Circuit Court of Baltimore City, and the Circuit Courts generally, have no jurisdiction to adjudge, determine, and enjoin proceedings in fieri, under the charter of a railroad company, for objections apparent upon their face, or otherwise, as, for instance, where the inquisition showed that land has been condemned for the use and occupation of a railroad "in fee simple," without specifying that the use is for any purpose authorized by the charter—the Circuit Courts having special and competent authority to adjudge and determine them.—*Western Maryland R. Co. v. Patterson*, 37 Md. 125.

### § 287. Venue.

### § 288. Limitations and laches.

#### Cross-References.

Accrual of right of action, see "Limitation of Actions," §§ 46, 55, 58.

Application of general statute of limitations, see "Limitation of Actions," §§ 28, 32.

Disabilities affecting limitations, see "Limitation of Actions," §§ 72, 73, 76.

Effect of bar by limitation, see "Limitation of Actions," §§ 170, 180.

Effect on limitation of election between remedies, see "Limitation of Actions," § 17.

Existence of trust as affecting limitations, see "Limitation of Actions," § 102.

Extension of time as impairing vested rights, see "Constitutional Law," § 107.

Extension of time for filing petition for damages against railroads as class legislation, see "Constitutional Law," § 208.

Proceedings by remaindermen, see "Remainders," § 17.

Statutes, construction of in favor of constitutionality, see "Constitutional Law," § 48.

(a) A turnpike company, a part of whose roadbed has been condemned for railroad purposes on condition that the railroad company should build a certain described fence between its track and the turnpike, cannot, after allowing the railroad to be built and operated for six years without requiring the railroad company to build the fence, and after the railroad has passed into the hands of receivers, obtain an injunction restraining the operation of the road over the condemned land because of noncompliance with the condition.—*Spencer v. Falls Turnpike Road Co.*, 70 Md. 136, 16 Atl. 451.

### § 289. Parties.

#### Cross-References.

Corporation or persons liable, see ante, § 285.

Persons entitled to sue, see ante, § 284.

### §§ 290-292. (See Analysis.)

### § 293. Pleading.

(a) In an action for damages occasioned by the construction of an approach to a bridge to abolish a grade crossing over a railroad, the ordinance authorizing the construction was admissible in evidence under general issue.—*Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128; *Same v. City of Baltimore*, Id.

(b) Code 1888, art. 75, § 23, provides that the forms of pleadings given therein shall be sufficient with such modifications as may be necessary to meet the facts of the particular case, etc. Subdivision 33 gives the following form: "That the plaintiff was possessed of land \* \* \* and was entitled to a way from said land over the land of defendant, to a public highway, \* \* \* for the more convenient occupation of the said

land of the plaintiff; and that the defendant deprived him of the use of said way." *Held*, in an action against a municipal corporation for damages from a change of grade in a public road, that a complaint charging that plaintiff had the right to the necessary ingress and egress to and from the said lot, and for the beneficial occupancy and enjoyment of the same, and that the defendant wrongfully deprived plaintiff of convenient access to the lot, and of the beneficial occupation of the same, sufficiently disclosed the nature of the injury and the cause.—*Offutt v. Commissioners of Montgomery County*, 94 Md. 115, 50 Atl. 419. (See Code 1911, art. 75, § 24, subd. 33.)

(c) An allegation that plaintiff and those under whom she claims have had, for over 20 years, "the uninterrupted, exclusive, and adverse use and enjoyment" of a part of the street which defendant city had condemned without awarding compensation for the fee, is insufficient to establish plaintiff's title, since it fails to show any privity between her and her predecessors, or that the street had not been dedicated to public use before their possession began.—*City of Baltimore v. Coates*, 85 Md. 531, 37 Atl. 18.

(d) A bill by an owner of property abutting on a turnpike to enjoin the turnpike company from tearing up the sidewalks in front of the owner's property, alleging that the company has not acquired title to the portion of the land bounding on plaintiff's property, either by condemnation, purchase, agreement, or otherwise, unless the same was acquired by certain condemnation proceedings, does not, when attacked by demurrer, sufficiently plead want of title on the part of the company to the road bounding on plaintiff's property.—*Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 34 Atl. 366.

(e) A declaration alleging that plaintiff was the owner of a warehouse, and that without her consent defendant, a telephone company, planted a large pole in the adjoining footway, thereby interfering with the reasonable use and enjoyment of her premises, but not alleging the mode and manner of the interference, is sufficient, under Code 1888, art. 75, § 3, requiring nothing more in a declaration than a plain statement of the

facts relied on.—*Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219. (See Code 1911, art. 75, § 3.) [Cited and annotated in 24 L. R. A. 721, on telegraph or telephone as additional burden on highway.]

(f) An averment in a bill for injunction, that a telegraph or telephone company is proceeding, or threatens to proceed, to construct its line of poles and wires over complainant's land without his leave, and without paying or tendering him compensation, is sufficient to entitle him to an injunction.—*American Telephone & Telegraph Co. v. Smith*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. [Cited and annotated in 17 L. R. A. 480, on what use of street or highway is additional burden; in 36 L. R. A. (N. S.) 518, on uses to which railroad right of way may be devoted.]

(g) Under Const. 1851, art. 3, § 46, which provides that: "The Legislature shall enact no law authorizing private property to be taken for public use without just compensation," etc., in an action to enjoin a railroad company from taking plaintiff's property on the ground that compensation has not been made, an averment in the bill of irreparable injury is not necessary.—*Western Maryland R. Co. v. Owings*, 15 Md. 199, 74 Am. Dec. 563. (See Const. 1867, art. 3, § 40.)

## §§ 294-300. Evidence.

### Cross-References.

Curing error in admitting testimony, see "Appeal and Error," §§ 1050-1054.

Opinion evidence, see "Evidence," §§ 488, 497, 501, 524, 533.

Parol evidence as to damages included in judgment or award, see "Evidence," § 386.

(a) An abutter suing for interference with access to his property caused by occupation of a street by a railway company must show the extent of his loss as a basis for assessing damages beyond nominal damages.—*Webb v. Baltimore & O. R. Co.*, 114 Md. 216, 79 Atl. 193.

## §§ 301-305. Damages and amount of recovery.

(a) If the mere right of way, freed from the railroad cut, would not add to the value of plaintiff's land without the opening of

the street and material changes in the grade, only nominal damages can be recovered for the trespass.—*Baltimore Belt R. Co. v. McColgan*, 83 Md. 650, 35 Atl. 59. [Cited and annotated in 36 L. R. A. (N. S.) 797, on abutter's right to compensation for railroads in streets.]

### § 306. Permanent injunction or alternative relief.

#### Cross-References.

Injunction in general, see ante, §§ 273-276.

Preliminary or interlocutory injunction, see ante, § 292.

### § 307. Trial.

(a) Where a municipal corporation so constructed a culvert, its approaches, and guard rails on a public road as to destroy the use of a private roadway, that part of an instruction as to the measure of damages was proper which stated that the owners of the right of way need not incur the risk of litigation attached to removing the rails from the public road, nor appropriate a private way without the limits of that to which they were entitled.—*De Lauder v. Commissioners of Baltimore County*, 94 Md. 1, 50 Atl. 427.

(b) Where a municipal corporation so constructed a culvert, its approaches and guard rails on a public road, as to destroy the use of a private roadway, there was no error in instructing that, if the guard rails were omitted, or so placed as to permit ingress and egress to and from the road, the expense of grading the private road up to the increased height of the public road would have been consequential damage.—*De Lauder v. Commissioners of Baltimore County*, 94 Md. 1, 50 Atl. 427.

(c) Where a municipal corporation so constructed a culvert, its approaches, and guard rails on a public road as to deprive plaintiff of the use of a private roadway, an instruction alleging consequential damage, without asserting it to be the inevitable result of the act done, or of any want of care and skill, is properly rejected.—*De Lauder v. Commissioners of Baltimore County*, 94 Md. 1, 50 Atl. 427.

(d) Since the right of plaintiff in an action against an elevated railway company for

damages to abutting property depends on whether the property was injured, it is immaterial whether any of his property had been actually taken by defendant, or whether the railway was built under authority of law, and instructions to the contrary effect are properly refused.—*Lake Roland El. Ry. Co. v. Hibernian Soc.*, 83 Md. 420, 34 Atl. 1017. [Cited and annotated in 36 L. R. A. (N. S.) 804, 834, on abutter's right to compensation for railroads in streets.]

### § 308. Judgment or decree.

#### Cross-Reference.

Effect of judgment as to title to property, see post, § 309.

(a) In an action by a property owner against a city and a railroad company, which are jointly liable for damages caused by the construction of a bridge approach, the court cannot determine the liability of the defendants between each other.—*Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 46 L. R. A. (N. S.) 1128.

### §§ 309-314. (See Analysis.)

### § 315. Appeal and error.

#### Cross-References.

Appeal in proceedings against insane person, see "Insane Persons," § 102.

Subject and title of act relating to appeal in condemnation proceedings, see "Statutes," § 117.

### § 316. Costs.

#### Cross-Reference.

Laws authorizing attorney's fees, as class legislation, see "Constitutional Law," § 208.

## V. TITLE OR RIGHTS ACQUIRED.

#### Cross-References.

Effect of judgment for damages, see ante, § 309.

Exemption from taxation, see "Taxation," § 217.

Taxation of land acquired by condemnation, see "Taxation," § 188.

Title for purposes of taxation, see "Taxation," § 79.

Way of necessity from land taken under condemnation proceedings over land of former owner, see "Easements," § 18.

### § 317. Nature of estate or interest acquired.

#### Annotation.

Condemnation or grant of land for railroad right of way as carrying right to lateral and adjacent support.—32 L. R. A. (N. S.) 155, note.



### § 318. Extent of right to use of property.

#### Annotation.

Right of railroad company to material or mineral within right of way.—45 L. R. A. (N. S.) 796, note.

Extent of title or rights taken for purposes of canal.—61 L. R. A. 836, 838, note.

Extent of rights acquired for purposes of water supply.—58 L. R. A. 248, note.

### §§ 319-322. (See Analysis.)

### § 323. Abandonment or nonuser.

#### Cross-References.

Recovery of payments made, see ante, § 165.

Reversion to owner on abandonment or nonuser, see post, § 325.

(a) A stipulation in a contract that a railroad should send all its traffic in a certain city over another road, entered into in order to secure to the latter road the necessary funds to take care of bonds to be issued by it to enable it to perform its obligations under the contract, and made while the stipulating road was in financial difficulties, but had great prospects of a future heavy business, could not be construed as precluding the stipulating road from availing itself of other lines to transport the traffic that the road contracted with could not take care of, or as conclusively indicating an intention to abandon a line previously projected by it, and land condemned for the construction of such line.—*Canton Co. v. Baltimore & O. R. Co.*, 99 Md. 202, 57 Atl. 637.

(b) Where a railroad, after having acquired property by condemnation proceedings, found itself financially embarrassed, and could not complete the proposed route over the land condemned, the mere fact that it entered into an arrangement with another road by which it secured traffic facilities did not conclusively show an abandonment of the condemned land and its own proposed line.—*Canton Co. v. Baltimore & O. R. Co.*, 99 Md. 202, 57 Atl. 637.

(c) Mere nonuser of land condemned by a railroad, or the establishment of another route, will not of themselves operate as an abandonment of the land condemned; but there must be some decided act indicative of an intention to abandon, which intention

must be determined from the circumstances of the case.—*Canton Co. v. Baltimore & O. R. Co.*, 99 Md. 202, 57 Atl. 637.

### § 324. Misuser or diversion.

#### Cross-Reference.

Reversion to owner on misuser or diversion, see post, § 325.

(a) Under the statute, as amended by act 1908, c. 240, expressly withholding from public service corporations power to apply for voluntary dissolution, such a corporation may not, after acquiring by eminent domain property for public uses, divest itself of such uses by amendment to its charter so as to hold the property for private uses.—*Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 76 Atl. 254. (See Code 1911, art. 23, § 76; act 1916, c. 596, § 12, p. 1228.)

(b) Where property was condemned by a railroad, it cannot be recovered by the former owner on the ground that the company is using it for unauthorized purposes, since abuse of its chartered privileges can only be taken advantage of by the state.—*Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107. [Cited and annotated in 17 L. R. A. 839, on implied restrictions on power of Legislatures.]

### § 325. Reversion.

(a) Act 1890, p. 246, c. 220, the title of which states that it provides for the use by any other railroad of the abandoned or unused right of way of a railroad, and the body of which declares nonuser of a right of way on an unfinished railroad for 10 years to amount to an abandonment, and to make the right of way subject to use and appropriation on purchase or condemnation by another road, merely permits another railroad to condemn unused property in the specified contingency, and has no application to a case in which the former owner of the property claims a reversion by reason of the nonuser.—*Canton Co. v. Baltimore & O. R. Co.*, 99 Md. 202, 57 Atl. 637. (See Code, art. 23, § 271.)

(b) Where a corporation, under condemnation proceedings, acquired for public purposes a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for

public purposes, and, when such public use becomes impossible or is abandoned, its right to hold the land ceases, and the property reverts to its original owner.—*Canton Co. v. Baltimore & O. R. Co.*, 99 Md. 202, 57 Atl. 637.

### **EMOTIONAL INSANITY.\***

#### *Cross-Reference.*

As defense to charge of homicide, see "Homicide," § 27.

### **EMPLOYERS' LIABILITY ACTS.**

#### *Cross-Reference.*

See "Master and Servant," § 179.

### **EMPLOYERS' LIABILITY INSURANCE.**

#### *Cross-Reference.*

See "Insurance," §§ 435, 514.

### **EMPLOYEES.\***

#### *Cross-Reference.*

See "Master and Servant."

### **EMPLOYMENT.\***

#### *Cross-References.*

Of broker, see "Brokers," §§ 6-18, 40.

Of factor, see "Factors," § 5.

Of servants in general, see "Master and Servant," §§ 1-9.

### **EMPLOYMENT AGENCIES.**

#### *Cross-References.*

See "Master and Servant," § 11.

Liability of, for wrongful acts of laborers furnished, see "Master and Servant," § 301.

License taxes, see "Licenses," § 11.

Regulation of employment agencies and requiring license as infringing constitutional right to carry on lawful business, see "Constitutional Law," § 88.

### **ENACTMENT.\***

#### *Cross-References.*

Of municipal ordinances, or by-laws, see "Municipal Corporations," §§ 106, 107, 109.

Of statutes, see "Statutes," §§ 1-65.

### **ENCROACHMENT.\***

#### *Cross-References.*

By executive on judiciary, see "Constitutional Law," §§ 79, 80.

By executive on Legislature, see "Constitutional Law," § 77.

By judiciary on executive, see "Constitutional Law," §§ 73, 74.

By judiciary on Legislature, see "Constitutional Law," § 70.

By Legislature on executive, see "Constitutional Law," § 58.

By Legislature on judiciary, see "Constitutional Law," §§ 52-57.

On adjoining land, see "Adjoining Landowners," § 9; "Injunction," § 50; "Party Walls," § 8.

On highway, see "Highways," §§ 153-164.

On private roads, see "Private Roads."

On public property or rights as nuisance, see "Nuisance," § 63.

On street, see "Municipal Corporations," §§ 691-700.

### **EN DECLARATION DE SIMULATION.\***

#### *Cross-References.*

See "Cancellation of Instruments"; "Quieting Title."

### **ENDOWMENT.\***

#### *Cross-References.*

Of charity, see "Charities," §§ 1-30.

Of colleges and universities, see "Colleges and Universities," § 6.

### **ENEMIES.\***

#### *Cross-Reference.*

See "War."

### **ENGAGEMENT.\***

#### *Cross-Reference.*

See "Breach of Marriage Promise."

### **ENGINES.\***

#### *Cross-References.*

Care required of master as to condition and quality of locomotives, see "Master and Servant," § 110.

Care required of person using traction engine on highway, see "Highways," § 172.

Duty to maintain highway in reasonably safe condition for traction engines, see "Highways," § 188.

Liability of owner or operator of steam engine or roller for injuries caused by frightening animals on highway, see "Highways," § 181.

Statutory and municipal regulation of equipment of trains, see "Railroads," § 229.

### **ENGLISH LANGUAGE.\***

#### *Cross-Reference.*

Official publications in, see "Newspapers," § 3.

### **ENGRAVINGS.\***

#### *Cross-Reference.*

Subjects of copyright, see "Copyrights," § 9.

### **ENJOIN.\***

#### *Cross-Reference.*

See "Injunction."

\*Annotation: Words and Phrases, same title.

**ENJOYMENT.\****Cross-References.*

Covenant for quiet enjoyment, see "Covenants," §§ 43, 65, 97, 128; "Landlord and Tenant," § 130.

Of easement, see "Easements."

**ENLARGEMENT.***Cross-References.*

Acquisition of precedent estate by remainderman, see "Remainders," §§ 7-9.

Acquisition of remainder by tenant of preceding estate, see "Remainders," § 6.

Acquisition of reversion by tenant of preceding estate, see "Reversions," § 3.

Of estate devised by failure of other devise, see "Wills," §§ 849-866.

**ENLISTMENT.\****Cross-References.*

In army, bounties, see "Bounties," § 1.

In army or navy, see "Army and Navy," §§ 17-19.

**ENROLLMENT.\****Cross-References.*

In general, see "Records."

Of decree in equity, see "Equity," § 428.

Of judgment, see "Judgment," §§ 270-293.

Of legislative bills, see "Statutes," § 37.

Of paupers, see "Paupers," § 1.

Of vessel as evidence of ownership, see "Shipping," § 19.

Place of enrollment of vessels as place to record mortgage, see "Shipping," § 33.

**ENTAIL.***Cross-Reference.*

See "Estates Tail."

**ENTERTAINMENT.\****Cross-References.*

See "Theaters and Shows."

As nuisance, see "Nuisance," § 3.

**ENTICEMENT.\****Cross-References.*

Of apprentice, see "Apprentices," §§ 21, 22.

Of child, see "Kidnapping"; "Parent and Child," § 18.

Of female, see "Abduction."

Of husband or wife, see "Husband and Wife," §§ 322-337.

Of servant to leave employment, see "Master and Servant," §§ 339, 343.

Of witness as ground for refusal of continuance, see "Criminal Law," § 594.

**ENTIRE CONTRACTS.\****Cross-References.*

See "Contracts," § 171; "Sales," § 62; "Vendor and Purchaser," § 55.

Insurance policies, see "Insurance," § 179.

**ENTIRETY, ESTATE BY.\****Cross-References.*

See "Husband and Wife," § 14.

Creation by will, see "Wills," § 627.

Testamentary disposition, see "Wills," § 6.

**ENTITLING.***Cross-References.*

Affidavits, see "Affidavits," § 7.

Bill in equity, see "Equity," § 130.

Indictment, see "Indictment and Information," §§ 20-26.

Information, see "Indictment and Information," § 48.

Motions, see "Motions," § 15.

Pleadings, see "Pleading," § 4.

Process, see "Process," § 25.

Statutes, see "Statutes," §§ 105-126.

**ENTRANCE FEES.\****Cross-Reference.*

In furtherance of gambling contest, see "Gaming," § 8.

**ENTRAPMENT.***Cross-Reference.*

Defense to criminal prosecution, see "Criminal Law," § 37.

**ENTRY.\****Cross-References.*

As element of burglary, see "Burglary," § 9.

By landlord to make repairs, see "Landlord and Tenant," § 150.

Entries in books of account as evidence, see "Evidence," § 376.

Fees of clerks for making entries, see "Clerks of Courts," §§ 19, 48.

For breach of condition in deed, see "Deeds," § 168.

Of appearance, see "Appearance," § 5.

Of assignment of judgment, see "Judgment," § 840.

Of cause for trial, see "Trial," § 7.

Of cause on appeal or writ of error, see "Appeal and Error," §§ 431-433; "Criminal Law," § 1082; "Justices of the Peace," § 161.

Of credit in account as evidence of part payment within statute of limitations, see "Limitation of Actions," § 159.

Of credits on partial satisfaction of judgment, see "Judgment," § 895.

Of decree in equity, see "Equity," § 428.

Of default, see "Damages," § 195; "Judgment," § 120.

Of deposit in bank, see "Banks and Banking," § 121.

Of deposit in bank for collection, see "Banks and Banking," § 158.

Of execution sale, see "Execution," § 240.

Of goods by carrier in custom house, see "Carriers," § 81.

Of imported goods, see "Customs Duties," §§ 63-65, 67, 68.

Of judgment in action to foreclose mortgages, see "Mortgages," § 493.

\*Annotation: Words and Phrases, same title.

Of judgment in civil actions in general, see "Judgment," §§ 63, 64, 88, 131, 132, 188, 270-293; "Justices of the Peace," § 125.  
 Of judgment in criminal prosecutions, see "Criminal Law," § 994; "Rape," § 63.  
 Of judgment in probate proceedings and actions relating to wills or probate, see "Wills," § 353.  
 Of judgment of appellate court, see "Appeal and Error," § 1183.  
 Of judgment on award of arbitrators, see "Arbitration and Award," § 84.  
 Of levy of execution, see "Execution," §§ 139, 140.  
 Of motion, see "Motions," § 17.  
 Of orders in general, see "Motions," § 56.  
 Of order of dismissal, see "Dismissal and Non-suit," §§ 40, 79.  
 Of order opening default judgment, see "Judgment," § 173.  
 Of public lands, see "Public Lands," §§ 29-41.  
 Of return indictment, see "Indictment and Information," § 11.  
 Of satisfaction of execution, see "Execution," § 357.  
 Of satisfaction of judgment, see "Judgment," § 897.

Of satisfaction of mortgage, see "Chattel Mortgages," § 246; "Mortgages," § 314.  
 Of special bail, see "Bail," § 4.  
 Of statutes, see "Statutes," § 37.  
 Of stipulations, see "Stipulations," § 9.  
 Of verdict of findings, see "Criminal Law," § 892; "Trial," § 342.  
 On demised premises under title paramount, as eviction of tenant, see "Landlord and Tenant," § 174.  
 On land as trespass, see "Trespass," § 12.  
 On land by force, see "Forcible Entry and Detainer."  
 On land, element of adverse possession, see "Adverse Possession," §§ 65, 67.  
 On land, peaceably, see "Forcible Entry and Detainer," § 3.  
 On land pendente lite, see "Lis Pendens," § 25.  
 Re-entry by landlord, see "Landlord and Tenant," §§ 275-318.  
 To foreclose mortgage, see "Mortgages," §§ 320-328.  
 Writ of entry, see "Entry, Writ of."

### ENTRY TAKER.\*

*Cross-Reference.*

De facto officer, see "Officers," § 41.

## ENTRY, WRIT OF.

### *Scope-Note.*

[INCLUDES actions for recovery of specific real property, founded on mere right of possession thereof, without or with incidental recovery of damages for detention or profits, etc., thereof, more particularly writs of entry, and statutory possessory actions of similar character; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; incidental recovery for use and occupation, profits, damages, improvements, etc.; verdict and judgment and enforcement thereof; review of proceedings; and costs in such actions.

[EXCLUDES real actions founded on right of property (see "*Real Actions*"); actions for forcible entry and detainer and of forcible detainer (see "*Forcible Entry and Detainer*"); recovery of possession merely of real property, and damages for detention thereof (see "*Ejectment*"; "*Trespass to Try Title*"); actions for damages for wrongful entry upon or injury to real property (see "*Trespass*"); and writs of entry to foreclose mortgages (see "*Mortgages*").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

- § 1. Nature and scope of remedy.
- § 2. Statutory provisions.
- § 3. Grounds.
- § 4. — In general.
- § 5. — Title and right to possession of demandant.
- § 6. — Ouster or disseisin and possession of tenant.
- § 7. Defenses.
- § 8. Persons entitled to sue.
- § 9. Persons against whom action may be brought.

\*Annotation: Words and Phrases, same title.

- § 10. Jurisdiction and venue.
- § 11. Time to sue.
- § 12. Parties.
- § 13. Process and appearance.
- § 14. Pleading.
- § 15. — Declaration.
- § 16. — Plea.
- § 17. — Disclaimer.
- § 18. — Replication.
- § 19. — Amendments.
- § 20. — Issues, proof, and variance.
- § 21. Evidence.
- § 22. Trial.
- § 23. Judgment.
- § 24. Damages and mesne profits.
- § 25. Improvements.
- § 26. Review.
- § 27. Restitution.

*Cross-References.*

Actions for damages for wrongful entry upon or injury to real property, see "Trespass," §§ 16-75.  
 Actions for forcible entry and detainer, see "Forcible Entry and Detainer."  
 Actions for recovery of possession of real property, and damages for detention thereof, see "Ejectment."  
 Actions for recovery of real property founded on right to damages for trespass thereon, see "Trespass to Try Title."  
 Fraud in conveyance, see "Fraudulent Conveyances," § 230.

Real actions founded on right of property, see "Real Actions."  
 Testimony as to transactions with persons since deceased, see "Witnesses," § 150.  
 Writ of entry to foreclose mortgage, see "Mortgages," § 325.  
 Writ of entry to obtain possession of mortgaged premises, see "Mortgages," § 213.  
 Writ of entry to recover land used by town for pumping station, see "Waters and Water Courses," § 193.

**ENVOYS.**

*Cross-Reference.*

See "Ambassadors and Consuls."

**EPIDEMIC.**

*Cross-References.*

See "Health," §§ 22-25.  
 Among animals, see "Animals," §§ 28-36.

**EPILEPSY.\***

*Cross-Reference.*

Evidence explanatory of evidence as to commission of crime during epileptic fit, see "Criminal Law," § 361.

**EQUALITY.\***

*Cross-References.*

Constitutional requirement as to equality and uniformity of taxation, see "Highways," § 122; "Municipal Corporations," § 407; "Taxation," §§ 40-45.

**EQUALIZATION.\***

*Cross-References.*

Of assessments for taxation in general, see "Taxation," §§ 447-450.  
 Of levee assessments, see "Levees," § 25.

**EQUAL PROTECTION OF THE LAWS.\***

*Cross-Reference.*

See "Constitutional Law," §§ 209-250.

**EQUIPMENT.\***

*Cross-References.*

For public schools, see "Schools and School Districts," § 75.  
 Injuries from defects in railroad equipment, see "Railroads," § 362.  
 Of street cars, see "Street Railroads," § 73.  
 Of trains, see "Railroads," § 229.  
 Of trains as subject of interstate commerce, see "Commerce," § 27.

\*Annotation: Words and Phrases, same title.

**EQUITABLE ASSETS.\****Cross-References.*

See "Attachment," § 58; "Creditors' Suit"; "Execution," § 40; "Executors and Administrators," § 45; "Trusts."

**EQUITABLE ASSIGNMENTS.\****Cross-References.*

See "Assignments," §§ 48-52; "Subrogation."  
Of judgments, see "Judgment," § 843.  
Of mortgages, see "Mortgages," §§ 233, 235, 236.

**EQUITABLE ATTACHMENTS.***Cross-References.*

See "Attachment," § 12; "Garnishment," § 5.

**EQUITABLE BAIL.***Cross-Reference.*

See "Ne Exeat."

**EQUITABLE CONVERSION.\****Cross-Reference.*

See "Conversion."

**EQUITABLE DEFENSES.\****Cross-References.*

Ground for relief against judgment, see "Judgment," § 430.  
In United States courts, see "Courts," § 371.  
To action at law in general, see "Action," § 24.  
To action on bill or note, see "Bills and Notes," § 448.  
To ejectment, see "Ejectment," §§ 26-28.  
To mandamus proceedings, see "Mandamus," § 15.  
To replevin, see "Replevin," § 12.  
To trespass to try title, see "Trespass to Try Title," §§ 19, 20.  
To validity of release, see "Release," § 24.

**EQUITABLE EJECTMENT.\****Cross-Reference.*

See "Ejectment," §§ 154-167.

**EQUITABLE ESTATES.\****Cross-References.*

See "Mortgages," §§ 138, 139; "Trusts"; "Vendor and Purchaser," § 54.  
Property subject to sale, see "Vendor and Purchaser," § 7.

Subject of equity jurisdiction, see "Equity," § 19.

Subject of mortgage, see "Mortgages," § 12.

Subject to attachment, see "Attachment," § 58.

Subject to execution, see "Execution," § 40.

Subject to taxation, see "Taxation," § 82.

Sufficiency to support trespass, see "Trespass," § 19.

**EQUITABLE ESTOPPEL.\****Cross-Reference.*

See "Estoppel," §§ 52-121.

**EQUITABLE EXECUTION.\****Cross-Reference.*

Process of bankruptcy court for sale of assets as equitable execution, see "Bankruptcy," § 191.

**EQUITABLE GARNISHMENT.\****Cross-Reference.*

By mechanic's lien claimant, see "Mechanics' Liens," § 113.

**EQUITABLE LIENS.\****Cross-References.*

See "Liens," § 7.  
Of factor, see "Factors," § 47.  
Vendors' liens, see "Vendor and Purchaser," § 254.

**EQUITABLE MORTGAGES.\****Cross-References.*

See "Chattel Mortgages," § 33; "Mortgages," §§ 27-30.  
Application of statute of frauds, see "Frauds, Statute of," § 66.

**EQUITABLE OWNERS.\****Cross-Reference.*

Of corporate stock, see "Corporations," § 243.

**EQUITABLE PLEDGES.***Cross-Reference.*

See "Pledges," § 14.

**EQUITABLE SET-OFF.***Cross-Reference.*

See "Set-Off and Counterclaim."

\*Annotation: Words and Phrases, same title.

## EQUITY.\*

*Scope-Note.*

[INCLUDES administration of equity as a distinct system of jurisprudence, either by separate courts of chancery or by other courts exercising chancery powers; nature, grounds, limits, and subjects of jurisdiction in equity in general; principles and maxims of equity jurisprudence; and procedure peculiar to suits in equity.

[EXCLUDES jurisdiction of courts of equity and its exercise over particular classes of persons or species of property or estates therein (see "*Infants*"; "*Partnership*"; "*Trusts*"; and other specific heads); particular equitable estates, rights, and defenses (see "*Estates*"; "*Assignments*"; "*Mortgages*"; "*Liens*"; "*Estoppel*"; "*Set-Off and Counterclaim*"; and other specific heads); particular equitable remedies (see "*Injunction*"; "*Quieting Title*"; "*Cancellation of Instruments*"; "*Reformation of Instruments*"; "*Specific Performance*"; "*Account*"; "*Discovery*"; and other specific heads); equitable relief and equitable defenses in actions at common law or under practice acts or codes abolishing distinction between actions at law and suits in equity (see "*Action*"; "*Pleading*"; and titles of particular proceedings in actions); appeals from decrees or orders in equity (see "*Appeal and Error*") ; costs in equitable cases (see "*Costs*") ; and organization and general conduct of business of courts of equity (see "*Courts*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Jurisdiction, Principles, and Maxims.**

## (A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION IN GENERAL.

- § 1. Nature and source of jurisdiction.
- § 2. Constitutional and statutory provisions.
- § 3. Grounds of jurisdiction in general.
- § 4. Accident.
- § 5. Mistake.
- § 6. — In general.
- § 7. — Of law.
- § 8. — Of fact.
- § 9. — Of expression.
- § 10. Fraud.
- § 11. — In general.
- § 12. — Actual fraud.
- § 13. — Inequitable or unconscionable transactions.
- § 14. — As to third persons.
- § 15. Subjects of jurisdiction in general.
- § 16. Personal status and rights.
- § 17. Property and rights therein in general.
- § 18. Community or uncertainty of ownership or interest.
- § 19. Equitable estates or interests.
- § 20. Liens.
- § 21. Fiduciary rights and obligations.
- § 22. Administration of estates.
- § 23. Contracts in general.
- § 24. Penalties and forfeitures.
- § 25. Illegal contracts, combinations, and transactions.

\*Annotation: Words and Phrases, same title.

**I. Jurisdiction, Principles, and Maxims—Continued.****(A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION IN GENERAL—Continued.**

- § 26. Torts.
- § 27. Crimes.
- § 28. Criminal prosecutions.
- § 29. Powers and acts of public officers.
- § 30. Political questions.
- § 31. Jurisdiction of the person.
- § 32. Jurisdiction of property or other subject-matter.
- § 33. Amount or value in controversy.
- § 34. Trivial matters.
- § 35. Ancillary and incidental jurisdiction.
- § 36. Exercise of jurisdiction beyond territorial limits.
- § 37. Retention of jurisdiction acquired.
- § 38. — In general.
- § 39. — Complete relief.
- § 40. — Alternative legal relief.
- § 41. — Denial of equitable relief.
- § 42. Waiver of objections.

**(B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.**

- § 43. Existence of remedy at law and effect in general.
- § 44. Exclusive or concurrent jurisdiction.
- § 45. Adequacy of legal remedy.
- § 46. — In general.
- § 47. — Title to or possession of property.
- § 48. — Performance or breach of contract.
- § 49. Enlargement of legal remedy.
- § 50. Statutory creation of remedy.
- § 51. Multiplicity of suits.
- § 52. Circuity of action.
- § 53. Waiver of objections.

**(C) PRINCIPLES AND MAXIMS OF EQUITY.**

- § 54. Application and operation in general.
- § 55. Equity suffers no right to be without a remedy.
- § 56. Equity regards substance rather than form.
- § 57. Equity regards that as done which ought to be done.
- § 59. Equality is equity.
- § 60. Where equities are equal, the first in time will prevail.
- § 61. Where equities are equal, the law will prevail.
- § 62. Equity follows the law.
- § 63. Equity acts in personam, not in rem.
- § 64. Equity aids the vigilant, not those who sleep on their rights.
- § 65. He who comes into equity must come with clean hands.
- § 66. He who seeks equity must do equity.

**II. Laches and Stale Demands.**

- § 67. Nature and elements in general.
- § 68. Grounds and essentials of bar.
- § 69. — In general.



**II. Laches and State Demands—Continued.**

- § 70. — Knowledge of facts.
- § 71. — Lapse of time.
- § 72. — Prejudice from delay in general.
- § 73. — Loss of evidence.
- § 74. Excuses.
- § 75. — In general.
- § 76. — Personal disabilities.
- § 77. — Pecuniary condition, insolvency, or bankruptcy.
- § 78. — Absence or nonresidence.
- § 79. — Negligence of attorney or other representative.
- § 80. — Fraud, concealment, or other act of adverse party.
- § 81. — Negotiations and agreements between parties.
- § 82. — Pendency of legal proceedings.
- § 83. — Recognition of right by adverse party.
- § 84. Application of doctrine in general.
- § 85. Rights of public.
- § 86. Effects of possession of real property involved.
- § 87. Following statute of limitations.
- § 88. Waiver of objections.

**III. Parties and Process.**

- § 89. Parties in general.
- § 90. — Necessity and effect of interest.
- § 91. — Nature and extent of interest.
- § 92. — Persons joined for purpose of discovery.
- § 93. Necessary or indispensable parties.
- § 94. — Persons indispensable to complete and final determination.
- § 95. — Persons legally represented.
- § 96. — Grounds for omitting or dispensing with parties.
- § 97. — One or more suing or defending on behalf of all.
- § 98. Proper parties.
- § 99. — Interest in controversy separable.
- § 100. — Interest in subject-matter without interest in controversy.
- § 101. — Dispensing with parties.
- § 102. Complainants.
- § 103. — In general.
- § 104. — Real party in interest.
- § 105. — Joinder.
- § 106. Defendants.
- § 107. — In general.
- § 108. — Joinder.
- § 109. Making party complainant or defendant.
- § 110. — In general.
- § 111. — Party refusing to join as complainant.
- § 112. — Change of position.
- § 113. Parties to original suit as parties to ancillary suit.
- § 114. Intervention.
- § 115. Bringing in new parties.
- § 116. Substitution.

**III. Parties and Process—Continued.**

- § 117. Defects and objections as to parties.
- § 118. Amendment as to parties.
- § 119. Process in general.
- § 120. Subpoena.
- § 121. — Nature and necessity.
- § 122. — Issuance, form, and requisites.
- § 123. — Service.
- § 124. — Return.
- § 125. — Defects, objections, and amendment.
- § 126. Attachment against the person.
- § 127. Appearance.

**IV. Pleading.****(A) ORIGINAL BILL.**

- § 128. Nature and office.
- § 129. Form and requisites in general.
- § 130. Title or caption.
- § 131. Address or direction.
- § 132. Introduction or statement as to parties.
- § 133. Premises or statement of cause of action.
- § 134. Confederating part.
- § 135. Charging part.
- § 136. Averment of jurisdiction.
- § 137. Interrogating part.
- § 138. Prayer for relief.
- § 139. Prayer for process.
- § 140. Interrogatories.
- § 141. Form and sufficiency of allegations in general.
- § 142. Directness and positiveness, or argumentativeness.
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 Necessity of exceptions for purpose of review in equitable actions, see "Appeal and Error," § 250.  
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 Scope and extent of review in equitable actions, see "Appeal and Error," §§ 847, 1000, 1009, 1065.  
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## **I. JURISDICTION, PRINCIPLES, AND MAXIMS.**

### **(A) NATURE, GROUNDS, SUBJECTS, AND EXTENT OF JURISDICTION IN GENERAL.**

#### *Cross-References.*

Averment of jurisdiction in bill, see post, § 136.  
 Demurrer for want of jurisdiction, see post, § 220.  
 Jurisdiction of subject-matter of cross-bill, see post, § 199.  
 Plea to the jurisdiction, see post, § 160.  
 Grounds for injunction, see "Injunction," §§ 9-24.

#### **§ 1. Nature and source of jurisdiction.**

(a) Equity jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in the court of chancery of England.—*Thompson v. McKim*, 6 H. & J. 302; *Amelung v. Seekamp*, 9 G. & J. 468. [Cited and annotated in 22 L. R. A. 238, on injunction against trespass to cut timber.]

#### **§ 2. Constitutional and statutory provisions.**

#### *Cross-References.*

Acts conferring jurisdiction on chancery courts as encroachment on judiciary, see "Constitutional Law," § 56.  
 Abolition of distinction between law and equity, see "Action," § 25.  
 Equitable relief or defenses in actions at law, see "Action," § 23.

(a) Const. art. 4, § 28, giving the law courts

of the city of Baltimore concurrent jurisdiction in all civil common-law cases, does not affect Code 1888, art. 16, § 194, passed before the adoption of the constitutional provision, and which provides that on failure of a purchaser at a trustee's sale to comply with his bid a court of equity may order a resale at the risk of the purchaser.—*Capron v. Devries*, 83 Md. 220, 34 Atl. 251. (See Code 1911, art. 16, § 224.)

(b) Where jurisdiction of a particular case is conferred upon the chancellor by a special act, he must adhere strictly to the authority given.—*In re Hepburn*, 3 Bland 95. [Cited and annotated in 22 L. R. A. (N. S.) 4, 32, 89, 97, on judicial power over eminent domain.]

(c) Where jurisdiction of a particular case is conferred on the chancellor by a special act, so far as the act is silent as to the mode of proceeding, the court must be governed by the established principles of law and equity applicable to the case.—*In re Hepburn*, 3 Bland 95. [Cited and annotated, see supra.]

#### **§ 3. Grounds of jurisdiction in general.**

#### *Annotation.*

Right of creditor of taxing district to invoke aid of court to obtain satisfaction of debt where ordinary remedies not available.—32 L. R. A. (N. S.) 1020, note.

(a) A court of equity has no jurisdiction of a bill filed by mutual understanding of the parties interested in a certain estate, to elicit the opinion of the court, where no legal cause of action appears, but simply a claim by a widow that she has a right to dower in such estate.—*Knighon v. Young*, 22 Md. 359.

#### § 4. Accident.

#### § 5. Mistake.

##### Cross-References.

Ground for avoiding release, see "Release," § 16.

Mistake in payment of fund by lienholder to trustee in bankruptcy, see "Bankruptcy," § 154.

Recovery of payments made under mistake, see "Payment," § 84.

#### § 6.— In general.

##### Annotation.

Mistake in computation by contractor as ground for relief.—10 L. R. A. (N. S.) 114, note.

(a) A mistake, to afford any ground for relief in equity, must be mutual.—*Groff v. Rohrer*, 35 Md. 327; *Renshaw v. Lefferman*, 51 Md. 277.

(b) Where relief is sought because of accident or mistake alone, without fraud, there must be conclusive proof of the mistake to justify the interference of the court of equity.—*Katz v. Moore*, 13 Md. 566. [Cited and annotated in 53 L. R. A. 362, on moral obligation as consideration.]

(c) Before a party can be relieved, in the case of a written contract, on the ground of a mistake, the evidence of the mistake must be clear and satisfactory; and, if any reasonable doubt can be entertained on the subject, relief will be refused.—*Goldsborough v. Ringgold*, 1 Md. Ch. 239.

(d) In case of mistake, clearly proved, equity will afford relief.—*Wesley v. Thomas*, 6 H. & J. 24. [Cited and annotated in 28 L. R. A. (N. S.) 876, 878, 913, on relief from mistake of law as to effect of instrument.] *Watkins v. Stockett*, 6 H. & J. 435. [Cited and annotated in 28 L. R. A. (N. S.) 876, 921, 922, on relief from mistake of law as to effect of instrument.]

#### § 7.— Of law.

##### Cross-Reference.

In accounting by executor or administrator, see "Executors and Administrators," § 515.

##### Annotation.

Mistake as to law of another state or country as one of law or of fact.—46 L. R. A. (N. S.) 174, note.

Relief from mistake of law as to effect of instrument.—28 L. R. A. (N. S.) 785, note.

(a) A simple mistake by a party as to the legal effect of a transaction is not ground for equitable relief.—*Euler v. Schroeder*, 112 Md. 155, 76 Atl. 164.

(b) Mistake as to the facts will not entitle a party to relief in equity, if the mistake arose from negligence or want of such diligence as might fairly be expected from a reasonable person.—*Kearney v. Sascor*, 37 Md. 264. [Cited and annotated in 30 L. R. A. 241, on injunction against judgments by confession; in 30 L. R. A. 797, on injunction against judgments obtained by fraud, accident, mistake, surprise and duress.]

(c) If a mistake of fact is the result of a party's own carelessness or inattention, the court will not interfere in his behalf; its policy being to grant relief to the vigilant, and to put all parties on the exercise of a reasonable degree of diligence.—*Wood v. Patterson*, 4 Md. Ch. 335. [Cited and annotated in 5 L. R. A. (N. S.) 799, on effect of ignorance or carelessness of person overreached on right to equitable relief; in 28 L. R. A. (N. S.) 854, 883, on relief from mistake of law as to effect of instrument.]

(d) Equity will grant relief to one who acts under a plain and acknowledged mistake of his legal rights, where the legal principle involved is confessedly doubtful and is one about which ignorance may well be supposed to exist.—*Lammot v. Bowly*, 6 H. & J. 500. [Cited and annotated in 48 L. R. A. (N. S.) 774, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another; in 28 L. R. A. (N. S.) 288, on relief from mistake of law as to effect of instrument.] Compare, *Williams v. Hodgson*, 2 H. & J. 474, 3 Am. Dec. 563. [Cited and annotated in 28 L. R. A. (N. S.) 805, on relief from mistake of law as to effect of instrument.]

(e) Ignorance of the law as to the legal consequences resulting from the acceptance by a creditor of a bond given by one partner for a simple contract debt due the creditor

from the partnership, cannot excuse or form a ground for relief in equity.—*Williams v. Hodgson*, 2 H. & J. 474, 3 Am. Dec. 563. [Cited and annotated, see supra.] Compare, *Lammot v. Bowly*, 6 H. & J. 500. [Cited and annotated, see supra.]

### § 8.—Of fact.

(a) Where each party to a contract is ignorant of a mistake of fact constituting a material ingredient in the contract, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, lays no foundation for equitable interference.—*Groff v. Rohrer*, 35 Md. 327.

(b) Equity may grant relief in cases where parties have done acts or entered into contracts through mistake or ignorance of a material fact; and the power is not confined to cases where the fact has been studiously suppressed or concealed by one party, which would amount to fraud, but embraces many cases of innocent ignorance and mistake on both sides.—*Wood v. Patterson*, 4 Md. Ch. 335. [Cited and annotated in 5 L. R. A. (N. S.) 799, on effect of ignorance or carelessness of person overreached on right to equitable relief; in 28 L. R. A. (N. S.) 854, 883, on relief from mistake of law as to effect of instrument.]

(c) If the fact be unknown to the parties, or each has equal and adequate means of information regarding it, and the parties have acted in good faith, equity will not interfere.—*Wood v. Patterson*, 4 Md. Ch. 335. [Cited and annotated, see supra.]

### § 9.—Of expression.

### § 10. Fraud.

#### Cross-References.

Giving remedy in equity to determine validity of will, see "Wills," § 222.

Ground of action for account, see "Account," § 7.

### § 11.—In general.

#### Annotation.

Equitable relief on ground of fraud to grantor in conveyance in consideration of agreement to support, which is broken by the grantee.—43 L. R. A. (N. S.) 924, note.

Fraud as ground for enforcement in equity of grantee's oral promise to grantor to hold in trust.—39 L. R. A. (N. S.) 911, 923, note.

Equity jurisdiction of suit by trustee in bankruptcy to recover a sum of money from one who has received a fraudulent transfer or unlawful preference.—16 L. R. A. (N. S.) 414, note.

Jurisdiction of equity over suits by corporation or its representative to hold directors or officers liable for losses occasioned by their fraud.—8 L. R. A. (N. S.) 738, note.

Enforcing rights in land as affected by statute of frauds.—5 L. R. A. (N. S.) 112, note.

Equitable relief against forfeiture of estate due to fraud.—69 L. R. A. 849, note.

Relief in equity against bona fide holder of note obtained by fraud.—36 L. R. A. 465, note.

(a) Transactions induced by the influence of one of the parties over the other will be set aside unless shown to be fair.—*Kensett v. Safe Deposit & Trust Co.*, 116 Md. 526, 82 Atl. 981.

### § 12.—Actual fraud.

(a) A bill charging that a defendant, having stolen and sold complainant's property, has conspired with a codefendant to conceal the proceeds by a deposit in bank under a false name, with the purpose of finally converting it to their joint use, is sufficient to vest jurisdiction in a court of equity, which is not ousted by a denial of the answer.—*Rothenberg v. Vierath*, 87 Md. 634, 40 Atl. 655.

(b) A court of equity in a clear case of fraud and overreaching, will not permit the wrongdoer to profit in the slightest degree by his transactions.—*Rosenthal v. Mahon*, 65 Md. 418, 5 Atl. 246; *Same v. Poole*, Id.

### § 13.—Inequitable or unconscionable transactions.

### § 14.—As to third persons.

(a) In some cases a person may be relieved against the consequences of a fraud practiced upon another; but, where it appears that the fraud can never extend so as to affect a third party, the court will not interfere.—*Chase v. Manhardt*, 1 Bland 333. [Cited and annotated in 30 L. R. A. 790, on injunction against judgments obtained by fraud, accident, mistake, surprise, and duress; in 40 L. R. A. (N. S.) 589, 600, on acceptance of principal as affecting right to interest.]

## § 15. Subjects of jurisdiction in general.

### Annotation.

Interference by equity with matters preceding election.—3 L. R. A. (N. S.) 382; 40 L. R. A. (N. S.) 576, notes.

Jurisdiction of court of equity to award compensatory damages for breach of trust.—14 L. R. A. (N. S.) 900, note.

Effect of legal remedy to defeat equitable jurisdiction to follow trust funds.—6 L. R. A. (N. S.) 793, note.

(a) The court of chancery has no jurisdiction over the subject of the appointment of insolvent trustees. This is a power confided exclusively to the courts of law, over which, in the exercise of their authority, the court of chancery can exercise no power of revision or control.—*Powles v. Dilley*, 2 Md. Ch. 119. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

(b) After courts of law have acted by the appointment of a trustee for an insolvent, equity cannot, on allegations that an improper person has been appointed, set aside the appointment and take upon itself the administration of the estate of the insolvent.—*Powles v. Dilley*, 2 Md. Ch. 119. [Cited and annotated, see *supra*.]

(c) A court of chancery has no supervisory power over courts of law.—*Richardson v. City of Baltimore*, 8 Gill 433.

(d) The court of chancery, except as an appellate tribunal, never interferes to arrest or set aside the proceedings of courts of law or other judicial tribunal, upon the ground of legal error therein, unless prompted by conscience to prevent wrong and injustice, but leaves the party complainant to his remedy at law.—*Methodist Protestant Church v. City of Baltimore*, 6 Gill 391, 48 Am. Dec. 540. [Cited and annotated in 22 L. R. A. (N. S.) 112, 113, 114, on judicial power over eminent domain.]

(e) Where claims between co-sureties on an administration bond have become complicated by sundry payments and receipts, to adjust which accounts would be necessary to show the true payments, a case is made for equity.—*Flickinger v. Hull*, 5 Gill 60. [Cited and annotated in 31 L. R. A. 66, on enjoining judgments against or in favor of sureties.]

## § 16. Personal status and rights.

(a) Equity has not jurisdiction to protect a person from surveillance by detectives.—*Chappell v. Stewart*, 82 Md. 323, 33 Atl. 542. [Cited and annotated in 1 L. R. A. (N. S.) 1148, on injunction to protect personal right; in 37 L. R. A. (N. S.) 945, on injunction against publication or sale of letters; in 43 L. R. A. (N. S.) 521, on liability for "shadowing" person.]

## § 17. Property and rights therein in general.

### Cross-Reference.

See "Partition," § 39.

### Annotation.

Equitable remedies available to one whose property has been taken for public use without his consent and without condemnation proceedings.—28 L. R. A. (N. S.) 973, note.

Power of equity in jurisdiction where mortgage does not convey the title, to impound rents and profits of mortgaged property pending foreclosure.—7 L. R. A. (N. S.) 1001, note.

Equitable relief against forfeiture of estate.—69 L. R. A. 833, note.

(a) The store of F. was broken into and robbed of gold coin, treasury notes, etc. H. was charged with the commission of the robbery, arrested, and lodged in jail, but escaped before trial and was never more heard of. At the time of his arrest he had on his person a sum of money which was taken possession of by the sheriff. F. filed a bill in equity to obtain possession of the fund in the hands of the sheriff. *Held*, that a court of equity had no jurisdiction to grant relief.—*Fletcher v. Hooper*, 32 Md. 210.

## § 18. Community or uncertainty of ownership or interest.

### Cross-Reference.

Ground of action for account, see "Account," § 3.

## § 19. Equitable estates or interests.

## § 20. Liens.

(a) Land was sold under a decree of a court of equity to satisfy a lien, and a petition was brought by judgment creditors of the owner of the land for the payment of their judgments from the surplus in the hands of the court. The judgment debtor died before the institution of the proceedings to enforce the lien, and the parties interested in the surplus were her minor chil-

dren. The judgments were obtained before the creation of the aforesaid lien. *Held*, that the petition should be dismissed.—*Sansbury v. Belt*, 53 Md. 324.

(b) One having a lien on certain machinery in a factory agreed that his lien suit in the county court should be stricken off, and the claim filed in a chancery suit in which the whole property was sold by a trustee en masse, free of all incumbrances; notice, however, of the lien claim having been given to the trustees at the time of sale. *Held*, that the fact that the whole property was sold for a gross sum was not a fatal objection to the claim for lien, since the relative value of the machinery could be ascertained by proof on the subject.—*Wells v. Canton Co.*, 3 Md. 234.

(c) A claim for lien was filed in the county court against certain machinery in a factory, and a scire facias issued thereon. Subsequently the lien suit was by agreement stricken off, and the claim filed in a chancery suit in which the whole property, consisting of the factory and all the machinery in it, was sold by a trustee en masse, free of all incumbrances; notice, however, of the lien claim having been given to the trustees at the time of sale. *Held*, that, under such circumstances, the mechanic had, upon general principles of equity, the right to demand satisfaction for his claim out of the proceeds of sale.—*Wells v. Canton Co.*, 3 Md. 234.

(d) A court of equity may very properly refuse to interfere actively in behalf of a party holding a security, and asking to have it made effectual, when the circumstances may not be strong enough to warrant a decree to compel him to surrender it.—*Williamson v. Morton*, 2 Md. Ch. 94.

## § 21. Fiduciary rights and obligations.

### Cross-References.

Ground of action for account, see "Account," § 4.

Rights as between attorney and client, see "Attorney and Client," § 129.

(a) Where a legal or fiduciary relation exists whereby confidence is reposed on the one side and influence and control are exercised on the other, equity, independent of positive fraud, will protect against over-

weening confidence, and will interpose to prevent one from stripping himself of his property.—*Thiede v. Startzman*, 113 Md. 278, 77 Atl. 666. [Cited and annotated in 35 L. R. A. (N. S.) 957, on presumption and burden of proof as to undue influence respecting gifts inter vivos from parent to child.]

## § 22. Administration of estates.

### Cross-Reference.

Exclusive or concurrent jurisdiction, see post, § 44.

(a) Testator gave his son a certain part of his residuary estate, including certain lands, the estimated value of which was charged against him on testator's books, as was stated in the will, together with cash advancements, on which charge he paid interest during testator's lifetime. *Held*, that such advancement being originally real estate, which the Orphans' Court cannot consider in the distribution of an estate, a court of equity has jurisdiction to determine whether such advancement is still real estate, or was converted by the testator into personalty.—*Safe Deposit & Trust Co. v. Baker*, 91 Md. 297, 46 Atl. 1071; *Baker v. Safe Deposit & Trust Co.*, Id.

(b) Complainants, who were nonresidents, claimed as next of kin, against the administrators and others, the personalty of an estate in the hands of the administrators for distribution. Though having actual notice of the appointment of a day for distribution under direction and control of the Orphans' Court (Code 1860, art. 93, § 143), they declined to submit to its jurisdiction, and filed a bill in equity to have their claims, and those of all others interested, adjudicated and settled. *Held*, that equity will entertain the bill, and not remit the parties to the ex parte and inconclusive proceedings of the Orphans' Court.—*Alexander v. Leakin*, 72 Md. 199, 19 Atl. 532. (See Code 1911, art. 93, § 143.)

(c) Equity will not superintend the settlement of the estate of one deceased, at the instance of the executor, unless special circumstances appear, nor unless immediate relief can be afforded; nor will it undertake to determine future rights.—*Woods v. Fuller*, 61 Md. 457. [Cited and annotated in 15 L. R.



A. (N. S.) 600, on equity jurisdiction of bill to construe wills of realty passing only legal estates.]

(d) The power and jurisdiction of courts of equity to superintend the administration of assets, and decree distribution among legatees and distributees, are now well-established.—*Barnes v. Crain*, 8 Gill 391; *Fenby v. Johnson*, 21 Md. 106.

(e) After the courts of law have acted by the appointment of a trustee, the chancery court cannot, upon allegations that they have appointed an improper person, or taken insufficient security, set aside such appointment, and take upon itself the administration of the estate of the insolvent, by an officer of its own.—*Powles v. Dilley*, 2 Md. Ch. 119. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

(f) A fund arising from the sale of real estate being in the court of chancery, or about to be brought there, for distribution among the heirs and legal representatives of the party who died seised, a petition was filed in the cause by a party claiming to be a creditor of one of the deceased heirs, who was a married woman at the time of her death, and left a husband living, for merchandise sold to her before her marriage (an account of which, with the usual probates, was exhibited with the petition), alleging that she left no assets applicable to the payment of her debts, and praying payment of his claim out of her proportion of the fund. Held, that his petition presented a prima facie case for the interposition of a court of chancery.—*Hays v. Miles*, 9 G. & J. 193, 31 Am. Dec. 70.

### § 23. Contracts in general.

#### Cross-Reference.

Illegal contracts, see post, § 25.

#### Annotation.

Equity jurisdiction to cancel oil or gas lease for failure to develop the leased premises.—34 L. R. A. (N. S.) 34, note.

Right to affirmative relief in equity from contract upon the ground that it was procured from complainant while intoxicated.—17 L. R. A. (N. S.) 1066, note.

Ignorance or carelessness as affecting the right to equitable relief from a contract by which one had been overreached.—5 L. R. A. (N. S.) 799, note.

### § 24. Penalties and forfeitures.

#### Cross-References.

Compelling production of books in action for penalty, see "Discovery," § 82.

Contracts within statute of frauds, see "Frauds, Statute of," § 142.

Demand as condition precedent to forfeiture of mortgage, see "Mortgages," § 414.

Enforcement of forfeiture for breach of condition in deed, see "Deeds," § 168.

Forfeiture for usury, see "Usury," § 147.

Forfeiture of contract of sale of land, see "Vendor and Purchaser," § 89.

Forfeiture of improvements on breach of contract of sale of mine, see "Mines and Minerals," § 54.

Forfeiture of leases, see "Landlord and Tenant," § 111.

Forfeiture of mining lease, see "Mines and Minerals," § 66.

Forfeiture of street railway franchise, see "Street Railroads," § 61.

Penalties or liquidated damages, see "Damages," §§ 74-86.

Relief from forfeiture of deed, see "Deeds," § 167.

Relief from forfeiture of rights in mutual benefit insurance associations, see "Insurance," § 765.

(a) A stipulation in a contract for the sale of goods, payable in installments, that, if default was made in any of the payments, the vendor might reclaim and take them, and that all payments should be forfeited, will not be enforced in equity.—*Lincoln v. Quynn*, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446. [Cited and annotated in 25 L. R. A. (N. S.) 792, on right of one leaving chattels in another's possession as against latter's vendees or creditors.]

(b) Equity will never force a penalty or forfeiture.—*McKim v. White Hall Co.*, 2 Md. Ch. 516; *Cross v. McClenahan*, 54 Md. 21.

(c) A court of equity will not lend its aid to a party claiming to have leased certain stone quarries, and charging a refusal on the part of the lessees, after due notice in writing, to vacate and surrender the premises, to recover the penalty imposed by St. 4 Geo. II. c. 28, upon parties willfully holding over after the expiration of the lease.—*Cross v. McClenahan*, 54 Md. 21. (See Alex. Brit. Stat. [Coe's ed.] 950.)

(d) A devise in trust was made to J. to allow his sister S. the rents and profits, unless she should marry or join a religious sisterhood, in which latter case she should have an annuity, and, if she continued in

the sisterhood 10 years, the property devised should vest in H. In 1837 J. died, and the same year S., upon whom the devised property had devolved as heir at law of J., joined a religious sisterhood. In 1854 H. filed a bill in equity against her for an account of the surplus rents and profits that had accrued, above the amount necessary to discharge the annuity, up to the filing of the bill. *Held*, that the rule that equity will never enforce a forfeiture is not applicable to cases like this of conditional limitation, and that S. was accountable for rents and profits as long as she continued in possession.—*Mitchell v. Mitchell*, 29 Md. 581.

(e) Where a husband and wife sold stock bequeathed in trust for the wife for life, the wife's participation, she being under the dominion of her husband, did not cause a forfeiture of her right as cestui que trust for life; forfeitures not being favored in equity.—*Farmers & Mechanics Bank v. Wayman*, 5 Gill 336. [Cited and annotated in 45 L. R. A. (N. S.) 1078, on liability of corporation to true owner for unauthorized stock transfer; in 15 L. R. A. 643, on corporation's duty as to transfer of stock held in trust.]

(f) Equity will relieve against penalties and forfeitures where the matter lies in compensation, whether the condition be subsequent or precedent; but, notwithstanding it will in many cases interpose to prevent the divesting of an estate, it will not relieve against the nonperformance of a condition precedent, by giving an estate which such nonperformance prevents from vesting.—*City Bank of Baltimore v. Smith*, 3 G. & J. 265. [Cited and annotated in 69 L. R. A. 836, on equitable relief against forfeiture of estate.]

## § 25. Illegal contracts, combinations, and transactions.

### Cross-References.

Rights in quotations of board of trade notwithstanding gambling transactions, see "Exchanges," § 13.

Specific performance of illegal contracts, see "Specific Performance," § 55.

### Annotation.

Equitable remedy of creditors where sale is made in violation of bulk sales law.—39 L. R. A. (N. S.) 374, note.

(a) Equity will not enforce against the

estate of the maker the collection of notes under seal in the hands of the payee, given by the decedent to him of his own free will and accord, simply with the desire of benefiting him, and without valuable consideration.—*Selby v. Case*, 87 Md. 459, 39 Atl. 1041. [Cited and annotated in 7 L. R. A. (N. S.) 160, on gift to child by promissory note.]

(b) Where the parties to a fraudulent or illegal transaction are in pari delicto, the simple fact that, at the time of such transaction, the relation of client and attorney existed between them, will give the former no claim to the aid of a court of equity to have restored to him the property of which the latter has become possessed by their joint fraud. Such relation alone will not except the case from the general rule, "In pari delicto potior est conditio possidentis, aut defendentis."—*Roman v. Mali*, 42 Md. 513.

(c) A bill was filed against a devisee to compel her to convey to the complainant certain real property, the legal title to which was held by her testator at the time of his death. The bill alleged in substance that the testator acquired the title to the property in the capacity of agent and legal adviser of the complainant, and that he paid for it with the money of the complainant, and held it as his agent and trustee from the time of the purchase until his death. The evidence in the case showed that in the transfer and concealment of the property of the complainant, in the name and apparent ownership of the testator, a gross fraud was perpetrated upon the creditors of the former; that the whole transaction was the joint scheme of the two—the one co-operating with the other and both being equally guilty—to withdraw and conceal the complainant's property from the pursuit of his creditors; that the object was accomplished, and the complainant got rid of his creditors by a composition founded upon his fraud and deception. *Held*, that the complainant could not obtain the aid of a court of equity to have the property restored to him.—*Roman v. Mali*, 42 Md. 513.

(d) A court of equity in this state will not entertain a suit based upon a contract or

transaction involving a violation of the laws of other states within their limits.—*Paine v. France*, 26 Md. 46. [Cited and annotated in 64 L. R. A. 170, 171, on conflict of laws as to gambling and lottery contracts.]

(e) The mortgagor of real estate about to be sold to pay the debt filed a petition stating a sale to B. on certain terms, and asking that the trustee to make the sale might be ordered to report it to B., and it was so ordered, and the vendor and vendee filed a written assent to its ratification. The court ratified the sale, and the mortgaged property was conveyed to B. by the trustee. The mortgagor subsequently filed a bill for relief from this sale and deed, on the ground that they were fraudulent. *Held*, that the complainant, having shown that he united with the defendant to reserve rights to himself, not appearing on the face of the legal conveyance, had practiced fraud on a court of justice, and was in *pari delicto* with the defendant, and therefore not entitled to the assistance of a court of equity.—*Wilson v. Watts*, 9 Md. 356.

(f) A. and B., not being indebted to each other, agreed that the former should convey certain property to the latter, who was to reconvey it to him in trust for his family. A. was to confess judgment to B., who was to obtain an execution against the property of A., make purchases to the amount of the judgment, and then convey it to A. in trust for his family. Such judgment was confessed, and B. died, and it was revived by his administrators. On a bill by A. to vacate the agreement and procure a reconveyance, it appeared that the purpose, which was known to both parties in making the conveyance, was to defraud creditors of A. *Held*, that complainant was not entitled to equitable relief, as such parties, as between themselves, being in *pari delicto*, a court of equity would leave them in the situation in which they had placed themselves.—*Freeman v. Sedwick*, 6 Gill 28, 46 Am. Dec. 650.

§§ 26-31. (See Analysis.)

## § 32. Jurisdiction of property or other subject-matter.

### Annotation.

Jurisdiction of equity when the only relief sought is an injunction or receiver to preserve status quo, pending action

or proceedings before other tribunal.—38 L. R. A. (N. S.) 228, note.

## § 33. Amount or value in controversy.

(a) Code 1904, art. 16, § 102, providing that courts of equity should not hear or give relief in any case wherein the original debt or damages did not amount to \$20, a bill to restrain a sale of land for the nonpayment of \$7.92 taxes was properly dismissed.—*Smith v. Wells*, 106 Md. 526, 68 Atl. 134. (See Code 1911, art. 16, § 106.)

(b) Under Code 1904, art. 16, § 102, providing that courts of equity shall not give relief in any cause wherein the original debt does not amount to \$20, a court of equity has no jurisdiction of a suit praying for an injunction to restrain the collection of a tax amounting to about 66 cents.—*Kenneweg v. Allegany County Com'rs*, 102 Md. 119, 62 Atl. 249. (See Code 1911, art. 16, § 106.)

(c) Under Code 1888, art. 16, § 91, providing that the equity courts shall not hear causes wherein the original debt or damage does not amount to \$20, equity will not restrain a tax for \$7.32.—*Kuenzel v. City of Baltimore*, 93 Md. 750, 49 Atl. 649. (See Code 1911, art. 16, § 106.)

## § 34. Trivial matters.

## § 35. Ancillary and incidental jurisdiction.

(a) The court of equity in which a proceeding is first commenced is the proper tribunal for determining all questions that could be raised in such proceeding, as, in case of an action to foreclose a mortgage, an action to set aside the mortgage on the ground of fraud should be brought in the same court.—*Bouldin v. Reynolds*, 50 Md. 171.

(b) Upon a bill for specific execution of an agreement and for an injunction, it is clear that if, upon the plaintiff's case, as made out by his bill, he is not entitled to a specific execution of the agreement set up by him, he cannot be entitled to an injunction, which is only ancillary to the principal object of the suit.—*Allen v. Burke*, 2 Md. Ch. 534.

(c) Though the Orphans' Court is exclusive judge of the sufficiency of the penalty of the bonds of an executor, the insufficiency of the securities on such bond may furnish a basis

for the ancillary jurisdiction of a court of equity in controlling an administrator until the Orphans' Court inquire into the subject, and secure all parties interested by requiring a new security.—*Alexander v. Stewart*, 8 G. & J. 226.

### § 36. Exercise of jurisdiction beyond territorial limits.

#### Annotation.

Jurisdiction of equity with respect to foreclosure of mortgage in another state.—4 L. R. A. (N. S.) 986, note.

Jurisdiction of equity to relieve from fraud affecting real property in another state or country.—69 L. R. A. 686, note.

Jurisdiction of equity to order foreclosure sale of railroad in different states.—32 L. R. A. 208; 69 L. R. A. 682, notes.

(a) A court of equity cannot decree a sale of realty for distribution among the heirs of a decedent where it is situated within another state.—*White v. White*, 7 G. & J. 208.

(b) Where defendant is within the state, and the property in contest is beyond its limits, a court of equity, though the proceeding is in rem, has jurisdiction.—*Carroll v. Lee*, 3 G. & J. 504, 22 Am. Dec. 350.

### § 37. Retention of jurisdiction acquired.

#### Cross-References.

See "Cancellation of Instruments," §§ 57, 58; "Mines and Minerals," § 81; "Nuisance," § 35; "Railroads," §§ 67, 97; "Reformation of Instruments," § 47; "Specific Performance," §§ 127-129; "Trusts," § 374.

Leave to file supplemental bill, see post, § 296.

Construction of will, see "Wills," § 705.

Establishment of boundaries, see "Boundaries," § 26.

For purpose of discovery, see "Discovery," § 20.

In action for injunction, see "Injunction," § 194.

In action of forcible detainer by tenant, see "Landlord and Tenant," § 291.

In action to restrain sale by administrator, see "Executors and Administrators," § 357.

In proceedings for equitable relief against judgment, see "Judgment," § 464.

In proceedings to foreclose mortgage, see "Mortgages," § 486.

### § 38.—In general.

### § 39.—Complete relief.

#### Cross-References.

Conformity to pleadings and proofs, see post, § 427.

Nature and extent of relief granted by decree, see post, § 423.

Relief in action to establish and enforce trust, see "Trusts," § 374.

(a) A court of equity, having properly taken jurisdiction to determine whether an advancement, originally real estate, had been converted by testator into personalty, may retain jurisdiction and distribute testator's estate.—*Safe Deposit & Trust Co. v. Baker*, 91 Md. 297, 46 Atl. 1071; *Baker v. Safe Deposit & Trust Co.*, Id.

(b) A borrower and stockholder in a building and loan association filed a bill praying leave to repay the borrowed money and redeem his mortgage. The bill further showed that it was the desire of the mortgagor to entirely terminate its relations with the association. *Held*, that a court of equity would not, after finding in favor of the right to redeem, limit its decree to an ascertainment of the amount due on the mortgage, but would afford full relief, by ascertaining what was due the mortgagor upon his stock, so as to determine the entire controversy.—*Middle States Loan, Building & Construction Co. v. Hagerstown Mattress & Upholstery Co.*, 82 Md. 506, 33 Atl. 886. [Cited and annotated in 35 L. R. A. 296, on withdrawal from loan associations; in 43 L. R. A. (N. S.) 882, on basis of settlement between building and loan association and borrowing member before maturity of stock.]

(c) Complainant in a bill to set aside a deed for fraud asked also that the grantee should account for the rents and profits of the property, and also that she be removed from her trusteeship under the will of the grantor in the deed. The court in its decree dismissed the bill, so far as it prayed for her removal from the trusteeship, for multifariousness. *Held*, that it was in the scope of equity jurisdiction to compel the fraudulent grantee to account for the rents and profits.—*Canton v. McGraw*, 67 Md. 583, 11 Atl. 287.

(d) The rule that a complainant who has a remedy at law must exhaust it before he can proceed in equity does not apply where the subject-matter of his ultimate equitable remedy is brought into a court of equity on a proceeding properly instituted by others, since the jurisdiction of equity, being once attached, will be retained for the protection

of all the interests involved.—*Kunkel v. Fitzhugh*, 22 Md. 567.

(e) Where a court of equity has originally asserted jurisdiction, which will lie to the settlement of all accounts which may arise out of the subject-matter, it will retain it to the exclusion of other courts for similar purposes.—*Keighler v. Ward*, 8 Md. 254.

(f) A bill averred that complainants instructed defendants, as their agents, to secure insurance for them on a vessel, which the latter neglected to do, and the vessel was lost, and prayed that the defendants discover on oath matters within their knowledge, and they be decreed to pay the amount of the insurance. *Held*, that the court of equity had no jurisdiction further than to compel the discovery, which formed one object of the bill.—*Taylor v. Ferguson*, 4 H. & J. 46.

#### § 40.—Alternative legal relief.

#### § 41.—Denial of equitable relief.

(a) Where a court of equity refuses, on account of fraud, to decree a conveyance of land to a party who has obtained a bond to convey, and paid the purchase money, it will not aid him to recover the money.—*Reinicker v. Smith*, 2 H. & J. 421. [Cited and annotated in 19 L. R. A. 491, on validity of deed of insane person; in 54 L. R. A. 448, on validity of contract with intoxicated person; in 19 L. R. A. (N. S.) 1073, on right, upon failure to establish ground of equitable jurisdiction, to obtain in a suit in equity relief obtainable at law.]

#### § 42. Waiver of objections.

##### Cross-Reference.

Dismissal on court's own motion, see post, § 364.

(a) Objection on the ground of want of jurisdiction may be taken advantage of at the hearing.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949.

(b) Code 1888, art. 5, § 35, providing that no defendant in a suit in equity shall object on appeal to the jurisdiction of the court below, unless the record shows that such objection was made in the lower court, is not satisfied by an objection made in argument in the lower court, but must be taken

by exception filed.—*Melvin v. Aldridge*, 81 Md. 650, 32 Atl. 389. (See Code 1911, art. 5, § 37.)

(c) A grantee who answers without objection that part of a bill in equity which attacks the deed under which he claims must be regarded as thereby submitting his rights under that deed for adjudication.—*Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375. [Cited and annotated in 3 L. R. A. (N. S.) 776, on husband's right to give away his personalty without wife's consent; in 18 L. R. A. (N. S.) 1156, on right of wife to relief against transfer made or contemplated by husband in fraud of her support.]

(d) Objections to the jurisdiction of the court in the case before it may be taken at the hearing.—*Dunnoch v. Dunnoch*, 3 Md. Ch. 140.

(e) In doubtful cases, the fact that objection to the jurisdiction of a court of equity was not raised till a late stage of the proceedings will prevent the court from lending a willing ear to the objection.—*Gough v. Crane*, 3 Md. Ch. 119.

(f) After answer to a bill in equity, the respondent cannot object to the jurisdiction of the court.—*Brooks v. Delaplaine*, 1 Md. Ch. 351.

(g) Where property has been removed from the state, and defendant resides without the state, his appearance in a suit in chancery, and answer to the bill to contest its merits, waives any objection to the jurisdiction, though in his answer he excepts to it.—*Carroll v. Lee*, 3 G. & J. 504, 22 Am. Dec. 350.

#### (B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

##### Cross-References.

Averments in bill as to inadequacy, see post, § 136.

As affecting equity jurisdiction of United States courts, see "Courts," § 262.

Relief to purchaser of chattel without notice of mortgage, see "Chattel Mortgages," § 157.

Remedy in equity as precluding action at law, see "Action," § 22.

Review of decisions, see "Appeal and Error," § 184.

Suit removed from state to federal court, see "Removal of Causes," § 116.

*Remedy at law as bar to particular actions or proceedings.*

See "Contribution," § 9; "Creditors' Suit," §§ 4-6; "Injunction," §§ 16-19; "Quieting Title," § 4; "Specific Performance," § 5.

Abatement of nuisance, see "Nuisance," §§ 23, 80.

Abatement of nuisance in street, see "Municipal Corporations," § 671.

Against executor de son tort, see "Executors and Administrators," § 544.

Against foreign executors, see "Executors and Administrators," § 525.

By executor for discovery of assets, see "Executors and Administrators," § 85.

By trustee in bankruptcy to recover property of bankrupt, see "Bankruptcy," § 287.

Cancellation of instrument, see "Cancellation of Instruments," §§ 10-16.

Cancellation of patents to public lands, see "Public Lands," § 120.

Cancellation of release, see "Release," § 24.

Compelling railroad company to construct private crossing, see "Railroads," § 104.

Construction of wills, see "Wills," § 695.

Contest of will, see "Wills," § 222.

Determination of adverse claim to mining location, see "Mines and Minerals," § 38.

Determination of conflicting claims to public land, see "Public Lands," § 103.

Determination of title to office in corporation, see "Corporations," § 283.

Enforcement of claims against devisees or legatees, see "Wills," § 872.

Enforcement of debts of heir against distributive share, see "Descent and Distribution," § 157.

Enforcement of debts of intestate against heirs and distributees, see "Descent and Distribution," § 138.

Enforcement of forfeiture for breach of condition in deed, see "Deeds," § 168.

Enforcement of liens, see "Liens," § 18.

Equitable relief against judgment, see "Judgment," § 408.

Equitable relief against municipal assessment, see "Municipal Corporations," § 513.

Establishment and enforcement of trusts, see "Trusts," § 359.

Establishment and protection of easements, see "Easements," § 61.

Establishment of boundaries, see "Boundaries," § 26.

Establishment of crossing of highway over railroad, see "Railroads," § 97.

Foreclosure of mortgages, see "Chattel Mortgages," § 255.

Infringement of copyright, see "Copyrights," § 73.

Infringement of patent, see "Patents," § 288.

Intervention in suit to foreclose railroad mortgage, see "Railroads," § 186.

On county bonds, see "Counties," § 188.

Opening or setting aside settlement of decedent's estate, see "Executors and Administrators," § 516.

Quieting tax title, see "Taxation," § 793.

Quieting title, see "Quieting Title," §§ 4, 5.

Recovery for wrongful removal of timber from public lands, see "Public Lands," § 13.

Recovery of damages to property arising from abolition of grade crossings, see "Railroads," § 99.

Reformation of instrument, see "Reformation of Instruments," § 3.

Restraining breach of contract respecting abolition of grade crossing over railroad, see "Railroads," § 99.

Restraining collection of tax, see "Taxation," § 608.

Restraining enforcement of municipal assessment, see "Municipal Corporations," § 535.

Restraining making of municipal improvements, see "Municipal Corporations," § 323.

Restraining municipal acts, see "Municipal Corporations," § 992.

Restraining public improvement before assessment of damages, see "Municipal Corporations," § 404.

Setting aside allowance of claim against decedent's estate, see "Executors and Administrators," § 238.

Setting aside award, see "Arbitration and Award," § 78.

Setting aside fraudulent transfer, see "Fraudulent Conveyances," §§ 237, 239.

Setting aside settlement of minor's claim, see "Guardian and Ward," § 118.

Subrogation, see "Subrogation," § 41.

**§ 43. Existence of remedy at law and effect in general.**

*Cross-Reference.*

See post, § 45.

*Annotation.*

Right to have void judgment reviewed by appellate court as affecting right to equitable relief.—50 L. R. A. (N. S.) 1055, note.

Effect of adequate remedy at law in relief from mistake of law as to effect of instrument.—28 L. R. A. (N. S.) 912, note.

Right, upon failure to establish ground of equitable jurisdiction, to obtain in a suit in equity relief that might be obtained at law.—19 L. R. A. (N. S.) 1064, note.

Jurisdiction of equity to try claims against its receiver which involve purely legal questions.—13 L. R. A. (N. S.) 709, note.

Effect of remedy at law on equitable jurisdiction to remove cloud on title.—12 L. R. A. (N. S.) 55, note.

Effect of legal remedy to defeat equitable remedy to follow trust funds.—6 L. R. A. (N. S.) 793, note.

Jurisdiction of equity to cancel instrument notwithstanding remedy at law.—5 L. R. A. (N. S.) 1048, note.

(a) Where counsel are employed to collect tax bills by a trustee appointed on the death of the county treasurer, equity will not com-

pel payment of the attorney's fees from funds collected, the counsel's claim being merely one of contract, for which he has a remedy at law.—*Chew v. Perkins*, 81 Md. xvi, memorandum case, 31 Atl. 507, full report.

(b) Where a person has been appointed to public office, and has qualified, but is prevented by a former incumbent from obtaining possession of the office, the title to the office will not be determined by a court of equity, the appropriate proceeding being by mandamus.—*Washington County Com'rs v. Board of County School Com'rs*, 77 Md. 283, 26 Atl. 115. [Cited and annotated in 20 L. R. A. 167, on power to grant mandatory injunctions.]

(c) It is well-settled law that the assignee of a term of years is liable to the original lessor upon covenants running with the land, and may be sued by the lessor at law for any breach thereof during his tenure; but by decisions in Maryland after such assignee is divested of his estate, an action at law will not lie for such breaches, and the lessor must resort to equity for his remedy.—*Donelson v. Polk*, 64 Md. 501, 2 Atl. 824. [Cited and annotated in 52 L. R. A. (N. S.) 988, 990, on liability of lessee, sub-lessee, or assignee for rent accruing after assignment or sublease; in 14 L. R. A. 153, 155, on liability of assignee of leasehold for rent.]

(d) Equity will not entertain a bill brought to secure plaintiff's rights in land the title to which has long been claimed adversely by defendants. The question of title must be settled in a court of law.—*Cowman v. Colquhoun*, 60 Md. 127.

(e) Equity will not entertain jurisdiction where there is an adequate remedy at law.—*Hazlehurst v. City of Baltimore*, 37 Md. 199; *Schall v. Nusbaum*, 56 Md. 512. [Cited and annotated in 28 L. R. A. (N. S.) 1053, on right of one prevented by unlawful obstruction from using highway to maintain action.]

(f) Although a note may have been handed to a receiver, that he might allow it as a mortgage debt, he promising to attend to it, and negligently failing so to do, he cannot be held answerable as receiver in a court of

chancery for such neglect. The liability is a personal one solely, to be enforced at law.—*Keene v. Gaehle*, 56 Md. 343.

(g) A remedy in a court of law is the only "remedy at law," which suffices to oust the jurisdiction of a court of equity.—*Webb v. Ridgely*, 38 Md. 364.

(h) Under act 1841, c. 64, providing that judgments of a justice of the peace in Washington county, upon being recorded in the clerk's office, shall become liens upon the lands of the defendant, and may be enforced by executions issued by the justice within three years from their date, and after that they may be reviewed by sci. fa., if the plaintiff neglect these remedies at law, he will not be permitted to go into equity to enforce his lien.—*Smith v. Meredith*, 30 Md. 429.

(i) Where a pledgee of shares in a corporation has illegally sold them to himself, and has had them transferred on the corporation books so that they stand in his name as legal owner, equity has jurisdiction to afford relief to the pledgor.—*Bryson v. Rayner*, 25 Md. 424, 90 Am. Dec. 69. [Cited and annotated in 43 L. R. A. 763, on conversion of pledged property by invalid sale.]

(j) One of several heirs of a deceased person, upon proceedings for partition, gave a bond with sureties for the payment to the other heirs of their proportions of the value of the land, and took the land itself, afterwards conveying it to a purchaser, who subsequently sold it to another. The other heirs, several years afterwards, brought a bill for the sale of the land, and for payment of their proportions out of the proceeds, against the personal representatives of the two purchasers and of one of the sureties. Held, that the remedy against the representatives of the surety was at law, his liability being merely personal.—*Stem v. Cox*, 16 Md. 533.

(k) A bill in equity will not lie to bring a party in possession of land into court, and compel him to show his title, in order that such title may be defeated, and possession delivered to complainant.—*Crook v. Brown*, 11 Md. 158.

(l) A court of equity cannot grant relief to a creditor of a deceased debtor against

a party for improperly interfering with or retaining and using the assets of the debtor. The remedy against such party is at law, either as executor de son tort or for withholding assets from the administrator.—*Guyton v. Flack*, 7 Md. 398.

(m) If there be a complete remedy at law, equity has no jurisdiction, except in a few peculiar cases in which courts of law and equity have concurrent jurisdiction.—*Clayton v. Carey*, 4 Md. 26.

(n) A bill filed to enforce a vendor's lien will be dismissed when it does not show that plaintiff has exhausted his remedy at law, or when he does not aver in his bill such facts as show that he cannot have a full, complete, and adequate remedy at law.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

(o) Where defendant in a judgment at law fails to object to the returns of the sheriff to a writ of fieri facias and venditioni exponas, by appearing in the county court at the time at which such writs are returnable and moving to quash them, but dies six years after such returns, without having made any attempt to impeach them, or in any way to question the validity of the purchaser's title, a bill to vacate the conveyance of the land and the decree of the court under which the land was sold cannot be maintained in favor of those claiming under him.—*Nelson v. Turner*, 2 Md. Ch. 73.

(p) The distribution of the surplus of personal property remaining in the hands of an administrator is within the powers conferred on the Orphans' Court, with which the court of chancery will not interfere, except on account of some special circumstance by reason of which the powers of the Orphans' Court may not be wholly adequate.—*In re Hewitt*, 3 Bland 184.

(q) Where a party has lost his remedy at law by his own neglect, equity will not relieve.—*Methodist Protestant Church v. City of Baltimore*, 6 Gill 391, 48 Am. Dec. 540. [Cited and annotated in 22 L. R. A. (N. S.) 112, 113, 114, on judicial power over eminent domain.]

(r) A surety who has become constructively liable at law to the principal debtor, by charging himself with funds he had not in fact received, will not be concluded in equity, as related to his co-surety originally liable for contribution, by his admission, where a remedy suitable to the circumstances of the case would be extended.—*Flickinger v. Hull*, 5 Gill 60. [Cited and annotated in 31 L. R. A. 66, on enjoining judgments against or in favor of sureties.]

(s) A. drew an order on B. in favor of C. out of funds of A. in the hands of B., after deducting B.'s claims on A., and, on payment of the same, C. to deliver A.'s two notes in favor of D., and release him from all claims. B. accepted the order when in funds, after paying his own debts and other orders drawn by A. Held, that an action at law would lie on such acceptance, and that it was no ground for going into equity to enforce it that the fund in the hands of B. consisted of mortgaged property, which had been converted into money.—*Oliver v. Palmer*, 11 G. & J. 426.

(t) Where a bill alleged that A. and B., partners in trade, delivered to C., as their agent, four promissory notes, to be discounted for their use, and that he, failing to get them discounted, placed them by way of pledge with D., to secure the repayment of a sum loaned by D.; that A. and B., becoming insolvent, executed a deed of trust of their property to E.; that D. was notified that the notes belonged to A. and B., and the surrender thereof demanded upon a tender of the principal and interest of the sum for which they were pledged; that the notes had since been paid,—and prayed an account, and delivery of the balance to E., it was held that chancery had no jurisdiction of the case, as it was nothing more than an action for money had and received.—*Adair v. Winchester*, 7 G. & J. 114.

(u) A bill for mesne profits, after a recovery in ejectment, showing no obstacle at law, and stating no ground of equitable relief, would be dismissed on plea or demurrer, and perhaps at the final hearing without either; there being an adequate remedy at law.—*Drury v. Conner*, 1 H. & G. 220.



(v) Where A., in consideration of a debt due from him to B., assigns to B. (not under act 1763, c. 23, § 9) the single bill of C., and C. is insolvent, a bill in equity cannot be sustained by B. against A. to compel payment of the bill. If the assignment be not an extinguishment of the original debt, B. has his remedy at law on the original contract.—*Gover v. Christie*, 2 H. & J. 67. (See Code, art. 8, § 9.)

#### § 44. Exclusive or concurrent jurisdiction.

##### *Cross-Reference.*

See ante, § 43.

(a) Courts of equity, and not the Orphans' Court, have jurisdiction over trusts and their construction and administration.—*De Galard, De Bearn v. Winans*, 111 Md. 434, 74 Atl. 626. [Cited and annotated in 34 L. R. A. (N. S.) 268, on determination of case properly governed by unproved foreign law.]

(b) Where, though the Orphans' Court has jurisdiction of the settlement of the personal estate of a testator, and likewise, under his will, to order a sale of realty, it has no authority to carry out a provision of the will in reference to an appraisal of real estate for sale, nor to dispose of further questions not unlikely to arise over the proper construction of the will, and the equity court not only has concurrent jurisdiction over such matters with the Orphans' Court, but has exclusive jurisdiction in the matter of appraisal, and of any subsequent question that may arise over the will the equity court, to prevent a multiplicity of suits, or a conflict of proceedings, should be permitted to retain complete control over the settlement of the estate, and not be limited to a construction of the will and the administration of the estate completed in the Orphans' Court.—*Magin v. Niner*, 110 Md. 299, 73 Atl. 12.

(c) Where equity has assumed jurisdiction of a cause of which it has concurrent jurisdiction with a court of law, it will retain it, though full and adequate remedy may be recovered at law.—*Meyer v. Saul*, 82 Md. 459, 33 Atl. 539.

(d) After a court of equity has assumed jurisdiction over the settlement of personal

estate under proceedings by bill against the administrator, he must account to that tribunal only; and any action at law against his bond for not accounting to the Orphans' Court during that time must be dismissed.—*State v. Dilley*, 64 Md. 314, 1 Atl. 612.

(e) An action at law will not lie to recover a sum of money decreed to be paid by a court of equity within the same jurisdiction.—*Boyle v. Schindel*, 52 Md. 1.

(f) A receiver in equity, by order of the court, sold property of the defendant. While the proceeds of sale were in the receiver's hands, the defendant obtained the benefit of the insolvent laws, and, in the insolvent court the receiver was appointed his trustee in insolvency. From an order of the court of equity, requiring the receiver to bring the fund into court, defendant appealed on the ground that the case abated by defendant's insolvency, and after the appointment of a trustee the fund passed into his hands, as such, and the jurisdiction of the equity court ceased eo instanti. Held, that the power of the court of equity did not conflict with that of the insolvent court, but was in this case ancillary to the jurisdiction of the insolvent court.—*Henry v. Kaufman*, 24 Md. 1, 87 Am. Dec. 591.

(g) Equity proceedings which rest upon the assumption that a certain trust deed is valid, and which were intended merely to obtain the aid of a court of equity to carry out the provisions of such deed, do not oust the jurisdiction of a court of law to declare such deed void.—*American Exch. Bank v. Inloes*, 7 Md. 380. [Cited and annotated in 26 L. R. A. 596, 597, on right to attach property in hands of assignee for creditors.]

(h) Under act 1810, c. 34, § 6, the Orphans' Court has power to appoint an administrator pendente lite where a caveat has been filed to a will, though the estate of the testator is in charge of a receiver appointed by the chancery court during his lifetime.—*Cain v. Warford*, 3 Md. 454. (See Code, art. 93, § 68.)

(i) The court of chancery will not assume jurisdiction of a suit to set aside, because of fraud, a trust deed for the benefit of creditors, and to compel the trustee to account,

after the commencement of an action at law in the county court by a creditor to compel the trustee to account, since the jurisdiction of the two courts was concurrent, and that of the county court, being exercised first, became exclusive.—*Brooks v. Delaplaine*, 1 Md. Ch. 351.

(j) The county courts have concurrent jurisdiction with the courts of equity in cases of fraud.—*Gott v. Carr*, 6 G. & J. 309. [Cited and annotated in 30 L. R. A. 795, on injunction against judgments obtained by fraud, accident, mistake, surprise and duress; in 31 L. R. A. 39, on negligence as cause for, and as bar to, injunctions against judgments.]

(k) Courts of law have concurrent jurisdiction with courts of equity in matters of fraud; but, where a cause has once been determined at law, equity will not take cognizance of it, unless there be some equitable circumstance of which the party could not avail himself at law, to give jurisdiction.—*Singery v. Attorney-General*, 2 H. & J. 487.

#### § 45. Adequacy of legal remedy.

##### Cross-Reference.

Inadequacy of legal remedy basis of suit to reinstate case erroneously dismissed, see "Dismissal and Nonsuit," § 81.

#### § 46.—In general.

##### Annotation.

Relief of grantor in conveyance in consideration of agreement to support, which is broken by grantee, as affected by remedy at law.—43 L. R. A. (N. S.) 923, note.

(a) Unless the legal remedy reaches the whole mischief and secures the whole right of the party for the present and future, equity will give such relief as the exigency of the case may require.—*Whitman v. Dorsey*, 110 Md. 421, 72 Atl. 1042.

(b) A bill alleged that, after death of complainant's mother, who was sole beneficiary of a policy on his father's life, and until the father's second marriage with defendant, complainant paid the premiums on the policy, under an agreement with his father that he should be sole beneficiary; that, after the second marriage, defendant, with knowledge of such facts, was made sole beneficiary, under an agreement with her husband that at his death complainant should receive a

fair share of the policy, but that on her husband's death defendant collected the insurance, and refused to pay any part thereof to complainant. Held, that complainant's remedy, if any, was at law.—*Hopkins v. Hopkins*, 86 Md. 681, 37 Atl. 371.

(c) A bill in equity alleging that a debtor, having a large real and personal estate, died, leaving a will duly executed and proved, the executor named in which duly qualified, but died without having administered the estate, and that one of the children of such deceased debtor is concealing, and counseling others to conceal, information concerning the estate, does not make out a case beyond the jurisdiction of the Orphans' Court, as conferred by Code 1888, art. 93, § 70, providing for the appointment of a successor to a deceased executor, and §§ 238, 239, authorizing proceeding in that court against any person charged with such concealment.—*Macgill v. Hyatt*, 80 Md. 253, 30 Atl. 710. (See Code 1911, art. 93, §§ 70, 243, 244.) [Cited and annotated in 23 L. R. A. (N. S.) 113, on conditions precedent to equitable remedies of creditors.]

(d) Where damages result to property from wrongful acts, unattended with profits to the wrongdoer, or where there is no joint or common interest between parties relative to the property, equity can set up no other rule of damages than that which would obtain at law.—*Atlantic & G. C. Consol. Coal Co. v. Maryland Coal Co.*, 62 Md. 135. [Cited and annotated in 28 L. R. A. (N. S.) 913, on relief from mistake of law as to effect of instrument.]

(e) Where the facts charged against an executor constitute only a case of devastavit, an action of law affords a plain, adequate remedy.—*Edes v. Garey*, 46 Md. 24.

(f) Complainant alleged that at the time of the death of his father, and previous thereto, his father had rented and occupied a certain stand in the market place for the purpose of vending meats; that among the valuable rights of the father in said stand was his good will in business; that, on the death of his father, such good will descended on complainant; that defendant entered into possession of said stand and agreed to ac-

count for the rents and the profits thereof to complainant when he should become of age; and that complainant is now of full age and defendant has refused to account to him. *Held*, that there is nothing in the character of what is termed the "good will" of the stand to give equity jurisdiction of the case, but that complainant's remedy, if he has any, is at law.—*Zeigler v. Sentzner*, 8 G. & J. 150, 29 Am. Dec. 534.

(g) The violation of an agreement by the distributees of personal estate to refund to the administrator the amount paid by him, beyond assets, to the intestate's creditors, is properly the subject of a special action on the case, and affords no ground for relief in equity.—*Gibbs v. Clagett*, 2 G. & J. 14. [Cited and annotated in 28 L. R. A. 838, 842, 851, on accounting by cotenants for use and occupation and rents and profits.]

#### § 47.—Title to or possession of property.

(a) Plaintiff delivered various notes and bills to defendants' testator to collect, but he died before collection. *Held*, on demurrer to a bill against the executors for a surrender of them, that plaintiff had no adequate remedy at law, as replevin would only secure a surrender if defendants saw fit to deliver the notes, and trover would involve the solvency of the various makers, and would only give damages for the value of the notes at the time of conversion, though they might be more valuable at the time of trial.—*Scarborough v. Scotten*, 69 Md. 137, 14 Atl. 704, 9 Am. St. Rep. 409.

(b) Where plaintiffs seek to recover land from those denying their title and holding adversely, not under a tenancy in common, and where the adverse holding may, for aught that appears, have continued for a period long enough to give title even as against the undisputed owner of the paper title, there is an adequate remedy at law, and so none in equity.—*Hecht v. Colquhoun*, 57 Md. 563. [Cited and annotated in 12 L. R. A. (N. S.) 61, on effect of legal remedy on equitable jurisdiction to remove cloud.]

(c) Where, on a bill for partition, the complainant's legal title is met by a defense cognizable only in equity, the court of equity will entertain the question, without waiting

until the right is tried at law.—*Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339.

(d) The legal representatives of the wife brought a bill against those of the husband to obtain possession of her choses in action not reduced to possession by him, to which the former were entitled under the statute. *Held*, that equity had jurisdiction of the case, neither trover nor replevin affording a complete and adequate remedy; the former only admitting of the recovery of damages after demand and refusal, which could not be made till after letters of administration had been granted, and the latter requiring a bond from the representatives, and allowing the defendant to regain possession upon giving a retorno habendo bond, thus converting a claim to a specific thing into a personal demand upon the obligors of bond for a return.—*Gough v. Crane*, 3 Md. Ch. 119.

#### § 48.—Performance or breach of contract.

##### Cross-References.

Breach of covenant, see "Covenants," § 104.

Grantee's covenant to pay debts of corporation grantor, see "Contracts," § 187.

(a) Testator entered into a contract with complainants by which they were to become his agents for the sale of his crops, and advance him money, and accept his drafts, for the payment of which he pledged his crops on hand and the growing crops of the year 1847. On the faith of the agreement, complainants made advances, and in January, 1848, testator died, largely indebted to them. *Held*, that the rights of complainants did not rest on the relation of factor and principal, but on the contract, which was a positive agreement on the part of testator to send to complainants, to cover their advances, all his crops which would be marketable in the year 1847, including the wheat crop seeded in the fall of that year; and, there being no adequate remedy at law, equity would enforce the contract as against the executors.—*Sullivan v. Tuck*, 1 Md. Ch. 59. [Cited and annotated in 6 L. R. A. (N. S.) 589, on specific performance of contract to give security.]

**§ 49. Enlargement of legal remedy.***Cross-Reference.*

See post, § 50.

**§ 50. Statutory creation of remedy.**

(a) Where the court of chancery has original jurisdiction, it is not deprived of it because the courts of law by statutory enactment may have power over the same subject, when the enactments giving them authority contain no provisions depriving the court of its ancient jurisdiction.—*Barnes v. Crain*, 8 Gill 391; *Crain v. Barnes*, 1 Md. Ch. 151; *Schroeder v. Loeber*, 75 Md. 195, 23 Atl. 579, 24 Atl. 226.

(b) Under 2 Code 1860, Pub. Loc. Laws, pp. 28, 29 (applicable to Allegany county), providing for proceeding by petition and the appointment of a receiver, the jurisdiction is in equity, and not law.—*Gephart v. Starrett*, 47 Md. 396.

**§ 51. Multiplicity of suits.***Cross-References.*

Enforcement of subscription, see "Subscriptions," § 21.

Ground for injunction in general, see "Injunction," § 19.

Ground for restraining collection of tax, see "Taxation," § 608.

Ground for restraining improper construction of electric appliances, see "Electricity," § 20.

Ground for suit to quiet title, see "Quiet-ing Title," § 5.

*Annotation.*

Multiplicity of suits as ground for equitable relief to grantor in conveyance in consideration of agreement to support, which is broken by the grantee.—43 L. R. A. (N. S.) 924, note.

Power of equity to take jurisdiction because of multiplicity of actions at law for personal injuries growing out of a single tort.—20 L. R. A. (N. S.) 848; 35 L. R. A. (N. S.) 491; 40 L. R. A. (N. S.) 464, notes.

Jurisdiction of equity on ground of preventing multiplicity of suits to enforce liability of stockholders.—28 L. R. A. (N. S.) 743, note.

Jurisdiction of equity, on the ground of preventing a multiplicity of suits, to enforce liability of members of a club or corporation.—28 L. R. A. (N. S.) 743, note.

Jurisdiction of equity, upon the ground of avoidance of multiplicity of suits, to entertain suit for possession of separate parcels of land held adversely by defendants claiming under a common source.—14 L. R. A. (N. S.) 239, note.

(a) Equity has jurisdiction of a suit by a

city against a county to account, where the county has collected the whole 30 cents tax on each \$100 of bonds owned by residents thereof, to one-half of which each is entitled under act 1896, c. 143, § 201; a multiplicity of suits thereby being saved.—*County Com'rs of Frederick County v. City of Frederick*, 88 Md. 654, 42 Atl. 218. (See Code, art. 81, § 214.)

**§ 52. Circuity of action.****§ 53. Waiver of objections.***Cross-Reference.*

Dismissal on court's own motion, see post, §§ 364, 388.

**(C) PRINCIPLES AND MAXIMS OF EQUITY.***Cross-References.*

Estoppel by acts making injury possible as between actor and another equally blameless, see "Estoppel," § 72.

Following statute of limitations, see post, § 87.

**§ 54. Application and operation in general.****§ 55. Equity suffers no right to be without a remedy.***Cross-Reference.*

Existence and adequacy of remedy at law, see ante, §§ 43, 44, 46-48, 50.

**§ 56. Equity regards substance rather than form.**

(a) Courts of equity are not subject to strict technical rules, but the remedies thereof are so molded as to reach the real merits of the controversy, and justice will not be suffered to be entangled in technicalities.—*Crain v. Barnes*, 1 Md. Ch. 151.

**§ 57. Equity regards that as done which ought to be done.**

(a) Real estate of a deceased was sold under a decree of court for the payment of his debts, and a portion of the purchase money was paid to the guardian of some of the minor heirs, without an order from the court authorizing the guardian to receive the same. *Held*, that the purchaser should be credited for the payment to the guardian, upon the established rule in equity that acts done bona fide without an order, for the doing of which an order would, on application, have been passed as a matter of course, shall be regarded in the same light as if emanating from an order previously ob-

tained for that purpose.—*Lee v. Stone*, 5 G. & J. 1, 23 Am. Dec. 589.

§ 58. (Omitted from the classification used herein.)

§§ 59-64. (See Analysis.)

§ 65. **He who comes into equity must come with clean hands.**

*Cross-References.*

See "Judgment," § 441; "Nuisance," § 84; "Taxation," §§ 792, 796; "Torts," § 20. Application of maxim on mandamus to compel payment of county warrant, see "Mandamus," § 109.

Good faith as affecting right to specific performance, see "Specific Performance," § 88.

Misrepresentation by plaintiff as defense to action for infringement of trademark or for unfair competition, see "Trade-Marks and Trade-Names," § 85.

Rights of parties to fraudulent conveyance, see "Fraudulent Conveyances," §§ 172, 174-178.

*Annotation.*

Maxim that one must come into equity with clean hands as affecting one who has violated or induced another to violate an invalid or unenforceable contract.—*L. R. A.* 1915A, 820, note.

(a) Complainant before embarking in a new business had given up all his interest in his former business, and all his individual property for the benefit of his creditors, which have yielded or will yield sufficient to satisfy all his obligations. When starting anew in a commission business with other people's merchandise and on others' credit, he opened a bank account in the name of another to prevent the funds from being tied up by attachment proceedings. *Held*, that he not guilty of such fraud towards his creditors as would preclude a suit by him to establish his right to the business as against the person in whose name the account was kept and who claimed to be proprietor; the maxim, "He who comes into equity must come with clean hands," not applying.—*Lord v. Smith*, 109 Md. 42, 71 Atl. 430.

(b) Since the refusal of the court to act always gives defendant an unfair advantage of complainant contrary to the real justice of the case, the application as a defense of the maxim, "He who comes into equity must come with clean hands," is only allowed for reasons of public policy, as a check upon fraud and wrongdoing.—*Lord v. Smith*, 109 Md. 42, 71 Atl. 430.

(c) A court of equity will not refuse redress to a suitor because his conduct in other matters than those before the court was not blameless, if it is shown that he has acted fairly and legally in the subject-matter of the suit.—*Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 65 Md. 73, 3 Atl. 108. [Cited and annotated in 52 L. R. A. 220, 223, on lost profits of sale or purchase as damages; in 57 L. R. A. 196, on damages for breach of sale of article without market price.]

(d) A party seeking the aid of a court of equity must come with clean hands; and, when he asks relief against injustice arising from the bad faith of his adversary, he must not be obnoxious to the same imputation. No man is entitled to the aid of a court of equity, when that aid becomes necessary by his own fault.—*Dilly v. Barnard*, 8 G. & J. 170. [Cited and annotated in 31 L. R. A. 37, on negligence as cause for, and as bar to, injunctions against judgments; in 32 L. R. A. 322, 325, on equitable jurisdiction as to injunctions against judgments.]

§ 66. **He who seeks equity must do equity.**

*Cross-References.*

See "Taxation," §§ 610, 722.

Conditions precedent to quieting title, see "Quieting Title," § 14.

(a) An administrator of a mortgagor applying for an accounting of a sale of mortgaged premises is subject to the maxim that "He who seeks equity must do equity."—*Tobin v. Rogers*, 121 Md. 249, 88 Atl. 133.

(b) A company asking the intervention of a court of equity to enable it to enjoy franchises granted by a city ordinance must show that it has performed the obligations imposed thereby.—*City of Baltimore v. Chesapeake & P. Tel. Co.*, 92 Md. 692, 48 Atl. 465.

(c) A plat dividing land into lots showed a dedication of a certain portion thereof as a street, but there was nothing on the ground showing where it was. Defendant in good faith erected buildings in the bed of the street, believing it was a part of lots that she had purchased. Owners of lots abutting on the street made no objection until after the improvements were completed. *Held*,

that such owners were not entitled to an order requiring defendant to remove her buildings unless they paid her the damages resulting from such removal, as he who seeks equity must do equity.—*Broumel v. White*, 87 Md. 521, 39 Atl. 1047.

## II. LACHES AND STALE DEMANDS.

### *Cross-References.*

Aid to vigilant in equity, see ante, § 64.  
 Allegations in bill, see post, § 133.  
 Demurrer on ground of laches, see post, § 219.  
 Pleading, see post, §§ 141, 167.  
 Affecting right to amend pleadings, see "Pleading," §§ 237, 245, 258, 269.  
 Affecting right to assert priority of lien over mortgage, see "Mortgages," § 186.  
 Affecting right to attachment lien, see "Attachment," § 184.  
 Affecting right to file supplemental pleadings, see "Pleading," §§ 279, 280.  
 Affecting right to rescind lease, see "Landlord and Tenant," § 34.  
 Conformity of findings of court as to laches, to evidence, see "Trial," § 396.  
 Demurrer raising defense of limitations, see "Limitation of Actions," § 180.  
 Ground for demurrer, see "Pleading," § 193.  
 In disputing settlement between partners, see "Partnership," § 311.  
 Limitation of actions, see "Limitation of Actions," §§ 36, 37, 39, 60.  
 Of creditors of insolvent corporations, see "Corporations," § 547.  
 Of member of exchange in seeking to set aside order of suspension, see "Exchanges," § 5.  
 Of purchaser at foreclosure sale affecting his grantee, see "Mortgages," § 553.  
 Of purchaser of insolvent's assets, see "Insolvency," § 82.  
 Ratification of deed by delay in avoidance, see "Infants," § 30.  
 Removal of governors from gas meters, see "Gas," § 13.

### *Particular remedies or proceedings.*

See "Admiralty," § 34; "Cancellation of Instruments," § 34; "Creditors' Suit," § 23; "Discovery," § 97; "Divorce," § 69; "Injunction," § 13; "Interpleader," § 18; "Partition," § 44; "Quieting Title," § 29; "Quo Warranto," § 29; "Reformation of Instruments," § 32; "Specific Performance," § 105; "Trespass to Try Title," § 25.  
 To vacate decree, see post, § 430.  
 Accounting by trustee, see "Trusts," §§ 304, 305.  
 Against devisees and legatees to enforce debts of testator, see "Wills," § 847.  
 Against heirs, distributees, and purchasers of property of intestate, see "Descent and Distribution," § 143.  
 Against personal representatives for accounting, see "Executors and Administrators," § 470.

Between shareholders and officers or agents of corporation, see "Corporations," § 320.

Bill of review to set aside decree of divorce, see "Divorce," § 166.

By heirs and distributees, see "Descent and Distribution," §§ 90, 91.

By heirs to enforce rights against grantee of widow's quarantine, see "Executors and Administrators," § 175.

By or against corporations, see "Corporations," § 504.

By or against firms or partners, see "Partnership," § 196.

By or against foreign corporations, see "Corporations," § 667.

By or against husband or wife, see "Husband and Wife," § 220.

By or against Indians, see "Indians," § 27.

By or against states, see "States," § 201.

By or against stockholders suing or defending on behalf of corporation, see "Corporations," § 209.

By owner of property taken for public use, see "Eminent Domain," § 288.

By receiver against bank president for negligence, see "Banks and Banking," § 82.

By trustee in bankruptcy, see "Bankruptcy," § 298.

By trustees, see "Trusts," § 256.

By United States, see "United States," § 133.

For accounting, see "Account," § 15.

For demurrage, see "Shipping," § 184.

For dissolution and accounting of partnership, see "Partnership," § 321.

For dower, see "Dower," § 75.

For infringement of copyright, see "Copyrights," § 80.

For infringement of patent, see "Patents," § 289.

For infringement of trade-mark, or trade-name, see "Trade-Marks and Trade-Names," § 86.

For relief against judgment, see "Judgment," § 456.

For subrogation, see "Subrogation," § 41.

For unfair competition in trade, see "Trade-Marks and Trade-Names," § 86.

Injunction against interference with water rights, see "Waters and Water Courses," § 152.

Injunction against pollution of water, see "Waters and Water Courses," § 75.

Injunction against warehousemen, see "Warehousemen," § 8.

Lien barred by laches, see "Liens," § 16.

On administration bond, see "Executors and Administrators," § 537.

Probate proceedings and actions relating to wills or probate, see "Wills," § 261.

Relating to usury, see "Usury," § 109.

To abate or restrain nuisance, see "Nuisance," § 29.

To annul marriage, see "Marriage," § 60.

To attack mortgage, see "Mortgages," § 85.

To avoid release made by legatees, see "Wills," § 741.

To cancel conveyance of married woman's separate property, see "Husband and Wife," § 201.

To cancel trust, see "Trusts," § 56.  
 To compel removal of telegraph or telephone poles and wires from streets and roads, see "Telegraphs and Telephones," § 10.  
 To confirm or try tax title, see "Taxation," §§ 803-805.  
 To construe wills, see "Wills," § 699.  
 To determine adverse claim to mining location, see "Mines and Minerals," § 38.  
 To determine character of instrument as mortgage, see "Mortgages," § 609.  
 To determine heirship, see "Descent and Distribution," § 71.  
 To determine water rights, see "Waters and Water Courses," § 152.  
 To enforce liability of bank officers, see "Banks and Banking," § 55.  
 To enforce liability of officers and agents of corporations for corporate debts and acts, see "Corporations," § 356.  
 To enforce liability of stockholders for corporate debts and acts, see "Corporations," § 264.  
 To enforce lien on assets of railroad company, see "Railroads," § 185.  
 To enforce municipal assessment, see "Municipal Corporations," § 564.  
 To enforce restrictions in deeds, see "Deeds," § 176.  
 To enforce subrogation, see "Subrogation," § 41.  
 To enforce testamentary charge, see "Wills," § 826.  
 To enforce vendor's lien, see "Vendor and Purchaser," § 278.  
 To establish and enforce trust, see "Trusts," § 365.  
 To establish and protect easements, see "Easements," § 61.  
 To foreclose lien or mortgage on railroad property, see "Railroads," § 185.  
 To foreclose mortgage, see "Mortgages," § 425.  
 To limit shipowner's liability, see "Shipping," § 209.  
 To recover price of land paid, see "Vendor and Purchaser," § 341.  
 To redeem from execution sale, see "Execution," § 301.  
 To redeem from mortgage sale, see "Mortgages," § 597.  
 To redeem from tax sale, see "Taxation," § 698.  
 To reinstate released mortgage, see "Mortgages," § 316.  
 To rescind contract of sale, see "Sales," §§ 106, 126; "Vendor and Purchaser," §§ 100, 119.  
 To restrain acts of election officers, see "Elections," § 154.  
 To restrain collection of tax, see "Taxation," § 611.  
 To restrain diversion of water, see "Waters and Water Courses," § 85.  
 To restrain enforcement of assessment for public improvements, see "Municipal Corporations," § 535.  
 To restrain execution, see "Execution," § 172.  
 To restrain illegal acts of county officers, see "Counties," § 196.

To restrain obstruction of waters, see "Waters and Water Courses," § 177.  
 To revive action, see "Abatement and Revival," § 74.  
 To set aside administration sale, see "Executors and Administrators," § 380.  
 To set aside assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 347.  
 To set aside execution sale, see "Execution," § 256.  
 To set aside fraudulent transfers, see "Fraudulent Conveyances," § 249.  
 To set aside judicial sale, see "Judicial Sales," §§ 42, 45.  
 To set aside sale on foreclosure of mortgage, see "Mortgages," § 529.  
 To set aside settlement of decedent's estate, see "Executors and Administrators," § 516.  
 To set aside trustee's sale, see "Trusts," § 204.  
 To set aside unauthorized acts and agreements between trustee and beneficiary, see "Trusts," § 288.  
 To vacate decree in divorce suit, see "Divorce," §§ 165, 167.  
 To vacate decree of foreclosure, see "Mortgages," § 496.  
 To vacate sale, under power in mortgage in trust deed, see "Mortgages," § 369.

### § 67. Nature and elements in general.

(a) Laches is such neglect to assert a right as taken in connection with the lapse of time and other circumstances causing prejudice to another party operates as a bar in a court of equity, and, to constitute laches, there must be a legal duty to do some act, a failure to do that act, and attending circumstances which cause prejudice to the adverse party.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(b) Where, after a decree for the sale of mortgaged premises unless the mortgagor paid within a certain time, the mortgagor remained in possession for more than 12 years, undisturbed by a sale or otherwise, he was not guilty of laches in failing to have the proceedings dismissed.—*Eakle v. Hagan*, 101 Md. 22, 60 Atl. 615.

(c) Gross laches on the part of the owner of the leasehold interest under a lease for 99 years, renewable forever, in making demand for a new lease after the term of the original lease has expired, and in seeking his remedy, will, as in other cases, be an insuperable bar to relief in equity.—*Banks v. Haskie*, 45 Md. 207. [Cited and annotated in 41 L. R. A. (N. S.) 387, on covenant to renew lease as affected by conveyance.]

(d) What will constitute laches and lapse of time must depend on the circumstances of each case.—*Syester v. Brewer*, 27 Md. 288. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

(e) In a court of equity, the question of laches is to be decided upon the special circumstances of each case.—*Glenn v. Smith*, 17 Md. 260.

(f) Where a wife has an equitable claim against her husband, which she cannot enforce against him during his life, at law, there are no limitations which can operate as a positive bar, and less than 20 years will not bar a claim on the rule of lapse of time, by which courts of equity are governed.—*Bowie v. Stonestreet*, 6 Md. 418.

(g) A court of equity will not aid in enforcing stale demands, where the party has been guilty of negligence and has slept upon his rights.—*Hertle v. McDonald*, 2 Md. Ch. 128; *Chew v. Farmers Bank*, Id. 231; *Same v. Same*, 9 Gill 361; *Beard v. Hubble*, Id. 420. [Cited and annotated in 28 L. R. A. (N. S.) 887, 919, on relief from mistake of law as to effect of instrument.]

(h) Lapse of time may be taken advantage of by the state.—*In re Hepburn*, 3 Bland 95. [Cited and annotated in 22 L. R. A. (N. S.) 4, 32, 89, 97, on judicial power over eminent domain.]

(i) Lapse of time is available as a defense against the state.—*In re Hepburn*, 3 Bland 95. [Cited and annotated, see supra.]

## § 68. Grounds and essentials of bar.

### § 69.— In general.

### § 70.— Knowledge of facts.

#### Cross-References.

See post, § 75.

Bill of review, see post, § 452.

Concealment by adverse party, see post, § 80.

(a) The bill of plaintiffs charged breaches of trust on the part of the trustee of an estate in which plaintiffs were reversioners. The breaches charged were committed 49 years before bill filed. The youngest of plaintiffs came of age 36 years before bill filed. Seven years had elapsed since plain-

tiffs' estate had become a present estate. Plaintiffs, by the exercise of diligence, might have acquainted themselves with the breaches, which consisted of a diminution of the estate, at any time. Held, that a court of equity should afford them no relief.—*McCoy v. Poor*, 56 Md. 197.

### § 71.— Lapse of time.

#### Cross-Reference.

Prejudice from delay, see post, § 72.

(a) It was held in this case that after the lapse of 20 years in which no complaint was made or action brought against a trustee of real estate the court must presume that he had done his duty.—*Syester v. Brewer*, 27 Md. 288. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

(b) Where an heir made no attempt to enforce a claim due to her father until 15 years after her father's death, then withdrew her claim, and did not revive it for over 5 years longer, there is such laches as to preclude plaintiff from any favors by the court, and to incline the court to look strictly on the evidence.—*Hadaway v. Hynson*, 89 Md. 305, 43 Atl. 806.

(c) The issue was whether property purchased by testator was conveyed to him by mistake, instead of to his son, by the substitution of a middle initial. The son was placed in possession on the purchase, and, although he knew all the facts, he paid rent, permitted himself to be dispossessed, and made no claim of title for 16 years thereafter, testator having died a few months after the purchase. In the meantime the son recognized the rights of testator's devisees in judicial proceedings, and acquiesced therein, and set up claims inconsistent with the claim of mistake. During said period many changes took place. Held, that the son was guilty of laches.—*Anderson v. Anderson*, 89 Md. 1, 42 Atl. 207.

(d) Lapse of time and staleness of the demand may be taken into consideration by a court of equity in passing upon the merits of a claim.—*Brendel v. Strobel*, 25 Md. 395.

(e) A lapse of 25 years from the inception of title is an effectual bar to a claim for rents and profits, where the delay is entirely



unexplained, and no claim in the meantime has been made.—*Chew v. Farmers Bank*, 9 Gill 361.

(f) A husband died in 1809, leaving real estate, and a widow entitled to dower therein. In 1839, she assigned all her interest in the land. In 1841, she filed a bill claiming her proportion of the rents and profits thereof. She had never recovered her dower at law or in equity. *Held*, that this was a stale demand.—*Kiddall v. Trimble*, 8 Gill 207. [Cited and annotated in 21 L. R. A. 183, on right to mesne profits or damages for detention of dower.]

(g) An administrator sought by a bill in equity to recover rents and profits of land in lieu of dower, but no demand or suit for the dower had been commenced by the widow in her lifetime, and no reason was alleged for the omission, and the respondent had been in possession for 21 years, and no claim for rents and profits had been made during that time. *Held*, that he was not entitled to recover, as equity only lends its aid where there has been an exercise of reasonable diligence.—*Steiger v. Hillen*, 5 G. & J. 121. [Cited and annotated in 21 L. R. A. 183, on right to mesne profits or damages for detention of dower.]

## § 72.—Prejudice from delay in general.

*Cross-Reference.*

Lapse of time, see ante, § 71.

(a) Where plaintiff obtained judgment against defendant on April 10, 1899, and defendant claimed that the property was purchased in 1890 with money his wife received from her parents' estate, and that the deeds were made in his name by mistake, the wife was barred by her laches from claiming the property, as against the plaintiff.—*Hinman v. Silcox*, 91 Md. 576, 46 Atl. 1017.

(b) An infant, who was also a married woman when she executed a deed conveying away improved city property requiring constant expenditure to keep it in repair, is guilty of unreasonable delay in waiting 40 years after the execution of the deed, and 5 years after her disability of coverture is removed, before attempting to avoid the deed.—*Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071.

(c) The right of a widow to an annuity commenced in 1818, and some of the lands supposed to be charged with its payment were purchased by the defendants in 1821; yet the claim was not asserted until 1846, 28 years after the accrual of the title, and 25 years from the accrual of the adverse title of the defendants. In the meantime, various transfers of the property had been made, and innocent parties had purchased in ignorance of the claim now set up, and with the full knowledge of the complainant, who, for all this time, neglected to assert her claim, and E. and F., the devisees of the land, who had sold it with covenants to convey unincumbered titles, had died insolvent. *Held*, that these circumstances were sufficient to outweigh the equity of the complainant's claim, strong as that equity would be under other circumstances, to the favorable consideration of the court, and that she had neglected for an unreasonable length of time to assert her claim, and therefore had no title to call for the active interposition of a court of equity in her favor.—*Chew v. Farmers Bank*, 2 Md. Ch. 231.

(d) The absence of the negroes sold by the sheriff from the place of sale, and other irregularities in the proceedings, though they might furnish a sufficient ground for setting aside the sale, on motion of the court, upon the return of the writs of execution, are not sufficient to induce the court, after the lapse of 25 years, to treat the sale as a nullity.—*Hughes v. Jones*, 2 Md. Ch. 178.

(e) A proceeding against an innocent purchaser, without notice to set aside a patent of land, 47 years after its date, and 45 after the patentee had sold and conveyed the land to such purchaser, cannot receive the countenance of a court of equity.—*Buckingham v. Dorsey*, 1 Md. Ch. 31.

## § 73.—Loss of evidence.

## § 74.—Excuses.

## § 75.—In general.

*Cross-Reference.*

Negligence of attorney or other representative, see post, § 79.

(a) The fact that a married woman delayed suing to recover property conveyed in fraud of her rights for two years after she

discovered the fraud is not laches which will bar her right to recover, where the commencement of the suit involved a charge of fraud against her husband, with whom she still lived.—*Connar v. Leach*, 84 Md. 571, 36 Atl. 591; *Leach v. Connar*, Id. [Cited and annotated in 31 L. R. A. (N. S.) 846, on validity of direct conveyance by wife to husband.]

(b) The trustee of a life estate in money died before the life tenant, but his estate was amply solvent, and was being settled in chancery. The legatee of the remainder filed her first petition 8 years after her right accrued. Her second, filed 12 years later, as substitute for the former, alleged the loss from the court files of certain needful papers, for which he had from time to time asked leave to file substitutes; that such papers had disappeared, had been searched for, and could not be found. *Held*, that she was not guilty of laches.—*Cherbonnier v. Goodwin*, 79 Md. 55, 28 Atl. 894; *Blandin v. Same*, Id.; *Emory v. Same*, Id.

(c) In determining whether an application for relief on the ground of mistake has been made with due diligence, only the delay after the discovery of the mistake will be considered.—*Keedy v. Nally*, 63 Md. 311. [Cited and annotated in 28 L. R. A. (N. S.) 793, 887, 919, on relief from mistake of law as to effect of instrument.]

(d) Holders of an equitable lien for the amount of money allowed as owelty in partition cannot be properly chargeable with laches, when they have instituted their proceedings to enforce their lien within 20 years, and so soon as they became informed of their rights.—*Baltimore & O. R. Co. v. Trimble*, 51 Md. 99. [Cited and annotated in 39 L. R. A. (N. S.) 1172, on effect of barring of action for purchase money upon right to enforce vendor's lien.]

(e) A judgment was recovered in April, 1862, against A., and on the 29th of December of the same year a supersedeas judgment, purporting to have been signed by A. B., who was at that time a minor, was filed in the clerk's office. In October, 1863, execution was issued and returned unsatisfied, and no further step was taken until Febru-

ary, 1873, when the death of B. was suggested, and a scire facias was issued to revive the judgment. A., at the first trial after service, appeared and moved to strike out the judgment against him, on an affidavit alleging his infancy and that, when he signed the paper, he did not know that it was a judgment; that it was represented to be a mere matter of form; that he had never appeared before a justice of the peace, and did not know of the existence of the judgment until the scire facias was served on him. *Held*, that, under the circumstances, A. was not guilty of such laches in seeking to avoid the judgment as would preclude relief.—*Tiernan v. Hammond*, 41 Md. 548.

(f) Under the circumstances, *held*, that laches did not bar the claim of a mortgagor to impeach the mortgage, though five years had elapsed and the mortgagee had died in the meantime, where he first had the benefit of legal advice, and was informed of his legal right, shortly before the bill was filed.—*Pairo v. Vickery*, 37 Md. 467.

(g) A wife by declining to sue her husband cannot, with propriety, be said to be guilty of gross laches in prosecuting her rights or an unreasonable acquiescence in an assertion of adverse rights.—*Bowie v. Stone-street*, 6 Md. 418, 61 Am. Dec. 318.

(h) The fact that a widow did not know that an annuity given her by will in lieu of dower, and which became payable in 1818, was a charge on the land until 1839, when she was informed of it by a decision of the Court of Appeals, will not excuse her delay and neglect to proceed against the parties personally responsible for its payment.—*Chew v. Farmers Bank*, 9 Gill 361.

(i) Where a vendee of land went into possession, and gave his notes with an indorser for the purchase money, the legal title to the land remaining in the vendor, who took no steps to enforce the payment of the notes by legal proceedings for 20 years, it was *held* that the insolvency of the maker and indorser of the notes, during the whole of the time after the last note fell due, was a sufficient excuse for the vendor's not proceeding at law, and that the lapse of time was not a bar to his lien on the land for the purchase money.—*Magruder v. Peter*, 11 G.

& J. 217. [Cited and annotated in 50 L. R. A. (N. S.) 625, as to whether less than all the donees or grantees named may exercise power of sale; in 21 L. R. A. 551, on bar of principal debt as bar to foreclosure of mortgage or deed of trust; in 32 L. R. A. (N. S.) 679, on implied power of executor or trustee to sell realty; in 37 L. R. A. (N. S.) 1205, on right of one advancing purchase price to subrogation to vendor's lien; in 37 L. R. A. (N. S.) 1174, on effect of barring of action for purchase money upon right to enforce vendor's lien.]

§§ 76-79.—(See Analysis.)

**§ 80.—Fraud, concealment, or other act of adverse party.**

(a) A party cannot avail himself, in bar of claims prosecuted against him, of a lapse of time brought about by his own improper conduct or of a judgment obtained by his fraud and imposition.—*Richardson v. Jones*, 3 G. & J. 163, 22 Am. Dec. 293. [Cited and annotated in 25 L. R. A. 567, as to statutory abrogation of maxim against profiting by one's own wrong.]

**§ 81.—Negotiations and agreements between parties.**

**§ 82.—Pendency of legal proceedings.**

(a) The mere institution of a suit does not of itself relieve a person of the charge of laches; and, if he fail in the diligent prosecution of the action, the consequences are as though no action had been begun.—*Rupp v. Rogers*, 118 Md. 534, 85 Atl. 774.

§§ 83-86. (See Analysis.)

**§ 87. Following statute of limitations.**

*Cross-References.*

In federal courts, see "Courts," § 375.  
Limitations in equitable actions, see "Limitation of Actions," § 36.

(a) Equity will not afford relief where the corresponding legal right has been barred by the statute of limitations.—*Lingan v. Henderson*, 1 Bland 236. [Cited and annotated in 49 L. R. A. (N. S.) 30, on necessity of pleading statute of frauds; in 21 L. R. A. 551, on bar of principal debt as bar to foreclosure of mortgage or deed of trust; in 39 L. R. A. (N. S.) 1172, on effect of barring of action for purchase money upon right to enforce vendor's lien.] *In re Mitchell*, 21

Md. 585; *Wilhelm v. Caylor*, 32 Md. 151; *Dickey v. Permanent Land Co.*, 63 Md. 170.

(b) In absence of special circumstances, equity will not interpose lapse of time as a bar to a claim which is not barred by the statute of limitations.—*Hagerty v. Mann*, 56 Md. 522.

(c) In cases where the courts of law and of equity have concurrent jurisdiction, the statute of limitations applies to proceedings in equity.—*Tiernan v. Rescaniere*, 10 G. & J. 217; *Sindall v. Campbell*, 7 Gill 66; *Hertle v. Schwartz*, 3 Md. 366; *Teackle v. Gibson*, 8 Md. 70; *Wilhelm v. Caylor*, 32 Md. 151.

(d) By analogy, equity will apply the statute of limitations.—*Watkins v. Harwood*, 2 G. & J. 307; *Sindall v. Campbell*, 7 Gill 66; *Knight v. Brawner*, 14 Md. 1; *Syester v. Brewer*, 27 Md. 288. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

(e) A court of equity may, in its discretion, refuse to grant relief after a limited period, even though the statute is not pleaded and the bill is not demurred to.—*Syester v. Brewer*, 27 Md. 288. [Cited and annotated, see supra.]

(f) When the statute of limitations is relied on as a bar, the defense avails only in favor of the party who sets it up.—*Dixon v. Dixon*, 1 Md. Ch. 271.

(g) It seems that, in enforcing liens upon land created by charging lands devised with a legacy, courts of equity, by analogy, generally adopt the statutory bar of 20 years as a bar to relief, where the lien is of longer standing, and where the plea of limitations or lapse of time is relied on in the defendant's answer.—*Crawford v. Severson*, 5 Gill 443.

(h) Equity will not refuse relief because of lapse of time, unless a period equal to that prescribed by the statute of limitations has expired.—*Dugan v. Gittings*, 3 Gill 138, 43 Am. Dec. 306.

**§ 88. Waiver of objections.**

(a) Where, in a bill in equity against vestrymen of a church to procure a decree of sale of church property to satisfy a lien

thereon, the vestrymen answered, and assented to the sale, but disputed the claim, it was *held* that, as the statute prohibited a voluntary sale of them without the consent of the rector, churchwardens, etc., and no such consent was given in this case, the assent of the vestrymen to the sale was an implied admission that the debt was due, and was a waiver of the objection that the claim was a stale one, and abandoned by lapse of time.—*Allender v. Vestry of Trinity Church*, 3 Gill 166.

### III. PARTIES AND PROCESS.

#### Cross-References.

Application to open or vacate decree, see post, § 430.  
Bill of review, see post, § 457.  
Demurrer on ground of improper parties, see post, § 219.  
Multifariousness by misjoinder of parties, see post, §§ 149, 150.  
Statement as to parties in bill, see post, § 132.

#### In particular proceedings.

See "Cancellation of Instruments," § 35; "Creditors' Suit," §§ 25-30; "Discovery," § 17; "Divorce," §§ 72-74; "Interpleader," §§ 19, 20; "Partition," §§ 46-51; "Quieting Title," §§ 30, 31; "Reformation of Instruments," § 33; "Specific Performance," § 106.  
For accounting, see "Account," § 16.  
For dissolution and accounting by partnership, see "Partnership," § 322.  
For dissolution or partition of community, see "Husband and Wife," § 272.  
For forfeiture of rights under Mexican land grant, see "Public Lands," § 209.  
For infringement of copyright, see "Copyrights," § 81.  
For infringement of patent, see "Patents," §§ 290, 291.  
For infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 91.  
For injunction, see "Injunction," § 114.  
For relief against judgment, see "Judgment," §§ 457, 458.  
For subrogation, see "Subrogation," § 41.  
For unfair competition in trade, see "Trade-Marks and Trade-Names," § 91.  
To construe will, see "Wills," § 700.  
To enforce mechanic's lien, see "Mechanics' Liens," §§ 262-267.  
To enforce vendor's lien, see "Vendor and Purchaser," § 279.  
To establish and enforce trust, see "Trusts," §§ 366, 367.  
To foreclose mortgage, see "Mortgages," §§ 426-443.  
To redeem from mortgage sale, see "Mortgages," § 615.  
To restrain foreclosure of mortgage, see "Chattel Mortgages," § 256.  
To restrain obstruction of highway, see "Highways," § 159.

To restrain sale to enforce assessment in irrigation district, see "Waters and Water Courses," § 231.  
To set aside fraudulent transfer, see "Fraudulent Conveyances," §§ 250-257.

### § 89. Parties in general.

#### Cross-References.

Defects and objections, see post, § 117.  
Making party complainant or defendant, see post, §§ 110-112.  
Necessary or indispensable parties, see post, §§ 94-97.  
Proper parties, see post, §§ 99-101.

#### Annotation.

Right of insane person to institute proceedings by next friend in equity.—64 L. R. 530, note.

### § 90.—Necessity and effect of interest.

(a) A party having no interest in the question litigated, and against whom no relief is prayed, need not be joined in the bill; and, if he has any rights in the matter, he must assert them by a separate bill.—*Wright v. Santa Clara Min. Ass'n*, 12 Md. 443.

(b) Where a bill is filed to affect a fund in which different persons have interests, all persons having interests are necessary parties to the bill.—*Oliver v. Palmer*, 11 G. & J. 426.

### § 91.—Nature and extent of interest.

(a) In a suit in equity by slaves claiming a right to freedom under a will, two executors, who renounced the trust, ought not to be made defendants; but it is only necessary to proceed against the executor who accepted the trust.—*Peters v. Van Lear*, 4 Gill 249.

(b) Where a party seeks to recover in equity, against one of the several sureties on the trustee's bond, the whole amount of his claim against a defaulting trustee, the co-sureties on the bond, or other representatives, should be made parties.—*Clagett v. Worthington*, 3 Gill 83.

### § 92.—Persons joined for purpose of discovery.

### § 93. Necessary or indispensable parties.

#### Cross-References.

Amendment, see post, § 118.  
Defects and objections, see post, § 117.  
Making party complainant or defendant, see post, §§ 110-112.  
Parties in general, see ante, §§ 90-92.  
Proper parties, see post, §§ 99-101.  
To cross bill, see post, § 204.

Parties to and mutuality of cross-demands as affecting, right to set-off, see "Set-Off and Counterclaim," § 41.

Persons entitled to reformation of written instruments, see "Reformation of Instruments," § 26.

**§ 94.—Persons indispensable to complete and final determination.**

(a) Though a bill asks relief for complainant and another not a party, yet the averments showing complainant entitled to relief independent of the other, the bill is not objectionable on the ground of want of a necessary party, though the relief cannot be allowed such other, he not being a party.—*Ridgely v. Wilmer*, 97 Md. 725, 55 Atl. 488.

(b) A court of equity when it interposes, and adjusts the relative obligations of contracts and agreements in which more than two parties are concerned, calls them all before the court, that a complete and final adjustment may take place, and each be compelled to pay his just portion.—*Edmondson v. Frazier*, 1 Bland 92, note.

§§ 95, 96.—(See Analysis.)

**§ 97.—One or more suing or defending on behalf of all.**

*Cross-Reference.*

Suit to cancel patent, see "Public Lands," § 120.

(a) Where many hundreds of preferred stockholders had a lien on the assets of a corporation, and it would be impracticable to bring all into court, and the sale of certain property discharged from the lien would be of great benefit to the corporation, the interests of the stockholders being common, one or more may be made representative defendants for the whole, and a suit against them will relieve the property of the lien of the other stockholders.—*Leviness v. Consolidated Gas, E. L. & P. Co.*, 114 Md. 559, 80 Atl. 304.

**§§ 98-101. Proper parties.**

*Cross-References.*

Defects and objections, see post, § 117.

Making party complainant or defendant, see post, §§ 110-112.

Necessary and indispensable parties, see ante, §§ 94-97.

Nonjoinder as ground of demurrer, see post, § 219.

Parties in general, see ante, §§ 90-92.

To cross-bill, see post, § 204.

(a) A bill in equity must not include as de-

fendants parties not interested in the whole of the relief sought, since the "parties in interest" whose rights can be completely disposed of in one litigation in equity comprise only those persons who can be united in a single bill of complaint.—*Gaither v. Bauernschmidt*, 108 Md. 1, 69 Atl. 425.

(b) One who is executor, and, as legatee, claims a right to purchase money received by him, is a proper party to a controversy to settle the right to the fund.—*Berry v. Pier-son*, 1 Gill 234.

(c) Any person may be properly made a party to a petition filed to reach a fund in chancery for distribution, who ought to have been made a party to the original bill.—*Hays v. Miles*, 9 G. & J. 193, 31 Am. Dec. 70.

**§§ 102-105. Complainants.**

(a) The purchaser of land and his vendee or assignee may join in a bill against the original vendor for the purpose of obtaining a title directly to the second vendee, but there must be no conflict between the complainants.—*Crook v. Brown*, 11 Md. 158.

(b) A testator devised land in trust for his daughter for life, remainder to his granddaughter, the complainant, for life, remainder to the lawful issue of such granddaughter in fee, if any such be living at the time of her death, but if not, then to his daughter, etc. Complainant filed a bill to have the land demised under act 1833, c. 311, § 5, providing that the chancellor or county court shall have authority to decree a demise where the tenant of a particular estate for life or for years, or for other estate, shall be of full age, and shall pray for such decree. *Held*, that it is not necessary that the party applying should be the tenant in possession, and hence complainant, though her estate does not vest in possession until the death of her mother, may maintain the bill.—*Hitch v. Davis*, 3 Md. Ch. 262.

(c) Complainants having conflicting interests, each claiming title to property in dispute, cannot be joined as plaintiffs in the same suit.—*Ellicott v. Ellicott*, 2 Md. Ch. 468.

(d) Equity may oblige a complainant to assume the position of a defendant that justice between the parties may be effectu-

ated, and, where the case justifies it, will decree at once without waiting for such change of position.—*Farmers & Mechanics Bank v. Wayman*, 5 Gill 336. [Cited and annotated in 45 L. R. A. (N. S.) 1078, on liability of corporation to true owner for unauthorized stock transfer; in 15 L. R. A. 643, on corporation's duty as to transfer of stock held in trust.]

### §§ 106-108. Defendants.

#### Cross-Reference.

Multifariousness by misjoinder, see post, § 150.

### §§ 109-112. Making party complainant or defendant.

#### Cross-References.

Defects and objections, see post, § 117.

Necessary or indispensable parties, see ante, §§ 94-97.

Parties in general, see ante, §§ 90-92.

Proper parties, see ante, §§ 99-101.

(a) All persons having the same interest should stand on the same side of the suit; but, if any such refuse to appear as plaintiff, they may be made defendants, their refusal being stated in the bill.—*Contee v. Dawson*, 2 Bland 264. [Cited and annotated in 44 L. R. A. (N. S.) 886, 919, 937, 981, on personal liability of trustee for losses; in 45 L. R. A. (N. S.) 419, on investments by trustees in foreign jurisdictions.]

### § 113. Parties to original suit as parties to ancillary suit.

### § 114. Intervention.

#### Cross-Reference.

In creditors' suits, see "Creditors' Suit," § 28.

(a) A simple contract creditor of one engaged in a bona fide litigation as to the title of property cannot become a party, or be heard in opposition to a decree rendered therein.—*Postal Tel. Cable Co. v. Snowden*, 68 Md. 118, 12 Atl. 549.

(b) A debtor executed his single bill to J., giving at the same time a mortgage upon personal property to his surety as security for its payment. The property covered by the mortgage was subsequently sold and conveyed to K., the surety joining in the conveyance. It appeared that a part of the purchase money due from K. was retained by him by agreement with the vendors to secure himself against the lien of J. *Held*,

that, upon proceedings in equity brought by K. to enforce his rights against the property, J. might intervene and be substituted to the rights of surety under the mortgage.—*Kunkel v. Fitzhugh*, 22 Md. 567.

### § 115. Bringing in new parties.

#### Cross-Reference.

Bringing in new parties by cross-bill, see post, § 204.

(a) New parties may be made to a suit in equity after a decree, by a supplemental bill, without joining the parties to the original bill, as the decree in such case does not bind the new parties, but is open to any objection which might have been made at the first hearing.—*Stewart v. Duvall*, 7 G. & J. 179. [Cited and annotated in 32 L. R. A. 673, on admissions and waivers by fiduciaries in actions.]

### § 116. Substitution.

### § 117. Defects and objections as to parties.

#### Cross-References.

Making party complainant or defendant, see ante, §§ 110-112.

Necessary or indispensable parties, see ante, §§ 94-97.

Parties in general, see ante, §§ 90-92.

Proper parties, see ante, §§ 99-101.

(a) Objection on the ground of the capacity of plaintiff instituting a suit in equity may be made by demurrer, plea, answer, or taken advantage of at the hearing.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949.

(b) Joinder of unnecessary complainants does not deprive another complainant of his remedy under the bill.—*Trustees of M. E. Church v. Asbury Sunday-School Society*, 109 Md. 670, 72 Atl. 199.

(c) An objection as to parties will not be considered on appeal.—*Bridges v. McKenna*, 14 Md. 258. [Cited and annotated in 30 L. R. A. 118, on injunction against execution sales or other proceedings under final process.]

### § 118. Amendment as to parties.

(a) A bank made a loan on the hypothecation of certificates of stock owned by D., of the firm of D. & Q. Subsequently D. & Q. conveyed their individual and co-partnership assets by deed of trust to R. for the benefit of their creditors. R., as such trustee, in-

stituted proceedings in equity to recover the hypothecated stock on the ground that the signatures of D. indorsed thereon were not genuine or authorized by him. Pending the proceedings, D. & Q. were adjudicated bankrupts, and the suit was entered to the use of their assignee in bankruptcy, who, on leave obtained for that purpose, filed a supplemental bill against the original defendants, praying the same relief sought by the original bill. *Held*, that the supplemental bill was the proper course of proceeding on the part of the assignee.—*Collateral Security Bank v. Fowler*, 42 Md. 393.

(b) Act 1854, c. 230, enlarges the time for making amendments in proceedings in equity, and allows them at any time before final decree.—*Calvert v. Carter*, 18 Md. 73. (See Code, art. 16, § 17.)

(c) Where complainant has parted with his title to land since filing an answer to a bill brought to enjoin his interference with complainant's claim to a right of way thereover, the fact should be brought forward by filing a bill in the nature of a supplemental bill, which is in the nature of a plea puis darrien continuance at common law.—*Pue v. Pue*, 4 Md. Ch. 386.

(d) A bill for the sale of land, under the statute on that subject, may, by amendment, be changed into a bill for a partition.—*Watson v. Godwin*, 4 Md. Ch. 25.

(e) An order granting to complainant the right to surcharge and falsify an account was appealed from, and the appellate court remanded the cause for the purpose of having the pleadings amended, and for further proceedings, and extended the right to surcharge and falsify the account to both parties, provided defendant's amended pleadings should warrant such extension. *Held*, that defendant could amend his answer so as to surcharge and falsify in respect of matters known to him at the time of filing his original answer.—*Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

(f) A supplemental bill may be filed either before or after decree.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

(g) A supplemental bill may be in aid of a

decree to help its being carried into full execution, or that proper directions may be given on some matter omitted in the original bill, or not put in issue by it, or the defense made to it.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

(h) A supplemental bill, after a decree, must not seek to vary the principles of the decree, but, taking that as the basis, seek merely to supply any omissions there may be in it, or in the proceedings which led to it, so as to enable the court to give full effect to its decision.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

(i) Where the parties to a bill before the hearing of the cause, or after it is at issue, discover new evidence, the bill may be amended so as to bring it within the issue.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [*Cited and annotated* in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

(j) The imperfection in an original bill, rendering a supplemental bill necessary, may arise either from the importance of the omitted fact not being previously understood, or from the fact itself not having come to the knowledge of complainant until after the bill was filed.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [*Cited and annotated*, see *supra*.]

(k) A new title or new interest may be set up by a supplemental bill, where the title relied on in the original bill is sufficient to entitle plaintiff to relief; but a confessedly bad title, thus relied on, cannot be supported by a good title subsequently acquired, which is sought to be introduced by way of supplement.—*Winn v. Albert*, 2 Md. Ch. 42.

(l) Filing a supplemental bill is not a matter of course, but only by leave of court, on sufficient cause shown; and, in a doubtful case, the court may direct notice of the application to be given to defendants who have appeared.—*Winn v. Albert*, 2 Md. Ch. 42.

(m) Plaintiffs in an original bill claimed title as grantees in a deed of trust for the benefit of the creditors of an insolvent debtor, and were afterwards appointed permanent trustees of the same debtor under the insolvent laws. *Held*, that they had a right

to introduce their new title as such trustees by a supplemental bill.—*Winn v. Albert*, 2 Md. Ch. 42.

(n) No answer is necessary to an amended bill from one of several defendants, who, in his answer to the original bill, has fully responded as to all matters in the amended bill by which his interest can be affected.—*Fitzhugh v. McPherson*, 9 G. & J. 51.

(o) Where a supplemental bill is filed solely to bring in a new party in interest, he alone should be made to respond to it.—*Calwell v. Boyer*, 8 G. & J. 136.

(p) Where plaintiff amends his bill, he is entitled to a new answer to the new matter.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

(q) A party enjoined against obstructing a road represented by petition that certain proceedings in a county tribunal, by which he was originally authorized to do it, although subsequently enjoined, having been taken to a higher court by certiorari, had been set aside; that he had made another application, and obtained an order for closing the road, which he alleged to be final and conclusive without appeal; that he did, therefore, conceiving himself fully authorized to do so, close the road,—and prayed for leave to file an amended answer to the original bill setting forth these matters. *Held*, that the petition laid no proper ground for leave to amend the answer, and, not being sworn to, it was dismissed with costs.—*Williamson v. Carnan*, 1 G. & J. 184.

(r) Where a bill has been amended on application to the court, defendant will be compelled to answer such amended bill.—*West v. Hall*, 3 H. & J. 221.

#### § 119. Process in general.

##### Cross-References.

Prayer for process, see post, § 139.

Process to support decree, see post, § 415.

Process to support decree pro confesso, see post, § 418.

Service on parties to cross-bill, see post, § 204.

Subpoena, see post, §§ 121-125.

(a) Where jurisdiction of nonresident defendants in a bill to subject the lands of their

ancestor to plaintiff's debt is obtained by publication, they are not in court for any other or different purpose, and such jurisdiction could not be retained to make the bill one for specific performance.—*McGaw v. Gortner*, 96 Md. 489, 54 Atl. 133. [Cited and annotated in 69 L. R. A. 677, on equity jurisdiction over suits affecting realty outside state; in 23 L. R. A. (N. S.) 1136, as to whether jurisdiction of suit for specific performance of land contract within territorial jurisdiction, may rest upon constructive service upon nonresident.]

#### §§ 120-125. Subpoena.

##### Cross-Reference.

Process in general, see ante, § 119.

(a) Service of the subpoena issued upon an amended bill in a suit against a resident mariner temporarily absent in his vocation cannot be made on his solicitor.—*McKim v. Odom*, 3 Bland 407. [Cited and annotated in 4 L. R. A. (N. S.) 1003, on punishment of corporation for contempt.]

(b) Where defendants who have not answered an original bill are called upon by an amended bill simultaneously to answer both, it is not necessary to issue new subpoenas.—*Fitzhugh v. McPherson*, 9 G. & J. 51.

(c) According to the well-settled practice of the court of chancery, the issuing and service of a subpoena should always precede the issuing of a commission to take the answers of infants.—*Calwell v. Boyer*, 8 G. & J. 136.

#### § 126. Attachment against the person.

##### Cross-References.

Process in general, see ante, § 119.

To enforce decree, see post, § 439.

#### § 127. Appearance.

##### Cross-Reference.

See "Appearance."

### IV. PLEADING.

##### Cross-References.

Petition of intervention, see ante, § 114.

Following state statutes and practice in federal courts, see "Courts," § 347.

Pleading tender, see "Tender," § 22.

##### In particular pleadings.

See "Cancellation of Instruments," §§ 37-43; "Creditors' Suit," §§ 39-42; "Discovery," §§ 19, 20; "Divorce," §§ 88-108; "Interpleader," §§ 23, 26; "Partition," §§ 55-62; "Quieting Title," §§ 34-43;



"Reformation of Instruments," §§ 36-41; "Specific Performance," §§ 113-117.  
 By city to rescind contract, see "Municipal Corporations," § 255.  
 By or against trustee in bankruptcy, see "Bankruptcy," § 302.  
 For accounting, see "Account," § 17.  
 For accounting by broker, see "Brokers," § 37.  
 For accounting by trustee, see "Trusts," § 305.  
 For dissolution and accounting by partnership, see "Partnership," § 327.  
 For dissolution or partition of community, see "Husband and Wife," § 272.  
 For forfeiture of grant of public lands to railroad company, see "Public Lands," § 88.  
 For infringement of copyright, see "Copyrights," § 82.  
 For infringement of patent, see "Patents," §§ 310, 311.  
 For infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 92.  
 For injunction, see "Injunction," §§ 116-123.  
 For injunction to protect water rights, see "Waters and Water Courses," §§ 152, 247.  
 For relief against judgment, see "Judgment," § 460.  
 For sale of real estate of decedent, see "Executors and Administrators," § 356.  
 For subrogation, see "Subrogation," § 41.  
 For unfair competition in trade, see "Trade-Marks and Trade-Names," § 92.  
 On county bonds, see "Counties," § 188.  
 To cancel bonds of irrigation district, see "Waters and Water Courses," § 230.  
 To cancel patent, see "Public Lands," § 120.  
 To confirm or try tax title, see "Taxation," § 809.  
 To determine adverse claim to mining location, see "Mines and Minerals," § 38.  
 To determine custody of children, see "Parent and Child," § 2.  
 To enforce forfeiture for breach of conditions in grant of railroad right of way, see "Railroads," § 82.  
 To enforce liability of stockholders, see "Corporations," § 268.  
 To enforce mechanic's lien, see "Mechanics' Liens," §§ 271-277.  
 To enforce vendor's lien, see "Vendor and Purchaser," § 280.  
 To establish and enforce trust, see "Trusts," § 371.  
 To foreclose mortgage, see "Mortgages," §§ 444-464.  
 To open or set aside settlement of decedent's estate, see "Executors and Administrators," § 516.  
 To redeem from mortgage sale, see "Mortgages," § 616.  
 To reform settlement of account, see "Account Stated," § 11.  
 To restrain collection of drainage assessment, see "Drains," § 91.  
 To restrain diversion of water, see "Waters and Water Courses," § 87.

To restrain execution, see "Execution," § 172.  
 To restrain interference with surface water, see "Waters and Water Courses," § 126.  
 To restrain interference with waters, see "Waters and Water Courses," § 179.  
 To restrain obstruction of highways, see "Highways," § 159.  
 To set aside fraudulent transfer, see "Fraudulent Conveyances," §§ 258-269.  
 To set aside settlement of guardian, see "Guardian and Ward," § 165.

#### (A) ORIGINAL BILL.

##### *Cross-References.*

Amendment of bill, see post, §§ 268-277.  
 Bill of review, see post, § 460.  
 Bill to enforce decree, see post, § 441.  
 Cross-bill, see post, §§ 195, 196, 198-202.  
 Grounds for demurrer, see post, §§ 218-224.  
 Supplemental bill, see post, §§ 295-301.  
 As sufficient memorandum in writing to take contract out of operation of statute of frauds, see "Frauds, Statute of," § 103.  
 For accounting, see "Account," § 17.  
 For cancellation of instruments, see "Cancellation of Instruments," § 37.  
 For discovery, see "Discovery," § 19.  
 For divorce, see "Divorce," §§ 90-95.  
 For injunction, see "Injunction," § 118.  
 For partition, see "Partition," § 55.  
 For reformation of instruments, see "Reformation of Instruments," § 36.  
 For specific performance, see "Specific Performance," § 114.  
 In creditors' suits, see "Creditors' Suit," § 39.  
 Of interpleader, see "Interpleader," §§ 23, 24.  
 To enforce mechanics' liens, see "Mechanics' Liens," § 271.  
 To enforce trust, see "Trusts," § 371.  
 To foreclose mortgages, see "Mortgages," §§ 445-453.  
 To quiet title, see "Quieting Title," §§ 34-36.  
 To set aside fraudulent transfers, see "Fraudulent Conveyances," §§ 258-269.

#### § 128. Nature and office.

(a) Bills of equity are not required to comply with the technicalities of the law or of English practice, and their character is determined by the allegations and the relief prayed, rather than by the title.—*Ridgely v. Bond*, 18 Md. 433.

(b) Although a bill is styled therein as a supplemental bill, and refers to prior proceedings and decrees as facts on which to ground the claim for relief, but not praying a revision of any prior decree, it is not a supplemental, but an original, bill.—*Brooks v. Brooke*, 12 G. & J. 306, 38 Am. Dec. 310.

**§ 129. Form and requisites in general.**

(a) Plaintiff's title to the assistance of the court must always be exposed by his pleadings, but the style and character of a pleading in equity has always been of a more liberal cast than that of other courts, as mispleading in matter of form has never been held to prejudice a party if the case made is right in the matter of substance and supported by proper evidence.—*Tiernan v. Poor*, 1 G. & J. 216, 19 Am. Dec. 225.

§§ 130-132. (See Analysis.)

**§ 133. Premises or statement of cause of action.**

(a) Complainant must aver in his bill all that is necessary to show his right and title to the relief he seeks.—*Hayward v. Carroll*, 4 H. & J. 518; *Berry v. Pierson*, 1 Gill 234.

**§ 134. Confederating part.****§ 135. Charging part.****§ 136. Averment of jurisdiction.**

(a) The court of chancery cannot take jurisdiction of a bill for the sale of lands unless the bill alleges that it will be for the advantage of all the owners to have them sold.—*Watson v. Godwin*, 4 Md. Ch. 25.

(b) A bill must show that the matter of it is within the jurisdiction of the court of chancery.—*Estep v. Watkins*, 1 Bland 486; *Townshend v. Duncan*, 2 Bland 45.

(c) The jurisdiction of the court, and plaintiff's legal capacity to recover, must appear by the bill itself in order to entitle plaintiff to a decree in any form or on any terms.—*Iglehart v. Armiger*, 1 Bland 519.

**§ 137. Interrogating part.**

*Cross-Reference.*

Demurrer or objections to discovery, see post, § 224.

**§ 138. Prayer for relief.**

*Cross-References.*

Conformity of decree to prayer, see post, § 427.

Ground for demurrer, see post, § 222.

In bill of review, see post, § 460.

Relief under general prayer, see post, § 427.

Want of prayer as ground for dismissal, see post, § 362.

In action to foreclose mortgage, see "Mortgages," § 450.

(a) There is no objection to a case being presented in the alternative provided both alternatives be cognizable by the court and

are not so framed as to elude a rule of court.—*Lingan v. Henderson*, 1 Bland 236. [Cited and annotated in 49 L. R. A. (N. S.) 30, on necessity of pleading statute of frauds; in 21 L. R. A. 551, on bar of principal debt, as bar to foreclosure of mortgage or deed of trust; in 39 L. R. A. (N. S.) 1172, on effect of barring of action for purchase money upon right to enforce vendor's lien.]

(b) Complainant must allege in his bill that he has done, or offered to do, or is ready to do, everything necessary to entitle him to the relief he seeks, or sufficient excuse for its nonperformance.—*Oliver v. Palmer*, 11 G. & J. 426.

**§ 139. Prayer for process.**

*Cross-Reference.*

Want of prayer for process as ground of demurrer, see post, § 222.

**§ 140. Interrogatories.****§ 141. Form and sufficiency of allegations in general.**

*Cross-References.*

See ante, § 138.

Directness and positiveness, or argumentativeness, see post, § 142.

(a) A bill in equity must contain a clear statement of the facts on which plaintiff relies for relief.—*Euler v. Schroeder*, 112 Md. 155, 76 Atl. 164.

(b) Generally a bill must state clearly plaintiff's right to the relief prayed.—*Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442.

**§ 142. Directness and positiveness, or argumentativeness.**

*Cross-References.*

Certainty, see post, § 143.

Form and sufficiency of allegations in general, see ante, § 141.

(a) A bill in equity should state the facts with reasonable clearness and accuracy, so that defendant may be informed of the nature of the case he is called on to answer.—*Baltimore & O. R. Co. v. Latimer*, 118 Md. 183, 84 Atl. 377.

(b) Pleadings in equity are not framed with the same precision and exactness as at law. Facts are often indirectly alleged or expressed by necessary implication. It is sufficient to present substantially the facts on which the acts of Assembly are predi-

cated, when applying for relief under any of them.—*Bolgiano v. Cooke*, 19 Md. 375.

(c) Though facts, not conclusions either of law or fact, are to be stated, yet a general charge, without averments of all the circumstances which go to prove it, is sufficient.—*Dennis v. Dennis*, 15 Md. 73.

(d) Every material fact to which complainant intends to offer evidence must be stated, but a general statement of such matter is sufficient, and he need not charge minutely all circumstances that might conduce to prove the general charge; such circumstances being matters of evidence, which need not be charged so as to let them in as proof.—*Dennis v. Dennis*, 15 Md. 73.

### § 143. Certainty.

#### Cross-Reference.

Directness and positiveness or argumentativeness, see ante, § 142.

(a) Where complainant in a bill quia timet claimed title under a judicial sale, and the deed recited the power to sell, it was held that the objection was not tenable that the bill did not exhibit the authority under which the sale was made, as the maxims, "Id certum est, quod certum reddi potest," and "Omnia rite præsuntur," were applicable.—*Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773.

(b) Though parties have a right to resort to demurrer, this mode of defense is viewed with suspicion and disfavor. The claim of plaintiff must be stated with clearness; but, if the case is so stated as to apprise the opposite party of the claim, he would not be permitted to object on the ground of uncertainty, though every particular circumstance is not stated. General certainty is sufficient.—*Mewshaw v. Mewshaw*, 2 Md. Ch. 12.

### § 144. Consistency, ambiguity, or repugnancy.

#### Annotation.

Right to plead inconsistent defenses in equity.—48 L. R. A. 177, note.

### § 145. Double aspect.

### § 146. Multifariousness.

#### Cross-References.

See post, §§ 292, 328, 330, 363, 364, 365.

Ground for demurrer, see post, § 223.

Of cross-bill, see post, § 202.

Grant of preliminary injunction against nuisance notwithstanding misjoinder of parties, see "Nuisance," § 31.

Infringement of copyright, see "Copyrights," § 78.

Joinder of causes of action under codes and practice acts, see "Action," §§ 38-60.

Joinder of legal and equitable causes of action, see "Action," § 40.

Patent infringement suits, see "Patents," § 310.

### § 147.—In general.

(a) There is no fixed rule to determine whether a pleading is multifarious, but each pleading must be tested on the facts alleged therein in view of the general principles forbidding the uniting of distinct matters relating to different parties in the same suit.—*Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797.

(b) Defendant H. was the holder of notes variously indorsed by plaintiffs, which were alleged to represent a single transaction or series of transactions consisting of loans, or discounts at grossly usurious rates and usurious renewals. Among such notes were two indorsed by defendant N. which were given to H. as collateral without further consideration. It was also alleged that H. in renewing the loans had purposely so mingled and planned his usurious transactions as to make it difficult if not impossible without a full accounting with him to determine the amount of legal indebtedness to him either of plaintiff or defendant N. on the notes bearing their names. The bill prayed such an accounting and pending such suit, H. having brought suit on the two notes indorsed by defendant N., an injunction restraining the prosecution thereof pending determination of the suit in equity was issued at her request. Held, that the bill was not objectionable for multifariousness in so far as defendant N., the maker of the notes, and defendant H. were concerned.—*Horner v. Nitsch*, 103 Md. 498, 63 Atl. 1052.

(c) A bill is not demurrable for multifariousness unless several distinct matters are joined in the bill against the same defendant, thus compelling him to defend disconnected matters, or the bill contains the demand of several distinct matters against several defendants, thus imposing upon each the costs incident to the trial of several

claims against the other defendants, with which he has no connection or interest.—*Reese v. Wright*, 98 Md. 272, 56 Atl. 976.

(d) No general rule can be laid down as to what constitutes multifariousness in a bill in equity. The court must exercise a sound discretion in determining, from the circumstances of each case, whether a bill is liable to that objection.—*Chew v. Glenn*, 82 Md. 370, 33 Atl. 722.

(e) Lands were held in trust to sell and pay the debts of the grantors, according to their legal claims. The trustees failed to apply the proceeds according to the directions in the deed. A. purchased a part of the land, and paid the trustees the full value of it, and this land was levied on by judgment creditors, who had a lien on it. B. also purchased land under the trust, but retained the purchase money, and applied it, in pursuance of an agreement with the trustees, to his own junior judgment. A. filed a bill against B. and other co-purchasers, praying for an account and contribution, and that B. might be enjoined to pay in his purchase money, to be applied on the elder judgments, etc. B. filed his answer, and A. then filed an amended bill, charging that B.'s judgment was usurious and void. On demurrer, it was held that the bill was not multifarious, the two causes of complaint arising from the same transaction, and all the defendants having similar interests, and the relief against all being similar.—*Thomas v. Mason*, 8 Gill 1.

**§ 148.—Misjoinder of causes of action.**  
*Cross-Reference.*

Misjoinder of parties, see post, §§ 149, 150.

(a) A bill by the cestui que trust and remaindermen entitled to take after him held multifarious in attempting to set aside mortgages and the cestui que's assignment of his income.—*Houghton v. Tiffany*, 116 Md. 655, 82 Atl. 831.

(b) The bill alleged the conveyance, without any consideration in fact, though one was nominally recited, of property belonging to plaintiff to another upon the understanding that he would convey it to plaintiff's wife, to be held for plaintiff's benefit; that such other afterwards conveyed it to plaintiff's wife without consideration; that

plaintiff and his family occupied the property peaceably until his wife left him without cause, when she conveyed to another defendant for a pretended consideration in order to harass plaintiff's possession; and that the wife's grantee, pursuant to such purpose, brought ejectment to oust plaintiff. The prayer was that he be enjoined from maintaining the ejectment proceeding; that the deed to him be canceled; that the wife be enjoined from transferring the property; and that a resulting trust be declared therein against her in plaintiff's favor. Held, that the bill was not multifarious for misjoinder of causes of suit; the object of the suit being single, the subject-matter being the same, and all of the parties having an interest therein.—*Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797. [Cited and annotated in 39 L. R. A. (N. S.) 919, 925, on grantee's oral promise to grantor as giving rise to constructive trust.]

(c) To make a bill multifarious for containing different causes of action against the same persons, the grounds of suit must be different, and each ground alleged must sustain the bill.—*Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797. [Cited and annotated, see supra.]

(d) A bill for a discovery, account, and payment into court of a single debt, and for the cancellation of a fraudulent assignment of the debt and an injunction against the assignee restraining him from collecting it, is not multifarious.—*Whitman v. Dorsey*, 110 Md. 421, 72 Atl. 1042.

(e) A bill in equity by the receivers of an insolvent corporation, to enforce the liability of the directors of the company for certain losses, made charges of negligence which were alleged to have resulted in great loss to the company against the directors and each and all of them, in that they failed to attend meetings, failed to use due diligence in the selection of subordinate officers and agents, and to watch the acts of the executive officers and agents, and to do what men of ordinary caution ought to have done to protect the interests of the corporation, and alleged abuses of authority and breach of their contractual relations with the corporation in wasting its assets and in making

loans to officers and directors of a company in contravention of its charter and by-laws. *Held*, on a demurrer to the bill by one of the directors, the bill was not demurrable as being multifarious.—*Murphy v. Penniman*, 105 Md. 452, 66 Atl. 282; *Thomas v. Same*, *Id.*

(f) In a suit, the primary object of which was to enjoin a nuisance, the incorporation of an allegation in the bill that a mistake existed in defendants' deed as to the description of the alley in which the nuisance was maintained was not fatal to the bill on demurrer, where plaintiffs' title to their property and the alleys was admitted, and the mistake did not have any bearing on the case, and the prayer of the bill was not to reform the deed, but to declare it inoperative in so far as it should have any effect on plaintiffs' rights.—*Reese v. Wright*, 98 Md. 272, 56 Atl. 976.

(g) A bill to have property partitioned, and, in event of its being held to be not susceptible of partition, then to have it sold and the proceeds divided after payment of a mortgage debt, is not multifarious.—*Claude v. Handy*, 83 Md. 225, 34 Atl. 532.

(h) A bill which alleges that the subject-matter of the controversy arose out of senior defendant's failure to pay complainant his share of the profits arising from the negotiation of certain mortgage loans on real estate, and that part of the lands from which complainant was entitled to derive profits had vested in junior defendant, whose relation to the property was that of a trustee, entirely subsidiary to senior defendant, states a cause of action, and is not multifarious.—*Chew v. Glenn*, 82 Md. 370, 33 Atl. 722.

(i) A bill by heirs of a decedent for the sale of his land, which also alleges that decedent, as administrator of his brother, paid to the brother's widow and children money in excess of their distributive shares, and prays for an accounting, and further alleges that such widow had books and accounts of decedent in her possession, and prays for a discovery thereof, and further alleges payments by decedent as administrator to creditors of his brother, and made such creditors parties, and prays for an accounting by

them, is multifarious.—*Koontz v. Koontz*, 79 Md. 357, 32 Atl. 1054.

(j) The owner of an undivided interest in lands, situated both in the city and outside in the county, mortgaged his interest, and then filed a bill for partition. In the partition proceedings a decree of sale was made under which the city land was sold but the county lands were not disposed of at all. Subsequently, the mortgage was foreclosed and the undivided interest was sold to a purchaser, who brought partition of the county lands. The former decree in partition had not been recorded in the office of the clerk of the county court as required by Code 1888, art. 16, § 72. *Held*, that the new bill for partition was not multifarious, since it did not seek relief on two unconnected matters, but that the effect of the former decree must necessarily be determined in passing on the new application.—*Murguiondo v. Hoover*, 72 Md. 9, 18 Atl. 907. (See Code 1911, art. 16, § 87.)

(k) A bill is multifarious which asks for the partition of two tracts of land, of one of which plaintiffs' ancestor died seised as tenant in common with his brother, while of the other he died seised as tenant in common with his brother and a third person, and which joins both the brother and a third person as defendants.—*Reckefus v. Lyon*, 69 Md. 589, 16 Atl. 233.

(l) Complainant in a bill to set aside a deed for fraud asked also that the grantee should account for the rents and profits of the property, and also that she be removed from her trusteeship under the will of the grantor in the deed. The court in its decree dismissed the bill, so far as it prayed for her removal from the trusteeship, for multifariousness. *Held*, that the action of the court was authorized under Equity Rule 33.—*Canton v. McGraw*, 67 Md. 583, 11 Atl. 287. (See Code, art. 16, § 183, Rule 33.)

(m) Where a bill prays for relief in respect to two distinct matters, such as partition, and the enforcement of a mortgage claim against the estate, it is multifarious, and complainants ought to be put to their election as to which subject-matter for relief they will stand on.—*Belt v. Bowie*, 65 Md. 350, 4 Atl. 295.

(n) A bill against three named persons to enjoin the maintenance of a factory for the making of vitriol and sulphuric acid, after alleging damage to complainant's property caused by such factory, prayed that defendants "may, on their several and respective corporal oaths, answer the premises, and that they may set forth and discover whether they, or one of them (and, if one, which one), do not conduct, control, and operate a factory at the place hereinbefore mentioned, wherein vitriol, sulphuric acid, or sulphurous acid or some of these products are made," and prayed an injunction against the continuance of such factory. *Held*, not demurrable on the ground of multifariousness.—*Chappell v. Funk*, 57 Md. 465.

(o) The children of an intestate filed a bill in equity praying that the administrators be compelled to account for the whole personal estate of their intestate, for a decree annulling and setting aside a decree and sale under which one of the administrators claimed lands of deceased intestate, and that subpoenas issue to the sheriff of a certain city for one of the administrators and to the sheriff of a certain county for the other administrators, and for general relief. *Held*, that if complainants had confined themselves to allegations respecting the personal estate, which were peculiar to one of the administrators and auxiliary to the consummation of the fraud charged on him in the purchase of the real estate, the charges would have been all tending to one end, though involving various matters, and would not have been multifarious; but as two distinct objects of distinct natures against several persons in different characters, and joint and separate demands, were embraced in the same bill, it was error to overrule a demurrer for multifariousness.—*Wilson v. Wilson*, 23 Md. 162.

(p) A bill for an account of the concerns of two distinct firms, in both of which one of defendants was a partner, the other defendant being a partner only in the last firm, although the last firm, as a firm, was agent for collecting and disbursing the outstanding debts of the former, no reason being set forth in the bill for investigating the accounts of the agency, was *held* multifarious,

and dismissed.—*Griffin v. Merrill*, 10 Md. 364.

(q) A bill was filed by creditors to set aside certain alleged fraudulent conveyances of real estate, made by the debtor, and praying for the appointment of a receiver to take charge of certain property of the debtor, liable to decay and deterioration. A receiver was appointed, and, afterwards, an amended bill was filed to set aside other and distinct conveyances, made by the debtor, alleging them to be fraudulent, and asking that the receiver be ordered to sell the property, which was in danger of loss. Upon due notice to the defendants to show cause why the property should not be sold, and no cause being shown, an order was passed directing a sale by the receiver. After this, two of the defendants to the original, and one to the amended, bill demurred to the latter bill for multifariousness. It was *held* that, under the special circumstances of this case, the demurrer must be overruled.—*Dunn v. Cooper*, 3 Md. Ch. 46.

(r) Where an original and amended bill merely unite two causes of complaint growing out of the same transactions, affecting the same question of right, being the right of complainant to relief against the judgment of defendant, they cannot be regarded as obnoxious to the objection of multifariousness.—*Doub v. Barnes*, 1 Md. Ch. 127.

(s) In the year 1814, a partnership consisting of four persons existed, and in that year a fifth partner was added. In 1825 one of the original partners withdrew, and in 1835 another of the original partners withdrew. In 1843 the fifth partner withdrew, and filed a bill, requiring a settlement and account of the partnership concerns from 1814 to 1843, against all the four original partners. *Held*, on demurrer, that the bill was multifarious, and must be dismissed.—*White v. White*, 5 Gill 359.

#### § 149.—Misjoinder of complainants.

##### Cross-References.

Misjoinder of causes of action, see ante, § 148.

Misjoinder of defendants, see post, § 150.

(a) Under the direct provisions of act 1904, p. 597, c. 337, the exclusive remedy of the creditors of a corporation for the enforce-

ment of the liability of resident stockholders to them for the debts of the corporation is by a bill in equity in the nature of a creditors' suit against such stockholders by one or more creditors on behalf of themselves and all other creditors of the corporation who may come in and make themselves parties thereto; and hence a bill reciting claims of different creditors against numerous stockholders, some of whom are indebted to one portion of the creditors and others of whom are indebted to a different portion of them, is not multifarious, though without the statute it would be.—*Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704. (See Code, art. 23, §§ 116, 117.)

(b) A bill by several parties to enjoin a telephone company from charging them higher rates than a city ordinance permits is not multifarious, though it alleges a contract by each of them with the company.—*Charles Simon's Sons Co. v. Maryland Telephone & Telegraph Co.*, 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727. [Cited and annotated in 49 L. R. A. (N. S.) 1167, on right of citizens to enforce public contract.]

(c) Where plaintiffs and defendants were owners of adjoining lots, and entitled to the use in common of two alleys between the houses on the lots, it was proper for plaintiffs to bring one suit against defendants to enjoin a nuisance maintained by defendants in the common alleys.—*Reese v. Wright*, 98 Md. 272, 56 Atl. 976.

(d) A bill charged that complainant N. executed a deed to and took back a lease from one S., who conveyed the property to defendants; that the transaction was in fact a usurious loan and mortgage, and that defendants had notice of the fact; that N. had mortgaged the property to his co-complainants, subject to the mortgage to S.; and prayed that an account might be had, the amount of N.'s indebtedness under the S. mortgage ascertained, that he be allowed to redeem, and that his co-complainants have the benefit of their mortgage. Held, that the co-complainants were proper parties, and that the bill was not multifarious. The fact that two separate decrees may be necessary, in order to give full relief, is no objection.—*Neal v. Rathell*, 70 Md. 592, 17 Atl. 566.

(e) In order to sustain a demurrer to a bill on the ground of multifariousness, it should either appear that several matters perfectly distinct and independent are joined in the bill against the same defendant, thus compelling him to unite in his answer different matters wholly unconnected with each other, or that the bill contains the demand of several matters of a distinct and independent nature against several defendants, thus imposing upon each of these the costs incident to the trial of several claims against the other defendants, with which he has no connection and in which he has no interest. Hence the objection should be confined to cases in which the demand against each defendant is entirely distinct and separate in its subject-matter from that in which other defendants are interested, and does not apply where there is a common liability in the defendants, and a common, although not coextensive, interest in the complainants.—*Fiery v. Emmert*, 36 Md. 464.

(f) Where the interests of several complainants, though distinct and on distinct conveyances, are yet of a similar nature, against the same defendants, and in relation to the same subject-matter, and the relief prayed is the same to all in character, the objection of multifariousness does not apply.—*Kunkel v. Markell*, 26 Md. 390.

(g) Relief will not be refused to a party with reference to another and distinct subject because he has associated it in the same bill with matter in regard to which he is not entitled to relief on account of having delayed in his application too long.—*Union Bank v. Kerr*, 2 Md. Ch. 460.

(h) Where several sureties pay the whole debt, and then, in one bill, call on another surety for contribution, the objection that the bill is multifarious does not lie.—*Young v. Lyons*, 8 Gill 162.

(i) Slaves claiming a right to freedom under the same will may unite in the same bill to compel the executor to execute the directions of the will, and it is no misjoinder.—*Peters v. Van Lear*, 4 Gill 249.

#### § 150.—Misjoinder of defendants.

##### Cross-References.

Misjoinder of causes of action, see ante, § 148.

Misjoinder of complainants, see ante, § 149.

Bill to enforce liability for fraudulent administration of assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 295.

(a) The bill alleged the conveyance, without any consideration in fact, though one was nominally recited, of property belonging to plaintiff to another upon the understanding that he would convey it to plaintiff's wife, to be held for plaintiff's benefit; that such other afterwards conveyed it to plaintiff's wife without consideration; that plaintiff and his family occupied the property peaceably until his wife left him without cause, when she conveyed to another defendant for a pretended consideration in order to harass plaintiff's possession; and that the wife's grantee, pursuant to such purpose, brought ejectment to oust plaintiff. The prayer was that he be enjoined from maintaining the ejectment proceeding; that the deed to him be canceled; that the wife be enjoined from transferring the property; and that a resulting trust be declared therein against her in plaintiff's favor. *Held*, that the bill was not multifarious for misjoinder of defendants, the object of the suit being single, the subject-matter being the same, and all of the parties having an interest therein.—*Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797. [Cited and annotated in 39 L. R. A. (N. S.) 919, 925, on grantee's oral promise to grantor as giving rise to constructive trust.]

(b) A bill to reach property fraudulently conveyed is not multifarious because it joins as defendants with the debtor a number of persons alleged to have severally assisted him in covering up separate and distinct portions of his property by accepting transfers thereof.—*Regester v. Regester*, 104 Md. 359, 65 Atl. 12.

(c) Where a bill by a receiver of an insolvent national bank against directors and the representatives of deceased directors contained 29 charges of malfeasance, gross negligence, etc., in the care of the bank's funds, amounting to over \$300,000, and joined defendants, some of whom could only have been connected with three transactions objected to, amounting to a little over

\$12,000, and others were in no manner connected with a large number of the transactions, some of which did not transpire until after some of the defendants had ceased to be directors, the bill, as to them, was multifarious.—*Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738; *Harden v. Same*, Id.; *Horner v. Same*, Id. [Cited and annotated in 39 L. R. A. (N. S.) 174, on liability of bank directors for bad loans or investments.]

(d) A bill in equity filed with the single object of condemning lands for a street is not multifarious because all persons interested in any of the lands to be condemned are made parties.—*Gardiner v. City of Baltimore*, 96 Md. 361, 54 Atl. 85.

(e) A guardian died leaving an insufficient estate to pay his ward, and of his three sureties one died having voluntarily conveyed all his property, another died having obtained his discharge in bankruptcy, and the third leaving a widow and children. On a bill by the ward to have the voluntary conveyances set aside, *held*, that the joinder of all the grantees, the administrator of the guardian, and the widow and children of the surety, did not render the bill multifarious.—*Brian v. Thomas*, 63 Md. 476.

(f) A bill is multifarious when parties are joined as defendants, between whom there is no connection in interest as against the complainant.—*Wilson v. Wilson*, 23 Md. 162.

(g) A. executed a deed conveying to trustees certain property in trust, and the trustees were authorized to appoint an attorney under them to execute the trusts. The trustees appointed A. their attorney, who managed the trust several years and advanced a certain amount from his own funds. On the death of A., the trustees appointed B. agent with the same powers. After acting a long time as agent, B., on the death of the original trustee, was appointed trustee for closing the trust. The bill filed by the administrators of A. against B. prayed for an account of all his doings as agent and as trustee. *Held*, that this did not make the bill multifarious, the said B. having acted in a fiduciary capacity from the beginning.—*Williams v. West*, 2 Md. 174.



### § 151. Impertinence and scandal.

#### Cross-References.

Ground for demurrer, see post, § 223.

In bill to cancel tax certificate, see "Taxation," § 809.

### § 152. Exhibits.

(a) In considering the sufficiency of a bill in equity upon demurrer, the exhibits filed with the bill as a basis for its allegations should be considered in connection therewith.—*Peabody v. George's Creek Coal & Iron Co.*, 120 Md. 659, 87 Atl. 1097.

(b) Where complainant based his claim for injunction on a patent, its assignment, and a deed to land, with agreements made in reference thereto, copies of the patent, assignment thereof, and of the deed were necessary exhibits to be filed with the bill.—*Nagengast v. Alz*, 93 Md. 522, 49 Atl. 333.

(c) A bill to restrain a city from enforcing an assessment against plaintiff's property for grading a street alleged that said street had been condemned without awarding plaintiff or his predecessor any compensation for the fee; that said predecessor appealed to the city court, but that no interest was considered except his easement for certain tracks; and plaintiff prayed that the award and proceedings thereunder be considered a part of the bill, but did not file a copy thereof. *Held*, that no relief could be given in the absence of the records showing what was done in said condemnation proceedings.—*City of Baltimore v. Coates*, 85 Md. 531, 37 Atl. 18.

(d) Where a bill setting forth a co-partnership alleges that the articles of co-partnership were left in the hands of defendant, the failure of complainant to produce them forms no valid objection to the bill.—*Haight v. Burr*, 19 Md. 130.

(e) Where a decree was rendered in favor of complainant, founded on a prior decree, merely referred to in the bill, and not exhibited, it was reversed on appeal without prejudice to the equity of complainant.—*Norwood v. Norwood*, 4 H. & J. 112.

### § 153. Construction and operation.

(a) Notes having been filed with the bill as parts of and explanatory of its averments, must be taken to be as they appear,

notwithstanding averments of the bill contradictory of their legal effect as they so appear.—*Ridgely v. Wilmer*, 97 Md. 725, 55 Atl. 488.

(b) The allegations of a bill are to be construed most strongly against complainant.—*Maenner v. Carroll*, 46 Md. 193. [Cited and annotated in 59 L. R. A. 214, 270, on sufficiency of general allegations of negligence.]

(c) Rules of pleading in equity are not governed by the same technicality, as to matters of form, that controls proceedings at law. Courts of equity look to substance, not to form.—*Birely v. Staley*, 5 G. & J. 432. [Cited and annotated in 17 L. R. A. 348, on priority as to proceeds of creditors' bills; in 23 L. R. A. (N. S.) 93, on conditions precedent to equitable remedies of creditors.]

### (B) PLEA, ANSWER, AND DISCLAIMER.

#### Cross-References.

Amendment of plea or answer, see post, §§ 279-285.

Demurrer and answer to same bill, see post, § 215.

Demurrer to plea or answer, see post, § 216.

Further or additional answer, see post, § 302.

Necessity of pleading laches, see ante, § 88.

Plea or answer to amended bill, see post, § 276.

Plea or answer to supplemental bill, see post, § 300.

In creditors' suits, see "Creditors' Suit," § 40.

In interpleader proceedings, see "Interpleader," § 26.

In suits for accounting, see "Account," § 17.

In suits for cancellation of instruments, see "Cancellation of Instruments," § 39.

In suits for divorce, see "Divorce," §§ 97-99.

In suits for injunction, see "Injunction," § 119.

In suits for partition, see "Partition," § 56.

In suits for specific performance, see "Specific Performance," § 116.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 272.

In suits to enforce trusts, see "Trusts," § 371.

In suits to foreclose mortgages, see "Mortgages," § 454.

In suits to quiet title, see "Quieting Title," § 37.

In suits to set aside fraudulent transfers, see "Fraudulent Conveyances," § 266.

Practice in federal courts, see "Courts," § 347.

**§ 154. Mode of pleading defenses.**

(a) The objection to the jurisdiction of a court of equity may be taken either by way of exception or answer.—*Hughes v. Jones*, 2 Md. Ch. 178.

**§ 155. Plea and answer to same bill.****§ 156. Pleas.****Cross-References.**

Affidavit accompanying plea, see post, § 320.

Demurrer to plea, see post, § 214.

**§ 157.— Nature and office.****§ 158.— Necessity.**

(a) A court of equity may, in its discretion, refuse to grant relief after a limited period, even though the statute is not pleaded and the bill is not demurred to.—*Syester v. Brewer*, 27 Md. 288.

(b) When the statute of limitations is relied on as a bar, the defense avails only in favor of the party who sets it up.—*Dixon v. Dixon*, 1 Md. Ch. 271.

**§ 159.— Grounds in general.****§ 160.— To the jurisdiction.**

(a) Objection on the ground of want of jurisdiction may be made by plea.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949.

**§§ 161-163.—(See Analysis.)****§ 164.— In bar of discovery.**

(a) The rules of the English courts, in relation to pleas in bar to bills in equity, when resorted to by defendants, are considered as applicable to them here; and, where defendant's plea was not set down for hearing, and no replication was filed to it, it was held that the plea did not operate as a bar to complainant's suit.—*Chase v. McDonald*, 7 H. & J. 160.

**§ 165.— Time for filing.****§ 166.— Form and requisites.****Cross-References.**

Answer after demurrer overruled, see post, § 244.

Answer as cross-bill, see post, § 203.

Answer as evidence, see post, §§ 339-345.

Answer in support of plea, see post, § 169.

Answer to cross-bill, see post, § 206.

Demurrer incorporated in answer, see post, § 229.

Demurrer treated as special plea, see post, § 241.

Exceptions to answer, see post, §§ 252, 253.

**§ 167.— Sufficiency.**

(a) In an action on an automobile policy, a plea alleging false representation by plaintiff as to the model of the machine, and that, if the model had been truly stated, the rate of insurance would be higher and the amount of insurance less, pleaded by way of equitable defense, was bad; the facts being pleadable at law.—*British & Foreign Marine Ins. Co. v. Cummings*, 113 Md. 350, 76 Atl. 571.

(b) An equitable plea is not sustainable unless the facts stated are sufficient to move a court of equity to restrain the execution of the judgment.—*British & Foreign Marine Ins. Co. v. Cummings*, 113 Md. 350, 76 Atl. 571.

(c) In equity the same strictness is required in pleading as to matter of substance as at law; and all the facts necessary to make a plea a complete bar to the case made by the bill, so far as the plea extends, so that plaintiff may take issue on it, must be clearly and distinctly averred.—*Danels v. Taggart*, 1 G. & J. 311.

**§ 168.— Scope and extent.****Cross-Reference.**

Sufficiency, see ante, § 167.

**§ 169.— Answer in support of plea.**

(a) Where there is any charge in a bill in equity which constitutes an equitable ground or circumstance in favor of plaintiff's case against matter pleaded, as fraud, notice, or usury, that charge must be denied by way of answer as well as by averment in the plea. Therefore, where a junior mortgagee has filed a bill asking that the senior mortgage be reformed for usury, and the senior mortgagee puts in a plea not denying the usury, and without any answer containing such denial, the plea should be overruled.—*Rouskulp v. Kershner*, 49 Md. 516.

(a) Where a plea is such that an answer is required to support it, it will be overruled unless such answer is put in.—*Hagthorp v. Hook*, 1 G. & J. 270.

**§ 170.— Plea overruled by answer.****Cross-Reference.**

Abandonment, see post, § 171.

(a) Defendant's answer in a divorce proceeding held to waive or overrule previously

filed jurisdictional pleas of want of residence and of another action pending.—*Harrison v. Harrison*, 117 Md. 607, 84 Atl. 57.

(b) An answer overrules a plea to the same matter.—*Bank of Maryland v. Dugan*, 2 Bland 254.

**§ 171.— Abandonment or withdrawal.**  
*Cross-Reference.*

Plea overruled by answer, see ante, § 170.

**§ 172.— Admissions by plea.**

**§ 173.— Setting down plea for hearing.**

(a) A plea may be set down to obtain judgment of its sufficiency and formality without a replication.—*Moreton v. Harrison*, 1 Bland 491.

**§§ 174-176.—**(See 'Analysis.)

**§ 177. Answer.**

*Cross-References.*

In general, see post, §§ 277, 321.

Withdrawal, see post, § 323.

**§ 178.— Nature and office.**

(a) Objection on the ground of want of jurisdiction may be made by answer.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949.

(b) A defense to the jurisdiction of the court, because the subject-matter of the controversy is already in the possession of a court of competent jurisdiction, may be taken by answer, and, as soon as the court is informed of the prior suit, it will dismiss the subsequent proceeding.—*Withers v. Denmead*, 22 Md. 135.

**§ 179.— Necessity.**

(a) Where an answer, in the body of it, purports to be an answer to the whole bill, but respondent declares that he is wholly ignorant of the matters contained in the bill, and leaves plaintiff to make out the best case he can, or any language to that effect, and plaintiff files the general replication, all the allegations of the bill are denied and put in issue, and must be proved against defendant; but, if defendant appears from the bill to have knowledge of any matters in it, he may be required to answer to the extent of his knowledge or belief.—*Hagthorp v. Hook*, 1 G. & J. 270.

**§ 180.— Defenses in general.**

*Cross-Reference.*

See post, §§ 182, 185, 277, 321.

(a) On a bill to restrain the execution of a judgment at law, there was a demurrer thereto, which was overruled, and a perpetual injunction was granted. On appeal the suit was remanded by the Court of Appeals, for the want of necessary parties, and the bill amended. *Held*, that the defendant had a right to answer.—*Iglehart v. Lee*, 4 Md. Ch. 514. [Cited and annotated in 30 L. R. A. 791, on injunction against judgments obtained by fraud, accident, mistake, surprise and duress.]

**§ 181.— Time for filing.**

*Cross-Reference.*

After overruling plea, see ante, § 176.

(a) Under the express provisions of Code 1904, art. 16, § 143, a defendant against whom an order to take a bill pro confesso is passed may appear at any time before the final decree and file his answer, on oath, to the bill, and on the answer being filed such proceedings shall be had as in case such answer had been filed before the decree.—*Bailey v. Jones*, 107 Md. 405, 68 Atl. 881. (See Code 1911, art. 16, § 152.)

(b) Act 1820, c. 161, giving a party not appearing, or appearing and not answering, the right before final decree, in certain cases, to file his answer, does not prohibit a party from being let in to answer after final decree, for sufficient cause shown.—*Oliver v. Palmer*, 11 G. & J. 136. (See Code, art. 16, § 152.)

**§ 182.— Form and requisites.**

*Cross-Reference.*

See post, §§ 185, 277, 321.

(a) Where an answer refers to a paper as showing the dates of receipts from certain collaterals in defendant's possession, to a detail statement of which complainant is entitled, and such paper does not appear in the record, an exception for insufficiency in such particular will be sustained.—*Keighler v. Savage Mfg. Co.*, 12 Md. 383. [Cited and annotated in 30 L. R. A. 239, on injunction against judgments by confession; in 13 L. R. A. (N. S.) 580, on relief from judgment suffered in reliance on unkept promise.]

(b) It is competent for one defendant to make the answer of a codefendant his own, by referring to and adopting it.—*In re Binney*, 2 Bland 99.

(c) Where the answer of one defendant refers to and adopts the answer of a codefendant, he makes it a part of his answer, which must be looked into to ascertain whether the answer is full to the allegations of the bill.—*Warfield v. Banks*, 11 G. & J. 98.

### § 183.—Plea standing as answer.

### § 184.—Sufficiency as defense in general.

(a) The general rule in equity is that, if the infirmity of plaintiff's case appears on the face of the bill, defendant may rely on it at the hearing, no matter how imperfect or what the character of the answer; and it is only with respect to some defenses given by statute that a different rule prevails.—*Tartar v. Gibbs*, 24 Md. 323.

(b) An answer in chancery should consist of averments of allegations of fact, and not of inference and argument.—*McKim v. White Hall Co.*, 2 Md. Ch. 510.

(c) The allegations in an answer must be positive, otherwise the issue will be joined on a mere statement of the belief of the parties, and not on their allegations of fact.—*Coale v. Chase*, 1 Bland 136.

### § 185.—Scope and extent.

#### Cross-References.

See ante, § 182; post, §§ 277, 321.

(a) It is not sufficient that an answer contains general denial of the matters charged in the bill, but there must be an answer to the sifting inquiries on the general subject; and, wherever there are particular and precise charges, they must be answered particularly and precisely, though the general answer may amount to a full denial of the charges.—*Wootten v. Burch*, 2 Md. Ch. 190.

(b) The answer should, in general, be full to all the interrogatories founded on the matters charged in the bill, unless they are clearly immaterial; and some writers say that the general rule requires defendant to answer every question, without reference to whether it is or is not immaterial, and that the court will take care that it shall not be applied in such a way as to be oppressive to the parties.—*Wootten v. Burch*, 2 Md. Ch. 190.

(c) Defendant, who submits to answer,

must answer fully and explicitly, and may be pressed by exceptions until he thus answers.—*Rider v. Reily*, 2 Md. Ch. 16.

(d) The answer of one defendant in chancery can never implicate the interest of a codefendant.—*Edmondson v. Frazier*, 1 Bland 92, note.

(e) If defendant submits to answer at all, he must answer fully and particularly, not merely to the interrogatories of the bill, but to the whole and every substantial part of plaintiff's case.—*Hagthorp v. Hook*, 1 G. & J. 270.

### § 186.—Denials and admissions.

#### Cross-References.

Effect as evidence, see post, §§ 339-345.

Matters to be proved, see post, § 325.

(a) The validity of a deed by a husband was attacked by bill in equity on the ground of fraud on the rights of the wife. The grantee answered the bill, so far as it related to the deed, without objection. Held, that, by such answer, he submitted his rights under that deed for adjudication.—*Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375. [Cited and annotated in 3 L. R. A. (N. S.) 776, on husband's right to give away his personality without wife's consent; in 18 L. R. A. (N. S.) 1156, on right of wife to relief against transfer made or contemplated by husband, in fraud of her support.]

(b) An answer which does not deny the affirmations in which the equity of the bill consists, but states "that respondent does not believe and cannot admit that said attorney made any such arrangements as set forth in the bill," is not sufficient.—*Kent v. Ricards*, 3 Md. Ch. 392.

### § 187.—Allegations of new matter.

#### Cross-Reference.

Effect as evidence, see post, §§ 339-345.

### § 188.—Necessity for discovery.

(a) A defendant need not answer interrogatories irrelevant to the case.—*Hagthorp v. Hook*, 1 G. & J. 270.

(b) Defendant is not bound to make any discovery, in answering the bill of complainant, which will subject him to a criminal prosecution, or cause him to incur any pains, penalties, or forfeitures; but it must appear by the bill or his plea that such consequence

will follow, or he will be compelled to answer.—*Wolf v. Wolf*, 2 H. & G. 382, 18 Am. Dec. 313.

(c) Where a crime is charged in a bill, defendant cannot be compelled to confess either the fact charged or any fact the answer to which might furnish a step in the prosecution, should any person choose to indict him.—*Wolf v. Wolf*, 2 H. & G. 382, 18 Am. Dec. 313.

(d) A party is not bound to answer interrogatories charging him with usury, where his answer might subject him to fine or forfeiture for the offense; otherwise, where the result would be merely the loss of his claim.—*Legoux v. Wante*, 3 H. & J. 184.

(e) If the interrogatories of a bill are not answered, complainant may except to the answer, and defendant will be compelled to answer plainly, fully, and explicitly to proper interrogatories. If, then, any material matter charged in the bill has neither been denied nor admitted, it stands for naught.—*Hopkins v. Stump*, 2 H. & J. 301.

#### § 189.—Sufficiency of discovery in general.

(a) An answer to a bill need not be full as to interrogatories which are purely scandalous, or which would subject defendant to a penalty of forfeiture or punishment.—*Wootten v. Burch*, 2 Md. Ch. 190.

#### § 190.—Responsiveness.

*Cross-Reference.*

Effect of answer as evidence dependent on responsiveness, see post, § 340.

(a) An answer stating that respondent "does not believe, and denies," the material affirmations of the bill, is responsive to, and an express denial of, such averments.—*Philadelphia Trust, Safe Deposit & Insurance Co. v. Scott*, 45 Md. 451.

#### § 191.—Impertinence and scandal.

*Cross-Reference.*

See ante, § 189.

#### § 192. Disclaimer.

(a) A disclaimer must be full and explicit in all respects, and be accompanied by an answer denying the facts deemed necessary to be denied. It cannot be made by way of demurrer.—*Worthington v. Lee*, 2 Bland 678.

(b) A disclaimer is where defendant renounces all claim to the subject of the demand made by plaintiff's bill, not merely in a representative character or to the full extent charged, while the right to claim in a different character or to a more limited extent is in no wise abandoned, but in any capacity and to any extent.—*Bentley v. Cowman*, 6 G. & J. 152.

#### § 193. Attachment to compel answer.

(a) On a bill against a corporation, a distringas will issue to compel an answer.—*McKim v. Odom*, 3 Bland 407. [Cited and annotated in 4 L. R. A. (N. S.) 1003, on punishment of corporation for contempt.]

(b) Where a distringas is issued to compel an answer, the writ may be continued until the whole property of the corporation has been taken, or it has answered.—*McKim v. Odom*, 3 Bland 407. [Cited and annotated, see supra.]

#### § 194. Failure to answer.

*Cross-Reference.*

Decree pro confesso, see post, § 418.

(a) The refusal of defendant to answer is not to be taken as an admission of the allegations of the bill which have not been answered; but this rule of chancery practice will not exempt defendant from some degree of suspicion because of his declining to answer interrogatories to which he might easily have answered, and without subjecting him, so far as the court can see, to the slightest annoyance or inconvenience.—*McDowell v. Goldsmith*, 2 Md. Ch. 370.

(b) A judgment at law was enjoined by an injunction founded on the allegation of the bill that complainant was the holder of a single bill which he was entitled to set off against the claim on which the judgment was recovered. One of defendants in his answer admitted the execution of this single bill. The others stated that they had no knowledge of its existence. No proof was offered on this point, and the injunction was dissolved and the bill dismissed on final hearing. *Held*, that, in this condition of the cause, it was incumbent on complainant to sustain by proof the material allegations of his bill, and that he could not rely on the silence of defendants.—*Briesch v. McCauley*, 7 Gill 189. [Cited and annotated in 30 L. R.

A. 787, on injunction against judgments obtained by fraud, accident, mistake, surprise, and duress; in 31 L. R. A. 765, on injunction against judgments for defenses existing prior to rendition; in 32 L. R. A. 324, on equitable jurisdiction as to injunctions against judgments.]

(c) On a decree pro confesso, it is an established principle that the allegations of the bill are to be received as true as to those parties against whom the decree passed.—*Fitzhugh v. McPherson*, 3 Gill 408.

(d) The neglect of defendant to answer, and a decree pro confesso, are equivalent to an admission of the allegations of the bill as to all parties against whom such a decree passes.—*Lockett v. White*, 10 G. & J. 480.

(e) The neglect of a defendant to answer a bill on which a decree pro confesso is passed amounts to an admission only of the allegations of the bill.—*Robinson v. Townshend*, 3 G. & J. 413.

(f) If a defendant, when properly required, fails to answer the whole or a part of the bill, the part unanswered may be taken pro confesso, or a commission issued for taking depositions ex parte, at the discretion of the chancellor.—*Hagthorp v. Hook*, 1 G. & J. 270.

### (C) CROSS-BILL AND PLEA AND ANSWER THERETO.

#### Cross-References.

Amendment, see post, § 286.

Hearing demurrer to cross-bill, see post, § 241.

Necessity of process, see ante, § 119.

Cross-bill for cancellation of instrument, see "Cancellation of Instruments," § 38.

Cross-bill for discovery, see "Discovery," § 19.

Cross-bill for divorce, see "Divorce," § 101.

Cross-bill for interpleader, see "Interpleader," § 24.

Cross-bill for reformation of instrument, see "Reformation of Instruments," § 37.

Cross-bill for specific performance, see "Specific Performance," § 115.

Cross-bill to enforce agreement to convey railroad right of way, see "Railroads," § 64.

In administration suit, see "Executors and Administrators," §§ 473, 474.

In suits for accounting, see "Account," § 17.

In suits for partition, see "Partition," § 57.

In suits to enforce liability of stockholders, see "Corporations," § 268.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 273.

In suits to enforce trusts, see "Trusts," § 371.

In suits to foreclose mortgages, see "Mortgages," § 455.

In suits to quiet title, see "Quieting Title," § 39.

### § 195. Nature and office of cross-bill.

(a) A son, W., filed a bill against his sister S. and his other brothers and sisters to set aside, for fraud, a deed made by their father to S., and had a decree. Thereupon the father's property passed under his will to S., as executrix, in trust to divide the income among his children till the youngest was of age, and then to divide the estate among them, with a power of sale to the executrix to sell for purposes of division. Held, that a petition for leave to sell the estate at the majority of the youngest child could not be filed by the executrix in the action to set aside the deed, since a cause of action for partition by sale and a cause of action to set aside a deed for fraud cannot be joined in the same action.—*Canton v. McGraw*, 91 Md. 744, 47 Atl. 1030.

### § 196. Necessity for cross-bill.

(a) It is the practice of the chancery court, without a cross-bill, to decree as well in favor of defendant as of plaintiff where it appears, from the nature of the contract, that each party is bound to pay money or perform some act for the benefit of the other.—*In re Owings*, 1 Bland 370, 17 Am. Dec. 311.

### §§ 197-201. (See Analysis.)

### § 202. Sufficiency of cross-bill.

#### Cross-Reference.

Striking out, see post, § 263.

(a) A cross-bill which seeks no discovery, and makes no defense which was not equally available by way of answer to the original bill, will be dismissed.—*Glenn v. Clark*, 53 Md. 580.

### § 203. Answer as cross-bill.

(a) In an equity suit, cross-relief may be sought by answer instead of by cross-bill when it can be done with justice to all parties.—*Munich Re-Insurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579.

(b) Cross-bills in equity practice are not encouraged, when the same purpose can be

attained between the parties to the original suit; and, where it is possible, the answer is viewed in the light of a cross-bill, and made the foundation of the decree.—*Young v. Twigg*, 27 Md. 620.

§§ 204-206. (See Analysis.)

#### (D) REPLICATION.

##### Cross-References.

In creditors' suits, see "Creditors' Suit," § 40.

In interpleader proceedings, see "Interpleader," § 26.

In suits for injunction, see "Injunction," § 119.

In suits for partition, see "Partition," § 58.

In suits for specific performance, see "Specific Performance," § 116.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 274.

In suits to foreclose mortgages, see "Mortgages," § 456.

In suits to quiet title, see "Quieting Title," § 40.

#### § 207. Nature and office.

(a) In a suit in equity, complainant may not set up in the reply new grounds for the relief sought in the original bill.—*Munich Re-Insurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579.

#### § 208. Necessity.

#### § 209. Right to reply.

##### Cross-Reference.

Withdrawal, see post, § 323.

#### § 210. Time for filing.

(a) After a cause has been set down for hearing by consent, without any proof being taken, complainant has no right to put in a replication without the consent of the court or defendant, because his rights are affected thereby; but, where proof has been taken, the case is different, for defendant has had the opportunity to support his answer by evidence.—*Hall v. Claggett*, 48 Md. 223.

(b) After a cause has been set down for hearing on the bill, answer, and exhibits, without the taking of any proof, complainant cannot put in a replication without the leave of the court or defendant; and it is the duty of the court to prescribe the terms on which it may be done, and to allow defendant an opportunity to prove the matter of his answer.—*Warren v. Twilley*, 10 Md. 39.

#### § 211. Form and requisites.

#### § 212. Sufficiency.

(a) By taking issue on a plea in equity, plaintiff admits its sufficiency as a bar, if proved; and if, on such an issue, the matter of the plea be established, although foreign to the subject in controversy, the bar is complete.—*Danels v. Taggart*, 1 G. & J. 311.

#### § 213. Failure to reply.

##### Cross-Reference.

Decree pro confesso, see post, § 418.

#### (E) DEMURRER, EXCEPTIONS, AND MOTIONS.

##### Cross-References.

Demurrer accompanying application to set aside decree pro confesso, see post, § 419.

Demurrer to amended bill, see post, § 277.

Demurrer to bill of review, see post, § 462.

Demurrer to supplemental bill, see post, § 301.

Waiver of objections to rulings, see post, § 331.

Costs on demurrer, see "Costs," § 49.

Costs on failure to demur, see "Costs," § 50.

In suits for cancellation of instruments, see "Cancellation of Instruments," § 41.

In suits for divorce, see "Divorce," § 103.

In suits for infringement of patents, see "Patents," § 310.

In suits for injunction, see "Injunction," § 120.

In suits for specific performance, see "Specific Performance," § 116.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 275.

In suits to foreclose mortgages, see "Mortgages," § 457.

In suits to quiet title, see "Quieting Title," § 41.

Raising defense of statute of limitations, see "Limitation of Actions," § 180.

#### § 214. Mode of making objections to pleading.

(a) Where a deed is referred to and made a part of a bill, its construction is properly presented to the court by demurrer to the bill.—*Winter v. Gorsuch*, 51 Md. 180.

#### § 215. Demurrer and plea or answer to same bill.

##### Cross-Reference.

Demurrer overruled by plea or answer, see post, § 237.

#### § 216. Nature and office of demurrer.

##### Cross-Reference.

Demurrer to motion to dismiss, see post, § 363.

#### § 217. Necessity of demurrer.

#### § 218. Grounds for demurrer to bill.

#### § 219.—In general.

(a) The defense of limitations may be raised by a general demurrer to a bill in equity, where the bill shows that limitations apply, and does not state facts to defeat their operation.—*Meyer v. Saul*, 82 Md. 459, 33 Atl. 539.

(b) Since equity will vacate or order destroyed a forged paper, when the forgery is proved, a demurrer which denies the right to an injunction to restrain the assignment of a bill charged to be forged cannot be sustained.—*Dennison v. Yost*, 61 Md. 139.

(c) A bill for an injunction and for general relief, defective only as applied to the prayer for the injunction, for failure to file exhibits, is not subject to general demurrer.—*Miller v. Baltimore County Marble Co.*, 52 Md. 642.

#### § 220.—Objections to jurisdiction.

(a) Objection on the ground of want of jurisdiction may be made by demurrer.—*Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949.

#### § 221.—Objections to person of complainant.

(a) If the want of proper parties appears on the face of the bill, the defect may be taken advantage of by demurrer.—*Ellicott v. Ellicott*, 2 Md. Ch. 468.

#### § 222.—Objections to form or frame of bill.

(a) The proper method in which to take advantage of failure to number paragraphs of a bill in equity, as required by Code 1888, art. 16, §§ 131-133, is by motion in the nature of a *ne recipiatur*, and not by demurrer.—*Chew v. Glenn*, 82 Md. 370, 33 Atl. 722. (See Code 1911, art. 16, §§ 153-155, Rules 13-15.)

#### § 223.—Objections to substance of bill.

(a) A demurrer on the ground that the bill does not state such a case as entitles plaintiff to relief in equity presents a sufficient ground of demurrer, and raises the question of want of equity.—*Reeder v. Lanhahan*, 111 Md. 372, 74 Atl. 575.

(b) Where plaintiff's right to an injunction is left in doubt by the bill, and no other relief could be granted, if such defect did not exist, a demurrer to the bill should be sustained, though it also contains a prayer for

general relief.—*Stinson v. Ellicott City & Clarksville Co.*, 109 Md. 111, 71 Atl. 527.

(c) Multifariousness in a bill is a ground for demurrer.—*Grove v. Fresh*, 9 G. & J. 280; *Lockett v. White*, 10 G. & J. 480.

#### § 224.—Objections to discovery.

(a) Where a bill calls on defendant to answer charges imputing to him a criminal offense, he may demur.—*Dennison v. Yost*, 61 Md. 139.

#### § 225. Right to demur.

(a) Where, in a suit by the receiver of a national bank against directors for malfeasance, some of such directors had held their office from the organization of the bank to the day it failed, and were therefore charged with knowledge concerning all of the improper transactions complained of, they could not demur because the bill was multifarious as to other directors who were not liable for a large number of transactions objected to.—*Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738; *Harden v. Same*, Id; *Horner v. Same*, Id.

#### § 226. Joint demurrers.

#### § 227. Time for filing demurrer.

#### § 228. Form and requisites of demurrer. *Cross-Reference.*

Striking out defective demurrer, see post, § 263.

#### § 229. Demurrer incorporated in answer.

(a) The general reservation at the commencement of an answer does not save the right to object to the jurisdiction of the court, nor does it perform the office of a general demurrer, or of exceptions to the averments of the bill.—*O'Neill v. Cole*, 4 Md. 107.

#### § 230. Sufficiency of demurrer.

(a) A demurrer to a bill in equity, on the ground that it combines matters triable by a court of equity with those triable at law, should specify what is alleged to be triable at law.—*Murphy v. Penniman*, 105 Md. 452, 66 Atl. 282; *Thomas v. Same*, Id.

#### § 231. Scope and extent of demurrer in general.

#### § 232. Demurrer to bill good in part.

*Cross-Reference.*

Demurrer raising defense of limitations, see "Limitation of Actions," § 180.



(a) A general demurrer to a whole bill is properly overruled, if the bill shows that plaintiff is entitled to at least part of the relief prayed.—*Brown v. Benzinger*, 118 Md. 29, 84 Atl. 79.

(b) A demurrer to a whole bill is properly overruled though partly good.—*Hogan v. McMahon*, 115 Md. 195, 80 Atl. 695.

(c) Where the allegations of a bill are sufficient to give jurisdiction, a demurrer for want of jurisdiction cannot be sustained.—*Bolgiano v. Cooke*, 19 Md. 375.

§§ 232-236. (See Analysis.)

**§ 237. Demurrer overruled by plea or answer.**

*Cross-References.*

Demurrer and plea or answer to same bill, see ante, § 215.

Waiver of objection to ruling on demurrer, see post, § 331.

(a) A plea or answer, and demurrer to the same matter, cannot stand together, and the plea or answer overrules the demurrer.—*In re Chase*, 1 Bland 206, 17 Am. Dec. 277.

**§ 238. Abandonment or withdrawal of demurrer.**

**§ 239. Admissions by demurrer.**

*Cross-Reference.*

Demurrer to amended bill, see post, § 277.

(a) A demurrer to a bill in equity admits all facts properly alleged in the bill.—*Outlaw v. Outlaw*, 118 Md. 498, 84 Atl. 383.

(b) A demurrer to the bill admits all facts well pleaded.—*Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797.

(c) Meaning sought by a bill to be placed on a partnership agreement on which the bill is founded, which is exhibited with the bill, being negatived by the agreement, is not admitted by demurrer to the bill.—*Gusdorff v. Schleisner*, 85 Md. 360, 37 Atl. 170.

(d) A general demurrer to a bill admits the truth of all the facts therein stated.—*Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67.

**§ 240. Setting down demurrer for hearing.**

**§ 241. Hearing and determination on demurrer.**

*Cross-Reference.*

Effect of decree disposing of main issue as overruling demurrer, see post, § 431.

(a) The proper order on sustaining a demurrer to a bill in equity is, "Demurrer sustained with leave to amend," and on failure to amend, "Bill dismissed." But an order omitting the words "Demurrer sustained," and dismissing the bill absolutely, will not be reversed, where the bill was properly dismissed for want of jurisdiction.—*Fooks v. Purnell*, 101 Md. 321, 61 Atl. 582.

**§ 242. Operation and effect of decision on demurrer.**

*Cross-Reference.*

See ante, § 241.

**§ 243.—Overruling demurrer.**

(a) A demurrer to the plea is in no case final. If allowed, complainant may, by replication, take issue on the facts pleaded. If overruled, respondent is entitled to answer the bill.—*Rouskulp v. Kershner*, 49 Md. 516.

(b) On a bill to restrain the execution of a judgment at law, there was a demurrer thereto, which was overruled, and a perpetual injunction was granted. On appeal the suit was remanded by the Court of Appeals, for the want of necessary parties, and the bill amended. Held, that the defendant had a right to answer.—*Iglehart v. Lee*, 4 Md. Ch. 514.

§§ 244-246.—(See Analysis.)

**§ 247.—Amendment after demurrer sustained.**

(a) The demurrer, for want of interest, to a bill for partition having been sustained, but leave given to submit amendments to the court, plaintiff cannot, by an amended or supplemental bill, set up an interest acquired after the filing of the original bill.—*Bannon v. Comegys*, 69 Md. 411, 16 Atl. 129.

(b) A court of equity should not dismiss a bill, when the allegations are sufficient to authorize the court to grant the relief sought, because complainant has failed to make proper parties. Complainant should be allowed to amend his bill, and further proceedings had, that the cause may be determined on its merits.—*Davis v. Clabaugh*, 30 Md. 508.

(c) The court may, where the defect pointed out by demurrer to a bill can be remedied by amendment, and where justice requires it, make a special order allowing the amend-

ment at the hearing of the demurrer.—*Keerl v. Keerl*, 28 Md. 157.

(d) On a bill to restrain the execution of a judgment at law, there was a demurrer thereto, which was overruled, and a perpetual injunction was granted. On appeal the suit was remanded by the Court of Appeals, for the want of necessary parties, and the bill amended. *Held*, that the defendant had a right to answer.—*Iglehart v. Lee*, 4 Md. Ch. 514.

(e) Where a bill discloses merits, though deficiently stated, the court may sustain a demurrer, but must grant leave to amend the bill.—*Roser v. Slade*, 3 Md. Ch. 91.

(f) Allowing a demurrer to a whole bill puts it out of court, and no subsequent proceedings in strictness can be taken thereon, yet the court may allow an amendment.—*Cullison v. Bossom*, 1 Md. Ch. 95.

#### § 248. Failure to demur.

*Cross-References.*

Dismissal on court's own motion, see post, § 364.

Effect on award of costs, see "Costs," § 50.

#### § 249. Nature and office of exceptions.

*Cross-Reference.*

Withdrawal, see post, § 323.

(a) A bill charged an executor and trustee with neglect to pay rents and profits, failure to invest a legacy, and refusal to deliver to complainant a note claimed by her as a gift from the testator. The relief prayed was an account and payment of the legacy and rents and profits, delivery of the note, and, if assets were not admitted, an account thereof, and their application in due course of administration, and for general relief. *Held*, that, under this bill, defendant could not be charged as executor with the note as assets for the payment of the legacies of the will, exceptions having been filed to the sufficiency of the averments of the bill in this particular.—*Hitch v. Davis*, 3 Md. Ch. 266.

#### § 250. Necessity of exceptions.

#### §§ 251-253. Grounds for exceptions to answer.

*Cross-Reference.*

Exceptions to amended answer, see post, § 285.

(a) Complainant who objects to an answer because it is not sufficiently full and explicit may press defendant by exception until he answers fully.—*Rider v. Riely*, 2 Md. Ch. 16; *Same v. Same*, 22 Md. 540.

(b) Exceptions to an answer for insufficiency can only be sustained where some material allegation, charge, or interrogatory in the bill is not fully answered, and the court must see, by referring to the bill alone, in connection with the exception, that the precise matters as to which a further answer is sought are stated in the bill, or that such an answer is called for by the interrogatories.—*West v. Williams*, 1 Md. Ch. 358.

(c) Exceptions to an answer, on the ground that defendant did not give a detailed account of the management of a trust fund which came into his hands as agent, were overruled, because the bill only called on him for an account of the business of the trust, and not for an account of the business of the trust and agency.—*West v. Williams*, 1 Md. Ch. 358.

(d) If the answer be insufficient, defendant may be compelled to answer more fully on exceptions; but he may answer as to part, and as to the residue give a suitable reason for not answering as required by the bill.—*Hagthorp v. Hook*, 1 G. & J. 270.

#### § 254. Time for filing exceptions.

(a) Where a time is fixed for the hearing, and both parties proceed to take evidence, new parties are made, and other proceedings had, a court of equity will not, on the day set apart for the hearing, over two years from the filing of the answer, permit exceptions thereto for the first time.—*Belt v. Blackburn*, 28 Md. 227. [Cited and annotated in 32 L. R. A. 326, on equitable jurisdiction as to injunctions against judgments.]

#### § 255. Form and requisites of exceptions.

(a) The exceptions to the averments of a bill required by act 1832, c. 302, § 5, cannot be objected to as too general and indefinite to satisfy the requirements of the act, when they are as pointed as the multifarious character of the bill and its vague statements of the grounds on which relief is prayed will admit.—*Berrett v. Oliver*, 7 G. & J. 191.

(See Code, art. 5, § 36.) [Cited and annotated in 32 L. R. A. 673, on admissions and waivers by fiduciaries in actions.]

§§ 256, 257. (See Analysis.)

**§ 258. Operation and effect of decision on exceptions.**

(a) Though a motion to dissolve an injunction and all exceptions to the answer which may then be filed shall be decided at the same time, plaintiff will not be thereby prevented, for the purpose of obtaining a sufficient answer to the full extent required by the bill, from excepting to the answer within the proper time after the motion for dissolution of the injunction has been disposed of.—*Salmon v. Claggett*, 3 Bland 125.

(b) Where an answer is held to be insufficient on exceptions thereto, it is to be regarded as no answer; and, if defendant neglects to file a sufficient answer after the former is adjudged insufficient, the bill may be taken pro confesso.—*Mayer v. Tyson*, 1 Bland 559; *Buckingham v. Peddicord*, 2 Bland 447.

§§ 259, 260. (See Analysis.)

**§§ 261-264. Motions relating to pleadings.**

*Cross-Reference.*

To withdraw pleading, see post, § 323.

**(F) AMENDED AND SUPPLEMENTAL PLEADINGS AND REVIVOR.**

*Cross-References.*

Amendment after demurrer sustained, see ante, § 247.

Amendment as to parties, see ante, § 118. Continuance on ground of amendment, see post, § 375.

Verification, see post, § 318.

Waiver of objections to amendments, see post, § 332.

Changing form of action from equitable to legal and vice versa, see "Pleading," § 249.

Effect of amendment on award of costs, see "Costs," § 51.

Effect of amendment on *lis pendens*, see "Lis Pendens," § 21.

In creditors' suits, see "Creditors' Suit," § 41.

In suit for accounting, see "Account," § 17.

In suit for infringement of patent, see "Patents," § 310.

In suit for injunction, see "Injunction," § 121.

In suit for specific performance, see "Specific Performance," § 116.

In suit to establish or enforce trust, see "Trusts," § 371.

In suits for cancellation of instruments, see "Cancellation of Instruments," § 42.

In suits for divorce, see "Divorce," § 104.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 276.

In suits to foreclose mortgages, see "Mortgages," § 458.

In suits to quiet title, see "Quieting Title," § 42.

In suits to set aside fraudulent transfers, see "Fraudulent Conveyances," § 268.

**§ 265. Right to amend pleadings in general.**

(a) Either party in equity, upon application to the court, has the right to amend the pleadings at any time before final decree, so as to bring the merits of the controversy fairly to trial, upon payment of such costs as the court may direct.—*Filston Farm Co. v. Henderson & Co.*, 106 Md. 335, 67 Atl. 228; *Sparks v. Same*, Id.

**§ 266. Amendment as of course.**

(a) A bill in equity cannot be amended without leave of court.—*Walsh v. Smyth*, 3 Bland 9.

(b) An answer amended without leave will not be permitted to remain on the files.—*Thomas v. Visitors of Frederick County School*, 7 G. & J. 369.

(c) When a bill is substantially defective, it may be amended on application to the court.—*West v. Hall*, 3 H. & J. 221.

**§ 267. Discretion of court as to amendment.**

(a) Applications for amendment in equity, by way of supplemental answer, are addressed to the discretion of the court.—*Calvert v. Carter*, 18 Md. 73.

(b) A special case must, in general, be shown before defendant will be allowed to amend his answer; and, when the application to amend is made after the opinion of the court and the testimony have indicated how an answer can be amended so as to accomplish the purpose of defendant, the unwillingness of the court to allow an amendment is increased.—*Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

**§ 268. Amendment of bill.**

*Cross-References.*

Amendment after demurrer sustained, see ante, § 247.

Amendment to conform to proofs, see post, § 288.

Form and sufficiency, see post, § 293.

Of bill of review to make it bill to set aside decree, see post, § 430.

Time for amendment after decree on motion to dismiss, see post, § 367.

### § 269.—In general.

(a) A bill averred a mortgage by complainants to defendant; that the whole had been paid with interest, except a small balance, which complainants were ready to pay, but which defendant refused to receive; and that the latter had advertised the property for sale under a power in the mortgage,—and prayed for an accounting, the execution of a release, and an injunction restraining the sale, but claimed no relief on the ground of usury. *Held*, that a decree for complainants could not be sustained where the evidence showed that the mortgage was usurious, and was for a less amount than that averred, and that it had all been paid, with interest, if the usury was deducted, but the cause would be remanded for amendment of the bill, as permitted by Code 1860, art. 5, § 28.—*Jeffrey v. Flood*, 70 Md. 42, 16 Atl. 444. (See Code 1911, art. 5, § 38.)

(b) Complainant signed a deed, the consideration named purporting to be \$1,000, but being in fact a parol agreement that the grantee should board and lodge complainant. *Held*, that on a suit to annul the deed as having been obtained by fraud, the fraud, however, not being proven, the agreement could not be shown to contradict the apparent money consideration, but that the bill might be amended and maintained to recover the money consideration, and to enforce a vendor's lien therefor.—*Thompson v. Corrie*, 57 Md. 197. [Cited and annotated in 20 L. R. A. 102, 104, on parol evidence as to consideration of deed; in 68 L. R. A. 926, on recital of money consideration in deed as contractual.]

(c) Defendant having denied knowledge of the deed under which complainant claims, the latter may offer proof on that point without amending his bill, though it contains no averment of such knowledge on the part of defendant.—*O'Neill v. Cole*, 4 Md. 107.

(d) A party cannot, in his bill, claim of his guardian, and at final hearing insist that the answers of other defendants entitle him to abandon the claim against the guardian, and prefer the same claim against co-legatees.

To do this, he must amend his bill.—*Hilleary v. Hurdle*, 6 Gill 105.

### § 270.—Sworn bill.

### § 271.—Condition of cause.

*Cross-Reference.*

Discretion of court, see ante, § 267.

(a) Act 1854, c. 230, enlarges the time for making amendments in proceedings in equity, and allows them at any time before final decree.—*Calvert v. Carter*, 18 Md. 73. (See Code, art. 16, § 17.)

### § 272.—Matter arising after filing of bill.

(a) Where the parties to a bill before the hearing of the cause, or after it is at issue, discover new evidence, the bill may be amended so as to bring it within the issue.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

### § 273.—Matter making new case.

*Cross-Reference.*

Cause alleged in creditors' bill, see "Creditors' Suit," § 41.

(a) A bill for the dissolution of a partnership cannot be amended, so as to change the cause of action to one for partition between tenants in common.—*Fooks v. Williams*, 120 Md. 436, 87 Atl. 692.

(b) One cannot, by amended or supplemental bill, take a position inconsistent with that of the original bill.—*Cockey v. Plempel*, 86 Md. 181, 37 Atl. 792.

(c) A bill for the sale of land, under the statute on that subject, may, by amendment, be changed into a bill for a partition.—*Watson v. Godwin*, 4 Md. Ch. 25.

### § 274.—As to relief prayed.

*Cross-Reference.*

In action for partition, see "Partition," § 60.

### § 275.—Operation and effect in general.

### § 276.—Plea or answer to amended bill.

(a) Notice must be given defendants in the original bill to answer an amended or supplemental bill, where it introduces new matter which affects their interest.—*Cockey v. Plempel*, 86 Md. 181, 37 Atl. 792.

(b) No answer is necessary to an amended

bill from one of several defendants, who, in his answer to the original bill, has fully responded as to all matters in the amended bill by which his interest can be affected.—*Fitzhugh v. McPherson*, 9 G. & J. 51.

(c) Where plaintiff amends his bill, he is entitled to a new answer to the new matter.—*Hagthorp v. Hook*, 1 G. & J. 270.

(d) Where a bill has been amended on application to the court, defendant will be compelled to answer such amended bill.—*West v. Hall*, 3 H. & J. 221.

### § 277.—Demurrer to amended bill.

(a) On a bill to restrain the execution of a judgment at law, there was a demurrer thereto, which was overruled, and a perpetual injunction was granted. On appeal the suit was remanded by the Court of Appeals, for the want of necessary parties, and the bill amended. *Held*, that the defendant had a right to answer.—*Iglehart v. Lee*, 4 Md. Ch. 514.

### §§ 278-285. Amendment of plea or answer.

#### Cross-References.

Discretion of court, see ante, § 267.  
Form and sufficiency, see post, § 293.

(a) An order granting to complainant the right to surcharge and falsify an account was appealed from, and the appellate court remanded the cause for the purpose of having the pleadings amended, and for further proceedings, and extended the right to surcharge and falsify the account to both parties, provided defendant's amended pleadings should warrant such extension. *Held*, that defendant could amend his answer so as to surcharge and falsify in respect of matters known to him at the time of filing his original answer.—*Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

(b) A party enjoined against obstructing a road represented by petition that certain proceedings in a county tribunal, by which he was originally authorized to do it, although subsequently enjoined, having been taken to a higher court by certiorari, had been set aside; that he had made another application, and obtained an order for closing the road, which he alleged to be final and conclusive without appeal; that he did, there-

fore, conceiving himself fully authorized to do so, close the road,—and prayed for leave to file an amended answer to the original bill setting forth these matters. *Held*, that the petition laid no proper ground for leave to amend the answer, and, not being sworn to, it was dismissed, with costs.—*Williamson v. Carnan*, 1 G. & J. 184.

### §§ 286-289. (See Analysis.)

### § 290. Application for leave to amend, and determination thereon.

(a) The application to file an amended petition, merely alleging that petitioner has just come into possession of new facts of a highly important character, and they not being stated, and the proposed amended petition not being presented, the court was not required to grant the relief.—*Hendrix v. Bull*, 111 Md. 389, 74 Atl. 572.

(b) The application for the amendment of a bill should be made by petition setting forth the circumstances which make an amendment necessary.—*Walsh v. Smyth*, 3 Bland 9.

### § 291. Conditions on amendment.

### § 292. Mode of making amendment.

(a) Where a receiver's bill against the directors of a bank for losses sustained through their wrongful acts was multifarious in that directors not participating in the alleged wrongful acts were joined as defendants, and a demurrer was sustained thereto, a dismissal by plaintiff as to such defendants was a substantial compliance with an order permitting the filing of an amended bill.—*Gaither v. Bauernschmidt*, 108 Md. 1, 69 Atl. 425.

(b) Amendments of a bill should not be made by interlineations and erasures in the original bill, but by filing an amended bill reciting briefly the allegations of the original.—*Walsh v. Smyth*, 3 Bland 9.

### § 293. Form and sufficiency of amended pleading.

### § 294. Supplemental bill or cross-bill.

#### Cross-References.

See ante, §§ 118, 128.

Amendment as to matter arising after original pleading, see ante, § 272.

Effect of appeal, see "Appeal and Error," § 440.

### § 295.— Nature and office.

*Cross-Reference.*

Grounds, see post, § 296.

(a) A bank made a loan on the hypothecation of certificates of stock owned by D., of the firm of D. & Q. Subsequently D. & Q. conveyed their individual and co-partnership assets by deed of trust to R. for the benefit of their creditors. R., as such trustee, instituted proceedings in equity to recover the hypothecated stock on the ground that the signatures of D. indorsed thereon were not genuine or authorized by him. Pending the proceedings, D. & Q. were adjudicated bankrupts, and the suit was entered to the use of their assignee in bankruptcy, who, on leave obtained for that purpose, filed a supplemental bill against the original defendants, praying the same relief sought by the original bill. *Held*, that the supplemental bill was the proper course of proceeding on the part of the assignee.—*Collateral Security Bank v. Fowler*, 42 Md. 393.

(b) A supplemental bill may be in aid of a decree to help its being carried into full execution, or that proper directions may be given on some matter omitted in the original bill, or not put in issue by it, or the defense made to it.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

### § 296.— Grounds.

(a) Where complainant has parted with his title to land since filing an answer to a bill brought to enjoin his interference with complainant's claim to a right of way thereover, the fact should be brought forward by filing a bill in the nature of a supplemental bill, which is in the nature of a plea puis darrien continuance at common law.—*Pue v. Pue*, 4 Md. Ch. 386.

(b) The imperfection in an original bill, rendering a supplemental bill necessary, may arise either from the importance of the omitted fact not being previously understood, or from the fact itself not having come to the knowledge of complainant until after the bill was filed.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [*Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.*]

(c) A new title or new interest may be set up by a supplemental bill, where the title relied on in the original bill is sufficient to entitle plaintiff to relief; but a confessedly bad title, thus relied on, cannot be supported by a good title subsequently acquired, which is sought to be introduced by way of supplement.—*Winn v. Albert*, 2 Md. Ch. 42.

(d) Plaintiffs in an original bill claimed title as grantees in a deed of trust for the benefit of the creditors of an insolvent debtor, and were afterwards appointed permanent trustees of the same debtor under the insolvent laws. *Held*, that they had a right to introduce their new title as such trustees by a supplemental bill.—*Winn v. Albert*, 2 Md. Ch. 42.

### § 297.— Leave of court.

(a) A supplemental bill may be filed either before or after decree.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

(b) Filing a supplemental bill is not a matter of course, but only by leave of court, on sufficient cause shown; and, in a doubtful case, the court may direct notice of the application to be given to defendants who have appeared.—*Winn v. Albert*, 2 Md. Ch. 42.

### § 298.— Form and sufficiency.

(a) A supplemental bill, after a decree, must not seek to vary the principles of the decree, but, taking that as the basis, seek merely to supply any omissions there may be in it, or in the proceedings which led to it, so as to enable the court to give full effect to its decision.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

### § 299.— Construction and operation.

#### § 300.— Plea and answer.

(a) An answer to a supplemental bill must be restricted to the matters stated in it, and defendant has no right, under pretext of answering a supplemental, to add to, or amend his answer to, the original bill. Exceptions to an answer on these grounds will be sustained.—*Swan v. Dent*, 2 Md. Ch. 111.

#### § 301.— Demurrer.

#### § 302.— Further or additional answer.

(a) The propriety of granting a petition to file a supplemental answer depends on the objects avowed in the petition, and not on other and distinct matter contained in such

answer but not referred to in the petition.—*Calvert v. Carter*, 18 Md. 73.

(b) A motion for leave to file a supplemental answer must be accompanied with an affidavit.—*Thomas v. Doub*, 1 Md. 252.

(c) A supplemental answer can be filed only on petition, supported by affidavit, that defendant did not know, at the time of answering, the facts on which he applies, or other facts which he should have stated differently, or that he intended by the original answer the same which he expresses by the supplemental answer.—*McKim v. Thompson*, 1 Bland 150.

### §§ 303-309. Bill of revivor.

#### Cross-References.

Enforcement of decree, see post, § 441.

Scire facias to revive, see "Abatement and Revival," § 75.

(a) Where a decree in equity required the proceeds of land sold to be distributed, not alone to heirs, but also to persons claiming as incumbrancers, these latter take their rights as personal assets; and, after the death of any of them, their personal representatives must be made parties to a bill of revivor in order to pass a good title or to have the fund properly distributed.—*Ridgely v. Bond*, 18 Md. 433.

(b) Where, by a decree, the original respondent would have been charged with rents and profits so long as he should continue to hold the estate, parties claiming under him are properly held responsible to the same extent; and such a claim on them presents no new matter of litigation, but is properly the subject of a bill of revivor.—*Ridgely v. Bond*, 18 Md. 433.

(c) That the dismissal of a bill on the death of respondent would have enabled the heirs to set up a plea of the statute of limitations and laches, which the original respondent could not have availed himself of, was thought to be a reason for allowing complainant to ask for a new and special relief in his bill of revivor.—*Glenn v. Hebb's Adm'r*, 17 Md. 260.

(d) Act 1842, c. 229, only provides a more summary and economical remedy when cases abate, either before or after decree, by the death of parties, and does not embrace the

case of a decree which has become dormant by lapse of time.—*Franklin v. Franklin*, 1 Md. Ch. 342. (See Code, art. 16, § 7.)

(e) Act 1820, c. 161, only gives a new and more expeditious mode of reviving a suit, where the bill of revivor would lie without the statute.—*Griffith v. Bronaugh*, 1 Bland 547. (See Code, art. 16, §§ 1, et seq.)

(f) In general, a defendant cannot revive a suit until after a final decree, or a decree to account.—*Griffith v. Bronaugh*, 1 Bland 547. (See Code, art. 16, §§ 1, et seq.)

(g) Act 1820, c. 161, relating to the revival of suits in equity, does not apply where the suit has abated through marriage or after decree.—*Hall v. Hall*, 1 Bland 130. (See Code, art. 16, §§ 1-13.) [Cited and annotated in 33 L. R. A. (N. S.) 579, on exclusiveness of particular statutory method for revival of action.]

(h) Act 1820, c. 161, relating to the revival of suits in equity which had abated by death, is cumulative, and does not take away the remedy by bill.—*Hall v. Hall*, 1 Bland 130. (See Code, art. 16, §§ 1, et seq.) [Cited and annotated, see supra.]

(i) Under act 1820, c. 161, relating to new parties entered on the death of a complainant, and requiring the court to be satisfied of the death and of the applicant being the legal representative, the proof required will be an exhibition of the letters, or an exemplification thereof, or a certificate of the register under seal of their having been issued, or an affidavit of the death and administration.—*Labes v. Monker*, 1 Bland 130, note. (See Code, art. 16, §§ 1, et seq.)

(j) Application for new party to be entered on the death of complainant must be by petition or motion reduced to writing, suggesting the death and praying to be made a party.—*Labes v. Monker*, 1 Bland 130, note.

(k) Where the parties to a cause standing under a rule of reference die before an award returned, and there is ground to warrant the county court in reinstating the cause upon the trial docket, the regular course is to move for its reinstatement in the name of the original parties. When that is ordered, their death should next be suggested, then their representatives summoned

to appear, and, upon their appearance, the cause proceeds as in other cases.—*Price's Adm'r v. Tyson's Adm'r*, 2 G. & J. 475.

(G) SIGNATURE, VERIFICATION, FILING, AND SERVICE.

*Cross-References.*

Signature to bill attached to notice as sufficient for both papers, see ante, § 119.  
Waiver of defects, see post, § 333.  
Verification in suits for divorce, see "Divorce," § 105.  
Verification of bill for injunction, see "Injunction," § 122.  
Verification of bill in cause removed from state to federal court, see "Removal of Causes," § 116.  
Verification of creditors' bill praying discovery, see "Creditors' Suit," § 39.  
Verification of petition to vacate composition in bankruptcy, see "Bankruptcy," § 386.

§ 310. Signature of party.

§ 311. Signature and certificate of counsel.

*Cross-Reference.*

Certificate accompanying plea or demurrer, see post, § 320.

§§ 312-318. Necessity of verification.

*Cross-References.*

Effect of waiver on answer as evidence, see post, § 343.  
As ground for objection to making discovery in creditors' suit, see "Creditors' Suit," § 39.

(a) Under the provisions of Code 1860, art. 16, § 103, an answer without oath, when the bill does not require an answer under oath, is sufficient to put the cause at issue and on final hearing, and to authorize an appeal from an order granting an injunction; but, to sustain a motion to dissolve an injunction, the answer must be sworn to, whether the oath be required by the bill or not.—*Mahaney v. Lazier*, 16 Md. 69. (See Code 1911, art. 16, § 168.)

(b) Whether defendants answer jointly, or jointly and severally, or separately, each defendant must swear to his answer, or it will be no answer as to him.—*In re Binney*, 2 Bland 99. [Cited and annotated in 65 L. R. A. 954, on jurisdiction over boundary rivers; in 69 L. R. A. 675, 689, 692, on equity jurisdiction over suits affecting realty outside state.]

(c) The answer must be verified by affidavit, and if it is omitted, complainant may

treat it as a nullity, and cause it to be taken off the files.—*Nesbitt v. Dallam*, 7 G. & J. 494.

(d) A party enjoined against obstructing a road represented by petition that certain proceedings in a county tribunal, by which he was originally authorized to do it, although subsequently enjoined, having been taken to a higher court by certiorari, had been set aside; that he had made another application, and obtained an order for closing the road, which he alleged to be final and conclusive without appeal; that he did, therefore, conceiving himself fully authorized to do so, close the road,—and prayed for leave to file an amended answer to the original bill setting forth these matters. Held, that the petition laid no proper ground for leave to amend the answer, and, not being sworn to, it was dismissed, with costs.—*Williamson v. Carnan*, 1 G. & J. 184.

§ 319. Sufficiency of verification.

(a) An affidavit to a bill in equity, averring that facts stated in the bill are true "according to the best of his knowledge and belief," is sufficient.—*Triebert v. Burgess*, 11 Md. 452.

(b) An answer must, in general, be sworn to, but will have full effect as such, though made by one incompetent to give testimony in any case, and incapable of making oath.—*Salmon v. Clagett*, 3 Bland 125.

(c) An answer by a defendant out of the state is a judicial record of the state in which it is to be used, and must be authenticated according to the laws of the latter state.—*Contee v. Dawson*, 2 Bland 264.

(d) An answer of a defendant to a bill sworn to before a judge or justice of the peace within the state is sufficient.—*Snowden v. Snowden*, 1 Bland 550.

(e) Where an answer to a bill in chancery was sworn to in another state, and the affidavit was authenticated according to the course of proceeding in the state court, it was held to be no objection that it was not authenticated according to the requisitions of the Act of Congress respecting the mode of proving such proceedings.—*Gibson v. Tilton*, 1 Bland 352, 17 Am. Dec. 306.



**§ 320. Affidavit and certificate accompanying plea or demurrer.**

**§ 321. Filing and notice thereof.**

(a) Under Code, art. 16, § 142, inhibiting the issuance of process upon any bill until the same and all exhibits be filed with the clerk of the court, it is improper to issue an injunction and appoint a receiver before the filing of the bill.—*Dixon v. Dixon*, 119 Md. 413, 86 Atl. 1042.

(b) Under Code 1888, art. 16, § 120, providing that no order shall be issued on any bill until all exhibits referred to as part thereof are actually filed with the clerk of court, it was error to enter a decree on a petition alleging a trust under a certain will before a copy of the will was filed.—*Chappell v. Clark*, 92 Md. 98, 48 Atl. 36. (See Code 1911, art. 16, § 142, Rule 4.)

(c) On a petition alleging that plaintiff had executed a certain mortgage to a trustee, which was due, but that on plaintiff's tendering payment the trustee refused to execute a release in proper form, and praying that plaintiff be allowed to pay the money into court, it was error to issue an order restraining the trustees from foreclosing, where plaintiff had not yet filed a copy of the alleged mortgage with the clerk of court.—*Chappell v. Clark*, 92 Md. 98, 48 Atl. 36.

(d) Either party may withdraw a paper from the files which he has himself placed there, without special leave of the court, for the purpose of having it authenticated by testimony.—*Maccubbin v. Matthews*, 2 Bland 250.

**§ 322. Service.**

**§ 323. Withdrawal of pleadings.**

**(H) ISSUES, PROOF, AND VARIANCE.**

**Cross-References.**

Conformity of decree to pleadings and proofs, see post, § 427.

Denials and admissions in answer, see ante, § 186.

Issues raised by replication, see ante, § 207.

In creditors' suits, see "Creditors' Suit," § 42.

In suit for accounting, see "Account," § 17.

In suits for cancellation of instruments, see "Cancellation of Instruments," § 43.

In suits for divorce, see "Divorce," § 108.

In suits for infringement of patents, see "Patents," § 311.

In suits for injunction, see "Injunction," § 123.

In suits for partition, see "Partition," § 62.

In suits for reformation of instruments, see "Reformation of Instruments," § 41.

In suits for specific performance, see "Specific Performance," § 117.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 277.

In suits to establish or enforce trusts, see "Trusts," § 371.

In suits to foreclose mortgages, see "Mortgages," § 459.

In suits to quiet title, see "Quieting Title," § 43.

In suits to set aside fraudulent transfers, see "Fraudulent Conveyances," § 269.

In suits to set aside illegal preferential transfer of notes by national bank, see "Banks and Banking," § 287.

**§ 324. Issues in general.**

**Cross-References.**

Conclusiveness of allegations in bill as against plaintiff, see ante, § 153.

Waiver of objection on ground of laches, see ante, § 88.

(a) If defendant in his answer alleges that he is entirely ignorant of the matters alleged in the bill, and plaintiff replies, the allegations of the bill are thus put in issue.—*Neale v. Hagthorp*, 3 Bland 551.

(b) An answer, calling on complainant to prove his bill, only puts him to the proof of what is charged, and entitles him only to a decree on the case made in the bill when proved.—*Robinson v. Townshend*, 3 G. & J. 413.

(c) A bill, brought to obtain a decree for the sale of premises mortgaged by a partner for the debt of the firm, was opposed, on the ground that the mortgage was fraudulent as to creditors; but as the answers did not allege the insufficiency of the mortgagee's estate to satisfy his creditors, nor the insolvency of the firm, and as there was no proof as to these points, it was held that the question of fraud did not arise.—*Woods v. Fulton*, 4 H. & J. 329.

**§ 325. Matters to be proved.**

**Cross-Reference.**

Failure to file replication, see ante, § 213.

(a) Where a bill was filed in the name of a church corporation against five of the nine trustees in their individual capacity, as the

bill might have been filed in conformity with the charter, it will not be dismissed on motion and answer, without evidence, merely on allegations proceeding from defendants themselves.—*African M. B. Church v. Carmack*, 2 Md. Ch. 143.

(b) Under an ex parte commission to take testimony in support of the allegations of the bill, granted because of defendant's failure to answer, complainant need not offer the same proof of the allegations of his bill as in case of an answer denying the allegations, but only such as where defendant answers, and neither admits nor denies the allegations.—*Oliver v. Palmer*, 11 G. & J. 426.

(c) Where a material averment in a bill is neither admitted nor denied by the answer, it must be supported by proof.—*Stewart v. Stone*, 3 G. & J. 510; *Joice v. Taylor*, 6 G. & J. 54, 25 Am. Dec. 325.

(d) By taking issue on a plea, plaintiff admits its sufficiency as a bar, if the facts which it asserts are established by the proof; and if, on such issue, the matter of the plea is proven, the bar is complete, and the bill must be dismissed.—*Danels v. Taggart*, 1 G. & J. 311.

### § 326. Evidence admissible under pleadings.

(a) Evidence offered must correspond with the material allegations of the bill, and must be confined to the points at issue, and be the best evidence of which the case is in its nature susceptible; the burden of proof being with the party holding the affirmative.—*Schnepfe v. Schnepfe*, 108 Md. 139, 69 Atl. 829.

(b) Where complainant alleges an indebtedness to him by one as maker of notes, describing one of them filed as an exhibit, and defendant makes defense against any note of such person held by complainant when the bill was filed is embraced within its allegations, though not filed with the bill.—*Williams v. Banks*, 19 Md. 22.

(c) Where a bill charged that complainant was entitled to a mortgage debt, "with interest thereon," this allegation authorizes complainant to prove that the interest was

to be compound, if such were the fact.—*Fitzhugh v. McPherson*, 3 Gill 408.

### § 327. Variance between allegations and proof.

#### Cross-References.

Amendment of pleadings to conform to proofs, see ante, § 288.

Dismissal on ground of variance, see post, § 388.

(a) Where the allegations of a petition are sufficient to give jurisdiction, defective proof cannot affect the question of jurisdiction.—*Bolgiano v. Cooke*, 19 Md. 375.

(b) The allegations and proofs in suits in equity must set forth and support the same cause of action. A party cannot state one case in his pleading, and make a different one by his proofs.—*Small v. Owings*, 1 Md. Ch. 363. [Cited and annotated in 49 L. R. A. (N. S.) 16, on necessity of pleading statute of frauds.]

### (I) DEFECTS AND OBJECTIONS, AND WAIVER THEREOF.

### § 328. Defects and objections which may be cured or waived.

(a) A bill which is multifarious because it asks for the partition of two tracts of land owned jointly by different co-tenants will not be dismissed, though the petitioner refuse to ask leave to amend; but partition will be allowed as to one of the tracts, under Equity Rule 33, giving court of equity the power to dismiss a bill as to such of the subject-matter as may be improperly joined, so as to relieve it of the objection of being multifarious.—*Reckefus v. Lyon*, 69 Md. 589, 16 Atl. 530. (See Code, art. 16, § 183, Rule 33.)

(b) As a general rule, if the infirmity of plaintiff's case appears on the face of the bill, defendant may rely on it at the hearing, no matter how imperfect, or what the character of his answer may be.—*Gibbs v. Cunningham*, 4 Md. Ch. 322.

(c) Although defendant answers the bill, and issue be thereon joined, he may object at the hearing that the case made in the bill does not entitle complainant to equitable relief; and, if his objection be sustained, the bill will be dismissed. This rule, however, does not apply to some defenses

given by statute.—*Chambers v. Chalmers*, 4 G. & J. 420, 23 Am. Dec. 572.

(d) If a bill is objectionable for multifariousness, it ought to be dismissed in toto, and not made the foundation of partial relief.—*Gibbs v. Clagett*, 2 G. & J. 14.

### § 329. Cure by subsequent pleading.

(a) Plaintiff must recover on the case made by his bill, and that defendant, although he answers it, may at the hearing object that the case made in the bill, does not entitle plaintiff to equitable relief.—*Allen v. Burke*, 2 Md. Ch. 534.

(b) Joining issue on an answer must be regarded as a waiver of any mere technical objection to the form in which the defenses in such answer are presented.—*McKim v. Mason*, 2 Md. Ch. 510.

(c) The question of jurisdiction depends exclusively on the case made by the bill, and, in determining the question whether a court of equity can or cannot grant relief, recourse cannot be had to the statements of the answer, or to any other part of the proceedings.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

(d) Complainant cannot rely on the admissions of the answer and obtain relief on those admissions, unless he has set them out in his bill.—*Small v. Owings*, 1 Md. Ch. 363. [Cited and annotated in 49 L. R. A. (N. S.) 16, on necessity of pleading statute of frauds.]

(e) Defects in the statements of a bill cannot be supplied by subsequent proceedings.—*Townshend v. Duncan*, 2 Bland 45; *Lingam v. Henderson*, 1 Bland 236. [Cited and annotated in 49 L. R. A. (N. S.) 30, on necessity of pleading statute of frauds.]

(f) The want of a direct allegation of a material fact, strongly implied in a bill, is corrected by an admission of the fact in the answer.—*Birely v. Staley*, 5 G. & J. 432. [Cited and annotated in 17 L. R. A. 348, on priority as to proceeds of creditors' bills; in 23 L. R. A. (N. S.) 93, on conditions precedent to equitable remedies of creditors.]

### § 330. Waiver of objections to pleadings in general.

(a) Where objections to a bill for multifariousness were raised by motion to dismiss after defendant had filed his answer and at the beginning of the taking of testimony, his failure to demur at the proper time was a waiver of the objections.—*Wilmer v. Placide*, 118 Md. 305, 84 Atl. 491.

(b) Consent for issuance of a commission to take testimony, of which each party has availed itself, imports that the parties are at issue, without the formality of a replication.—*Hall v. Clagett*, 48 Md. 223.

(c) Where multifariousness in the bill is objected to at the hearing, it will be fatal only in the discretion of the court, which will not allow the objection where its reason fails.—*Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184.

(d) Where a case is submitted by agreement of the parties on bill, answer, and general replication, the case will be considered as if a general replication had been filed, though in fact none has been.—*Glenn v. Hebb*, 12 G. & J. 271.

(e) Where an averment in a bill in chancery is defective, and there is no proof that would sustain it if properly drawn, the Court of Appeals will reverse, although these objections were not raised below, notwithstanding act 1832, c. 302, § 5, forbids the reversal of a decree for insufficiency of the bill unless exception is raised below.—*Oliver v. Palmer*, 11 G. & J. 426. (See Code, art. 5, § 36.)

(f) An objection to a bill because of multifariousness, if apparent on the face thereof, must be taken advantage of by demurrer; otherwise, it will be deemed to be waived.—*Gibbs v. Clagett*, 2 G. & J. 14; *Grove v. Fresh*, 9 G. & J. 280; *Lockett v. White*, 10 G. & J. 480.

(g) After issue has been joined on an answer alleging usury generally, it cannot be objected at the hearing that the defense has not been taken with more legal precision.—*Chambers v. Chalmers*, 4 G. & J. 420, 23 Am. Dec. 572.

(h) A respondent, submitting to answer,

must answer fully; but, if the answer be defective and insufficient to meet the allegations and interrogatories of the bill, complainant, if he desires a fuller response, must except to the answer. If he does not, he cannot rely on the silence of respondent in relation to any material allegation, but must prove it.—*Warfield v. Gambrill*, 1 G. & J. 503.

(i) Mispleading in matter of form will not prejudice a party, if the case is made right in matter of substance, and supported by proper evidence.—*Tiernan v. Poor*, 1 G. & J. 216, 19 Am. Dec. 225.

§§ 331-335. (See Analysis.)

## V. EVIDENCE.

### Cross-References.

On bill of review, see post, § 463.  
 Taking and filing proofs, see post, § 349.  
 In creditors' suits, see "Creditors' Suit," §§ 44-46..  
 In interpleader proceedings, see "Interpleader," § 29.  
 In proceedings before master, see "Equity," § 404.  
 In suits for accounting, see "Account," § 18.  
 In suits for accounting by partnership, see "Partnership," §§ 336-338.  
 In suits for cancellation of instruments, see "Cancellation of Instruments," §§ 45-47.  
 In suits for dissolution of partnership, see "Partnership," § 328.  
 In suits for divorce, see "Divorce," §§ 109-137.  
 In suits for infringement of copyrights, see "Copyrights," § 83.  
 In suits for infringement of patents, see "Patents," § 312.  
 In suits for infringement of trade-marks or trade-names or for unfair competition, see "Trade-Marks and Trade-Names," § 93.  
 In suits for injunction, see "Injunction," §§ 125-128.  
 In suits for partition, see "Partition," § 63.  
 In suits for reformation of instruments, see "Reformation of Instruments," §§ 43-45.  
 In suits for relief from judgment, see "Judgment," § 461.  
 In suits for specific performance, see "Specific Performance," §§ 119-121.  
 In suits to enforce mechanics' liens, see "Mechanics' Liens," §§ 279-281.  
 In suits to enforce vendors' liens, see "Vendor and Purchaser," § 281.  
 In suits to establish and enforce trust, see "Trusts," §§ 41-44, 372.  
 In suits to foreclose mortgages, see "Mortgages," §§ 460, 461, 463, 464.  
 In suits to quiet title, see "Quieting Title," § 44.

In suits to redeem from mortgage sales, see "Mortgages," § 617.

In suits to set aside fraudulent transfers, see "Fraudulent Conveyances," §§ 270-302.

On motions for discovery, see "Discovery," § 24.

Omission to testify as proper subject for consideration in equity, see "Evidence," § 76.

## § 336. Rules of evidence and mode of proof in general.

(a) Where an administrator has filed a bill in the Orphans' Court alleging a concealment of the property of his intestate, and the defendants have appeared and answered, the proceedings are plenary, and the depositions must be taken in writing and recorded, as prescribed by Code 1860, art. 93, §§ 249, 250.—*Cannon v. Crook*, 32 Md. 482. (See Code 1911, art. 93, §§ 254, 255.)

(b) Parol testimony is in general inadmissible, both at law and in equity, to vary a written instrument.—*Elysiville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392. [Cited and annotated in 20 L. R. A. 102, 106, on parol evidence as to consideration of deed; in 24 L. R. A. (N. S.) 415, on parol evidence to show true nature of transaction where recited consideration of deed shown not paid.]

(c) Papers in a case, not marked as filed, cannot be considered as in the proceedings.—*Addison v. Bowie*, 2 Bland 606.

(d) Where a plaintiff has an interest in books or papers which the defendant by his answer admits to be in his possession, he has a right to have them produced; but, to have them produced, the plaintiff must proceed by petition, and cannot have them brought in by exceptions to the sufficiency of the answer.—*Bank of Maryland v. Dugan*, 2 Bland 254.

(e) A court of chancery is warranted in making the same deductions from facts as a jury might make.—*Thomas v. Visitors of Frederick County School*, 7 G. & J. 369.

(f) Proceedings in one suit are not sufficient ground for a decree in another suit between the same parties in the same court, although admitted and referred to by both, unless the record be exhibited and made part of the evidence.—*Norwood v. Norwood*, 1 H. & J. 525.

### § 337. Pleadings as evidence in general.

(a) Where the prima facie proof of a deed, as to the consideration for which it was executed, is neither contradicted nor assailed by any direct evidence in the case, the deed, supported by the answers of the defendants, is not affected by allegations in the bill of complaint of its being made to defraud creditors.—*Moore v. Blondheim*, 19 Md. 172.

(b) Where any material allegation of the bill is left unanswered, it may, at the hearing, be taken as true.—*Neale v. Hagthorp*, 3 Bland 551.

(c) Where matter is properly brought before the court by petition, not being the subject of motion, if it be not denied by answer, it is to be taken as true.—*In re Chase*, 1 Bland 206, 17 Am. Dec. 277.

(d) An allegation in a bill, though not denied, if material to the case, must be proved at the hearing.—*Joice v. Taylor*, 6 G. & J. 54, 25 Am. Dec. 325. [Cited and annotated in 28 L. R. A. (N. S.) 854, 857, on relief from mistake of law as to effect of instrument.]

### § 338. Answer as evidence.

#### Cross-References.

On hearing on bill and answer, see post, § 373.

On hearing on exceptions, see ante, § 257.

### § 339.—In general.

(a) The court, in a proceeding for the recovery of delinquency tax penalties, where case is heard on petition and answer, must consider the allegations of the answer as true.—*Blakistone v. State*, 117 Md. 237, 83 Atl. 151.

(b) Code 1888, art. 16, § 146, provides that defendant need not make oath to his answer, unless required by complainant, and that no answer, even though sworn to, shall be evidence against complainant, unless read by him at the hearing. Section 147 provides that if complainant shall not require an answer under oath, or shall require an answer only as to specified interrogatories, the answer, though under oath, except such part as shall be directly responsive to such interrogatories, shall not be evidence for defendant, unless the cause is heard on bill and answer only. Held, that, where an answer

under oath is required, it will be evidence against complainant only if read by him at the hearing, and, where not so required, it will, if under oath, be evidence for defendant when the cause is heard on bill and answer alone, but, whether or not the answer be evidence, it will always, when denying the allegations of the bill, force complainant to prove those allegations.—*Fehsenfeld v. Crockett*, 88 Md. 249, 41 Atl. 66. (See Code 1911, art. 16, § 168.)

(c) Where answers are called for and given under oath, denying the allegations of fraud in the bill, they are strong evidence for the defendants, and, unless rebutted by the degree of evidence required by the rule in such cases, must be taken as proof of what they allege.—*Rich v. Levy*, 16 Md. 74. [Cited and annotated in 23 L. R. A. (N. S.) 19, on conditions precedent to equitable remedies of creditors.]

(d) Act 1852, c. 133, or act 1853, c. 344, relating to the effect of answers as evidence, does not apply to an answer, at the hearing of a motion for the dissolution of the injunction, when such a hearing is not a final one.—*Bouldin v. City of Baltimore*, 15 Md. 18; *Gelston v. Rullman*, Id. 260. (See Code, art. 16, § 168.)

(e) Where a bill in chancery waives answer under oath, the fact that the answer is sworn to gives it no force as evidence.—*Winchester v. Baltimore & S. R. Co.*, 4 Md. 231.

(f) On a bill to account, the answer is no evidence of disbursements, as such a bill is no more than a demand on the defendant to show his receipts and legal proof of his expenditures.—*McNeal v. Glenn*, 4 Md. 87.

(g) Where a defendant dies after answering a bill, leaving minor children who are made parties, the complainant may still use the answer to the same extent as if the defendant were living.—*Robertson v. Parks*, 3 Md. Ch. 65.

(h) Where a creditors' bill for the sale of the real estate of a deceased debtor for the payment of his debts, besides alleging his indebtedness to the complainant, and that he left no personal estate, avers that no administration had been granted on his estate,

the admission of this averment in the answer dispenses with producing the proof that would be otherwise required.—*Robertson v. Parks*, 3 Md. Ch. 65.

(i) Though a complainant in equity may read a portion of an answer, and is not bound, as he would be at law, to read the whole, yet he will not be allowed to read a passage from the answer, for the purpose of fixing the defendant with an admission, without reading the explanations and qualifications by which the admission may be accompanied.—*Glenn v. Randall*, 2 Md. Ch. 220.

(j) If a plaintiff chooses to read a passage from the defendant's answer, he must read all the circumstances stated in the passage, and, if the passage so read contains a reference to any other passage, that must be read also.—*Glenn v. Randall*, 2 Md. Ch. 220.

(k) The answer when responsive to the bill, though uncontradicted, cannot be taken to establish anything in bar of the relief prayed, which parol testimony would not be admitted to prove, for it is as evidence only that it is received.—*Winn v. Albert*, 2 Md. Ch. 169. [Cited and annotated in 49 L. R. A. (N. S.) 27, on necessity of pleading statute of frauds.]

(l) Where an order is prayed for the defendant to bring money into court on the admissions of the answer, the whole answer must be taken together, and as true.—*Contee v. Dawson*, 2 Bland 264.

(m) An answer to a bill, alleging as facts what the defendant could not personally know, although responsive to the bill, cannot be considered as evidence of those facts, requiring the testimony of two witnesses, or one witness and corroborating circumstances, to overcome it, but merely puts the plaintiff upon proof of his own allegations.—*Dugan v. Gittings*, 3 Gill 138, 43 Am. Dec. 306.

(n) Where an executrix alleges in her answer that she has received the assets of her testator, as shown by her return to the Orphans' Court, which she is prepared, when required, to produce, this is not an admission of the sufficiency of assets; and where such sufficiency was a material allegation in the

bill, which the complainants failed to prove, the cause was remanded.—*Dugan v. Gittings*, 3 Gill 138, 43 Am. Dec. 306.

(o) An answer responsive to the bill is evidence even where the equity of the complainant is grounded upon an allegation of fraud.—*Dilly v. Barnard*, 8 G. & J. 170. [Cited and annotated in 31 L. R. A. 37, on negligence as cause for, and as bar to, injunctions against judgments; in 32 L. R. A. 322, 325, on equitable jurisdiction as to injunctions against judgments.]

(p) The answers of infant defendants are not evidence against them, and all material allegations in the bill must be proved by other means, before a decree can pass involving their interest.—*Harris v. Harris*, 6 G. & J. 111.

(q) Where it is not expressly provided by law that the answer of an infant defendant by his guardian shall be evidence against the infant, it is proper to put the plaintiff upon proof of the material allegations of the bill, although admitted by the answer.—*Kent v. Taneyhill*, 6 G. & J. 1.

(r) An infant's answer by his guardian is not regular evidence against him, because he is not sworn, and it is only for the purpose of making proper parties. In reality, it is the answer of the guardian only who is sworn.—*Kent v. Taneyhill*, 6 G. & J. 1.

(s) Where an administrator is called upon to answer certain matters which appear to have rested exclusively within the knowledge of his intestate, it is sufficient that he swears as he is informed and believes; but his answer must be taken with reference to the reasons given for his belief, as well as to the nature of the subject of which he speaks.—*Hagthorp v. Hook*, 1 G. & J. 270.

(t) On a general bill to account, the answer is no evidence of disbursements, nor is the case varied by a call for the amount of disbursements and debts paid.—*Ringgold v. Ringgold*, 1 H. & G. 11, 18 Am. Dec. 250.

(u) An answer cannot be taken to establish anything in bar of the relief prayed by the bill, which parol testimony would not be admitted to prove.—*Jones v. Slubey*, 5 H. & J. 372.

### § 340.—Responsiveness.

(a) Where the hearing is on bill and answer, every well-pleaded averment of the answer, whether responsive to the allegations of the bill or in avoidance, must be taken as true.—*Barton v. International Fraternal Alliance*, 85 Md. 14, 36 Atl. 658. [Cited and annotated in 39 L. R. A. (N. S.) 1033, 1034, 1039, on inherent equity jurisdiction to appoint receiver or wind up corporation because of mismanagement or fraud.]

(b) A vendor in an answer to a bill for specific performance admitted his failure to convey on demand, and charged such failure to the omission of the vendee to pay him a certain judgment not included in the contract, but averred in his answer to be a lien on the realty. *Held*, that such matter, being new and not responsive, nor supported by the proof, was no ground for denying complainant's relief.—*Smoot v. Rea*, 19 Md. 398.

(c) A mother conveyed property to her son for a consideration equal to that which she had paid for the property, but she had repaired it at considerable expense. The deed was attacked by the creditors of the grantor, the bill alleging that the repairs were put on the property by the mother after the conveyance to the son, but did not ask him to show how he compensated her. The son's answer denied that the repairs were made subsequent to the deed, and stated that the repairs were paid for by the indebtedness of his mother. *Held*, that such answer, not being responsive, must be sustained by proof.—*McNeal v. Glenn*, 4 Md. 87.

(d) If, to a bill by the representatives of the wife to recover possession of her choses in action, not reduced to possession by the husband, from the representatives of the latter, the defense taken is part performance of a parol antenuptial agreement, the defendants will be held to the same definite proof of the contract relied on as if they were plaintiffs asking for its specific performance.—*Gough v. Crane*, 3 Md. Ch. 119.

(e) The rule that an answer in chancery must be received as true does not extend to matters of affirmative defense.—*Ringgold v. Ringgold*, 1 H. & G. 11, 18 Am. Dec. 250;

*Hagthorp v. Hook*, 1 G. & J. 270; *Neale v. Hagthorp*, 3 Bland 551.

(f) Only such facts set forth in an answer as are clearly responsive to the allegations of the bill will be considered as evidence in the cause.—*Jones v. Slubey*, 5 H. & J. 372; *Ringgold v. Ringgold*, 1 H. & G. 11, 18 Am. Dec. 250; *Hardy v. Summers*, 10 G. & J. 316, 32 Am. Dec. 167; *Fitzhugh v. McPherson*, 3 Gill 408.

(g) New matter in an answer is not evidence.—*Jones v. Belt*, 2 Gill 106. [Cited and annotated in 48 L. R. A. 184, on right to plead inconsistent defenses.]

(h) A defendant's answer, if responsive to the bill, is evidence in his favor, though the bill sets up fraud.—*Dilly v. Barnard*, 8 G. & J. 170. [Cited and annotated in 31 L. R. A. 37, on negligence as cause for, and as bar to, injunctions against judgments; in 32 L. R. A. 322, 325, on equitable jurisdiction as to injunctions against judgments.]

(i) Where a bill for dower alleged that complainant's marriage took place "on or about the year seventeen hundred and —," and called on defendant to answer whether she was not married as stated, and the answer, after setting forth an agreement of February 14, 1789, alleged that the marriage took place some time after that agreement, it was *held*, that this allegation was responsive to the bill, both as to the time and fact of the marriage, and, not being contradicted by other evidence, was conclusive as to those facts.—*Cowman v. Hall*, 3 G. & J. 398.

(j) An answer is responsive to the bill only so far as it answers to a material statement or charge in the bill, as to which a disclosure is sought, and which is the subject of parol proof; but where the bill asks for the production of evidence, which, from the nature of the plaintiff's case, he has a right to claim, that may be necessary and useful to him in other cases besides the one under consideration, an answer to such a bill is not responsive which merely asserts the fact, without saying anything of the evidence of its existence, or the means of obtaining it; and where the defendant's answer asserts a right affirmatively, in opposition to the plaintiff's

demand, he must establish it by proof.—*Hagthorpe v. Hook*, 1 G. & J. 270.

**§ 341.—Directness and positiveness.**

(a) The answer of a defendant, professing ignorance of the transaction stated in the bill, is not evidence against the complainant. Its only legal effect is to compel him to establish his case by testimony.—*Drury v. Conner*, 6 H. & J. 288.

**§ 342.—Answer not under oath.**

(a) Though an answer not sworn to, and not required by the bill to be under oath, is not evidence, it may be looked to for ascertaining the matter at issue between the parties.—*Taggart v. Boldin*, 10 Md. 104.

(b) An answer may be received, without being sworn to, by the consent of the plaintiff; and in such case it will be allowed full effect as to the codefendants, as if sworn to.—*Billingslea v. Gilbert*, 1 Bland 566; *Contee v. Dawson*, 2 Bland 264.

(c) The answer of a corporation, sealed with its seal and signed by its president, has the same force and effect as evidence as the answer of an individual not under oath would have in like cases, and no other or greater.—*Maryland & N. Y. Coal & Iron Co. v. Wingert*, 8 Gill 170.

**§ 343.—Waiver of answer under oath.**

*Cross-References.*

Sworn answer, see ante, § 339.

In copyright infringement suits, see "Copyrights," § 84.

(a) Under act 1852, c. 133, an answer not required by the bill of complaint to be made under oath, and not read at the hearing by the complainant, is not evidence against the complainant.—*Hall v. Clagett*, 48 Md. 223. (See Code, art. 16, § 168.)

(b) Where a bill does not call for an answer under oath, and it is not read by the complainant at the hearing as evidence, it cannot, though sworn to, be considered as evidence on final hearing, and can only be looked to by the court, in connection with the bill, for the purpose of ascertaining what points are at issue.—*Dorn v. Bayer*, 16 Md. 144.

**§ 344.—For or against codefendant.**

(a) The answer of one defendant is not

evidence against a codefendant.—*Stewart v. Stone*, 3 G. & J. 510; *Hardesty v. Jones*, 10 G. & J. 404, 32 Am. Dec. 180; *Briesch v. McCauley*, 7 Gill 189; *McKim v. Thompson*, 1 Bland 150; *Glenn v. Baker*, 1 Md. Ch. 73; *Reese v. Reese*, 41 Md. 554.

(b) The answer of one defendant, however inconsistent with that of his codefendant, or with the proof in the case, cannot be used against the codefendant.—*Glenn v. Grover*, 3 Md. 212.

(c) In an application by bill for the sale of lands in which an infant is part owner, neither his answer nor the answer of any other owner is evidence which can affect the infant.—*Watson v. Godwin*, 4 Md. Ch. 25.

(d) The answer of one defendant in chancery is not evidence against a codefendant, claiming title under the former, for the reason that the party against whom the answer is proposed to be read would be deprived of the benefit of a cross-examination.—*Winn v. Albert*, 2 Md. Ch. 169. [Cited and annotated in 49 L. R. A. (N. S.) 27, on necessity of pleading statute of frauds.]

(e) The answer of one defendant, when responsive to the bill, is evidence against the plaintiff in favor of the other defendants.—*Glenn v. Baker*, 1 Md. Ch. 73.

(f) It is a rule in equity that the answer of one codefendant is not to be used against another; but, where a complainant calls on a defendant to answer, he makes the latter a witness, and his answer cannot be excluded, because it may operate in favor of a defendant.—*Powles v. Dilley*, 9 Gill 222. [Cited and annotated in 21 L. R. A. 418, on right to impeach one's own witness; in 41 L. R. A. (N. S.) 3, on admissibility of vendor's declarations out of court, as to purpose in making transfer attacked as fraudulent.]

(g) Where, on a bill for an accounting against certain partners, one of the partners denies the existence of the partnership, and two other partners admit it and consent to an accounting, the answer of the latter is not evidence against the other, who denies the existence of the partnership.—*Bevans v. Sullivan*, 4 Gill 383. [Cited and annotated in 20 L. R. A. 599, on proof against one per-



son of declarations by another to show partnership.]

(h) Where a complainant, alleging himself to have been a partner with three defendants, prays for an account, etc., and one of the defendants, in his answer, denies the partnership, while the other two admit it, their admission is not evidence against the defendant who denies it.—*Bevans v. Sullivan*, 4 Gill 383. [Cited and annotated, see supra.]

(i) The answer of one defendant is not evidence against a codefendant, either as to matters in contest between complainant and such codefendant or as to conflicting claims of the defendants inter se.—*Calwell v. Boyer*, 8 G. & J. 136.

(j) Where two trustees have united in a receipt for money, the allegation of one, in his answer to a bill filed against him for an account, is not competent evidence that the money was in fact received by his co-trustee.—*Maccubbin v. Cromwell*, 7 G. & J. 157.

#### § 345.—Evidence to overcome answer.

(a) The answer of defendant, so far as responsive to the bill, must be taken as true unless it be overturned by two witnesses, or one with strong corroborative circumstances.—*Hopkins v. Stump*, 2 H. & J. 301; *Hagthorp v. Hook*, 1 G. & J. 270; *Roberts v. Salisbury*, 3 G. & J. 425; *Beatty v. Davis*, 9 Gill 211; *Rider v. Riely*, 2 Md. Ch. 16; *Glenn v. Grover*, 3 Md. 212; *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375; *Brooks v. Thomas*, 8 Md. 367; *Rider v. Riely*, 22 Md. 540.

(b) The fact that a liability as surety for the grantor was incurred on the same day that an absolute deed was delivered is not such a corroborating circumstance to show that the conveyance was a mortgage as will make the oath of one witness overcome the denial in a sworn answer.—*Gelston v. Rullman*, 15 Md. 260.

(c) In an action to set aside a deed on the ground of fraud, an answer denying its allegations of fraudulent intent is conclusive on that question unless overcome by the testimony of two witnesses, or of one witness with corroborating circumstances.—*Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375.

(d) A responsive answer to a bill cannot be overcome except by the testimony of two witnesses, or of one sustained by pregnant circumstances. Circumstances standing alone will not destroy the answer.—*Ing v. Brown*, 3 Md. Ch. 521; *West v. Flannagan*, 4 Md. 36.

(e) Though a contract or settlement in writing will be reformed in equity on parol proof of mistake, it requires strong proof to overcome denial in the answer.—*Gill v. Claggett*, 4 Md. Ch. 470.

(f) Where it was urged that the defendants to a bill in equity should be required to offer proof in support of some of the statements of the answer, though responsive to the bill, because such proof was within their reach, while it was inaccessible to the complainants, it was held that the rule that the answer, when responsive to the averments of the bill, shall be taken as true unless discredited by two witnesses, or one witness with pregnant circumstances, is not subject to the modification which the introduction of such a principle would involve.—*Thompson v. Diffenderfer*, 1 Md. Ch. 489.

(g) Where a defendant's answer makes certain statements responsive to the bill, such statements may be contradicted and outweighed by documentary evidence, as well as by the oral testimony of two witnesses.—*Jones v. Belt*, 2 Gill 106. [Cited and annotated in 48 L. R. A. 184, on right to plead inconsistent defenses.]

(h) The answer of an executor or administrator in his representative capacity, asserting a fact that is not, and cannot be, within his own knowledge, does not properly come within the general rule that an answer asserting a fact responsive to the bill can only be disproved or outweighed by the testimony of two witnesses, or one with pregnant circumstances.—*Pennington v. Gittings*, 2 G. & J. 208.

#### § 346. Presumptions and burden of proof.

##### Cross-References.

In suits for injunction, see "Injunction," § 126.

Omission to testify, see "Evidence," § 76.

(a) Where an answer to a bill states the

general result of transactions between complainant and defendant, and a second answer sets forth the mode of payment, and discloses the particulars by which such result was affected, such answers are not to be considered as involving such contradictions as to deprive them of their legal effect in casting the burden of proof on complainant.—*Woodville v. Reed*, 26 Md. 179.

(b) Where a bill in equity by a partner against his co-partners alleged the partnership to have commenced at a certain period, and to have terminated at a particular day, and the defendants, in their answer, insisted that it was dissolved at an earlier day, and the proof established the commencement of the partnership, it was *held* that the burden was on the defendants to show that it was dissolved at an earlier day than was alleged.—*Bevans v. Sullivan*, 4 Gill 383.

(c) Where a defendant insists upon full proof of the complainant's claim, the latter is not bound to produce the primary proof, such as his own books, which would not amount to full evidence.—*Allender v. Vestry of Trinity Church*, 3 Gill 166. [Cited and annotated in 52 L. R. A. 600, on party's books of account as evidence in own favor.]

### § 347. Admissibility.

#### Cross-Reference.

Evidence admissible under pleadings, see ante, § 326.

#### Annotation.

Admissibility in evidence in equity of copies of records of other states.—5 L. R. A. (N. S.) 948, note.

### § 348. Weight and sufficiency.

#### Cross-References.

Evidence to overcome answer, see ante, § 345.

In suits for injunction, see "Injunction," § 128.

(a) When an auditor is required to ascertain the enhanced vendible value of certain plats and grounds at the time of sale by reason of the meliorations and improvements placed thereon by the occupier, he may, as the most reliable and safe method of approximating the truth with the least risk of falling into error, take the average of all the opinions expressed by the witnesses examined on the subject.—*Barnum v. Barnum*, 42 Md. 251.

(b) Where the mistake sought to be rectified was in regard to the number of acres sold under a decree in chancery, and the only evidence was found in a survey ordered by the court, upon the ex parte application of the petitioner, which differed from the survey, according to which the land was sold, it was *held*, that this evidence was not sufficient to overthrow the contract on the ground of mistake.—*Goldsborough v. Ringgold*, 1 Md. Ch. 239.

(c) In an equity suit to enforce a lien for work and labor, materials furnished, and money paid 24 years before suit was commenced, general proof being introduced, and free from suspicion, much less detailed proof should be exacted from the claimant than if, immediately after its origin, a controversy in relation to it had arisen.—*Allender v. Vestry of Trinity Church*, 3 Gill 166.

(d) Where funds are in the court of chancery, and a party petitions to have them applied in discharge of his claim, it is the practice of that court to receive the papers on which the claim is founded as prima facie evidence, and to act upon them accordingly, unless the testimony is put in issue and full proof required by the opposite party.—*Mac-cubbin v. Cromwell*, 2 H. & G. 443.

## VI. TAKING AND FILING PROOFS.

#### Cross-References.

In suits for divorce, see "Divorce," §§ 137, 146.

Subject and title of act relating to taking of evidence in suits in equity, see "Statutes," § 117.

### § 349. Taking in general.

(a) Since either party may ask leave to take testimony in an equity case, that a party who applies to have the case set for hearing at the same time asks leave to take testimony could not injure the other party, though it might be somewhat irregular.—*Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85.

(b) After a cause was at issue, on motion of the complainant leave was given to take testimony before any examiner of the court. The first examiner notified to take testimony being sick, complainant took testimony before a second, and finally before a third, examiner. The defendants were present and

cross-examined the witnesses. The court, on motion of complainant, ordered the testimony as taken to stand, and that the third examiner should continue taking the testimony under the original order. *Held*, that the order of the court violated none of the equity rules, nor any of the general principles of equity.—*Canton v. McGraw*, 67 Md. 583, 11 Atl. 287.

### § 350. Time for taking.

#### *Cross-Reference.*

Continuance to take further proofs, see post, § 375.

(a) Under the provisions of an equity rule, the court caused the testimony to be returned, and, on plaintiff's application, the case was set for hearing, and the defendant afterwards applied for leave to take further testimony, to be returned by the day set for the hearing, which leave was granted, and both parties took testimony under the order. *Held*, that it was a matter of discretion with the trial court to grant such leave.—*Wagoner v. Wagoner*, 67 Md. xiv, memorandum case, 10 Atl. 221, full report.

(b) Where the parties, at any time before hearing of a bill, discover new evidence, they may, on application, be allowed permission to take such newly discovered evidence.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [*Cited and annotated* in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

### § 351. Examination of witnesses.

#### *Cross-Reference.*

In divorce suits, see "Divorce," § 146.

### § 352.— In general.

(a) Where a party to the suit, who was required, under a subpoena duces tecum, to produce a certain paper, and dismissed by plaintiff without a question pertaining to the merits, volunteered, in response to the general interrogatory prescribed by Equity Rule 39, and propounded at request of defendants' solicitor, to give a circumstantial and detailed account of the entire transaction involved, such answer should have been suppressed.—*Frush v. Green*, 86 Md. 494, 39 Atl. 863.

### § 353.— Cross-examination and re-examination.

(a) A witness in an equity case should not

be re-examined in relation to the same subject upon which he has been examined and cross-examined, without a special order of court, the granting of which is a matter of discretion.—*Swartz v. Chickering*, 58 Md. 290.

(b) Where an ex parte commission issues under the provisions of act 1820, c. 161, § 1, the defendant has no right to appear and cross-examine the complainant's witnesses, or to produce witnesses of his own, or otherwise prove any matter of defense to the bill.—*Oliver v. Palmer*, 11 G. & J. 426. (See Code, art. 16, § 149, Rule 12.)

### § 354.— Privilege of witness.

### § 354½. Production of documents.

### § 355. Depositions.

(a) Where the defendants answered to an original bill, but failed to answer a bill of revivor, and testimony was taken under an ex parte commission without notice, such testimony cannot be read.—*Kerr v. Martin*, 4 Md. Ch. 342.

(b) Under act 1820, c. 161, an ex parte commission must lie in court an entire term before final decree; and, if a decree be rendered before that time, it is irregular, and ground of reversal on appeal.—*Hatton v. Weems*, 12 G. & J. 83. (See Code, art. 16, § 149, Rule 12.)

### § 356. Filing proofs.

### § 357. Publication.

(a) In Maryland there is no formal rule for the publication of testimony as in England, but objections to the evidence are taken and considered at the hearing.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [*Cited and annotated* in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

### § 358. Objections to evidence.

(a) Where, under Code 1888, art. 16, § 220, objection is made to a question because it is leading, the ground of objection should be stated by the attorney making the objection, and recorded by the examiner.—*Freeny v. Freeny*, 80 Md. 406, 31 Atl. 304. (See Code 1911, art. 16, § 256, Rule 40.)

(b) Exceptions to testimony taken before

an examiner must state clearly the testimony excepted to, the ground on which the exception is based, and the name or names of the witnesses whose testimony is excepted to.—*Freeny v. Freeny*, 80 Md. 406, 31 Atl. 304.

(c) Where, after the examination of a witness, who has been recalled without leave of court by the party originally calling him, an agreement is made to refer the case to an auditor to state an account on the evidence in the case, the objection that the examination was improper cannot be sustained.—*Young v. Omohundro*, 69 Md. 424, 16 Atl. 120.

(d) The pendency of an appeal from a decree reserving a certain question for future adjudication is no ground for exceptions to the admissibility of evidence taken as to such question after the entry of the decree.—*Barnum v. Barnum*, 42 Md. 251.

(e) Exceptions by defendant to the admissibility of testimony on a point not alleged in the bill do not amount to exceptions to the averments of the bill.—*O'Neill v. Cole*, 4 Md. 107.

## VII. DISMISSAL BEFORE HEARING.

### Cross-References.

Dismissal at final hearing, see post, § 388.  
In creditors' suits, see "Creditors' Suit," §§ 36, 47.

In interpleader proceedings, see "Interpleader," § 30.

In suits for divorce, see "Divorce," §§ 139-151.

In suits for infringement of patents, see "Patents," § 313.

In suits for injunction, see "Injunction," § 129.

In suits for partition, see "Partition," § 64.

In suits for relief against judgment, see "Judgment," § 462.

In suits for specific performance, see "Specific Performance," § 122.

In suits to enforce mechanics' liens, see "Mechanics' Liens," § 284.

In suits to foreclose mortgages, see "Mortgages," § 475.

In suits to quiet title, see "Quieting Title," § 45.

Mandamus to compel dismissal, see "Mandamus," § 4.

### § 359. Voluntary dismissal.

#### Cross-Reference.

Of bill for divorce, see "Divorce," § 139.

(a) One who brought a suit was not deprived of power to compromise it, and dismiss the bill by her contract giving persons, who were not parties to the suit, and to whose use it was not entered, a third interest in any money or property she might obtain through prosecution or compromise of the cause.—*Hendrix v. Bull*, 111 Md. 389, 74 Atl. 572.

(b) After a decree for an account, the plaintiff will not be allowed to dismiss his bill without a rule for further proceedings on the defendant.—*Hall v. McPherson*, 3 Bland 529.

### § 360. Involuntary dismissal.

#### § 361.—In general.

#### § 362.—Grounds.

##### Cross-Reference.

Waiver of objection to want of jurisdiction of equity, see ante, §§ 42, 53.

(a) Equity Rule 25 of the Circuit Court for Howard County provides that, at any stage of a case where further proceedings are proper to be had on the part of the complainant, the defendant may obtain a rule therefor, and, on failure of complainant to comply, his bill may be dismissed. Rule 4 of the same court provides that commissions for taking testimony shall be returned on or before the first day of the first term after the date, etc., and, if not so returned, an order may be obtained for the return thereof at such day as shall be limited, etc., provided that, when such commission shall not be returned, it shall prima facie be considered the fault of the party who had the carrying of such commission. *Held*, that the rule "further proceedings" can be had after the cause is at issue, and where the commission has been outstanding nearly five years, and, on failure to comply therewith, complainant's bill may be dismissed.—*Whelan v. Cook*, 29 Md. 1.

(b) Where it appears that a bill is altogether scandalous for the ill language, it may be dismissed, and the defendant given judgment for costs.—*Neale v. Calvert*, 3 Bland 401, note.

**§ 363.—Motion and determination thereof.**

*Cross-Reference.*

Time for hearing demurrer and motion to dismiss cross-bill, see ante, § 241.

(a) Under Equity Rule 10 of the Circuit Court for Howard County, service of a copy of a rule "further proceedings," which is a substitute for a motion to dismiss for want of prosecution, on the petitioners or their solicitor, is not required.—*Whelan v. Cook*, 29 Md. 1.

(b) Where a bill in equity is liable to be dismissed for multifariousness, the complainant cannot have a partial relief, but the bill ought to be dismissed in toto.—*White v. White*, 5 Gill 359.

**§ 364.—Dismissal on court's own motion.**

(a) Where defendant omits to demur for multifariousness, the court may, sua sponte, take the objection and dismiss the bill; but whether this will be done or not must depend on the nature of the case and the course of proceedings at the time of the hearing. Where trouble and expense which a demurrer would have prevented have been incurred, and the case is fully presented on the record, the court should not interfere.—*Chew v. Bank of Baltimore*, 14 Md. 299.

(b) Act 1841, c. 163, only applies to the Court of Appeals, and the court of chancery may, sua sponte, refuse to grant relief, if it be apparent from the proceedings that it has no jurisdiction, though defendant does not make the objection by his pleadings.—*Dunnock v. Dunnock*, 3 Md. Ch. 140. (See Code, art. 5, § 37.)

**§ 365.—Dismissal without prejudice.**

(a) The children of an intestate filed a bill in equity praying that the administrators be compelled to account for the whole personal estate of their intestate, for a decree annulling and setting aside a decree and sale under which one of the administrators claimed lands of deceased intestate, and that subpœnas issue to the sheriff of a certain city for one of the administrators, and to the sheriff of a certain county for the other administrator, and for general relief. Held, that the bill, being multifarious, should be

dismissed without prejudice and without costs.—*Wilson v. Wilson*, 23 Md. 162.

(b) Where a bill is dismissed, not upon its merits, but under a rule further to proceed in the cause, it is not necessary to qualify the order of dismissal by saying it shall be without prejudice to the rights of the complainants.—*Cross v. Cohen*, 3 Gill 257.

(c) Where a bill was filed against the heirs at law of a mortgagor, and the purchasers under a decree for the sale of the mortgaged premises, to disembarass the title and reach the proceeds of the mortgaged premises, and it appeared that no decree could pass against some of the heirs because the mortgage deed had not been so introduced into the cause as to be evidence against them, nor against others, who were minors, for the want of other evidence than their guardian's answers, nor against the purchasers because a title could not be given to them, the bill was dismissed without prejudice, that the complainants might institute new proceedings to bring the merits of their case before the court, and call upon the purchasers to elect whether they would have the sale rescinded.—*Stewart v. Duvall*, 7 G. & J. 179. [Cited and annotated in 32 L. R. A. 673, on admissions and waivers by fiduciaries in actions.]

**§ 366.—Conditions.**

**§ 367.—Operation and effect.**

*Cross-References.*

Filing amended or supplemental bill after dismissal, see ante, § 296.

Effect of dismissal of creditors' bill on lien acquired by suit, see "Creditors' Suit," § 36.

(a) Where a petition is answered and a day fixed for the hearing, but the petitioner is not present, and no proof has been taken by him, and no excuse offered for his failure to do so, he will not, on the dismissal of his petition, afterwards be allowed to file another petition on the ground that he had no notice of the answer, and therefore did not know what evidence had been required to be produced, since it was his duty to have been present on the day fixed for hearing, and to take care of his rights.—*Ducker v. Belt*, 3 Md. Ch. 13.

**§ 368. Setting aside, and reinstatement of cause.**

*Cross-References.*

As affecting lien acquired by creditors' suit, see "Creditors' Suit," § 36.  
Divorce proceedings, see "Divorce," § 139.

**VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.**

*Cross-References.*

Hearing and determination of plea, see ante, § 175.  
Hearing and determination on demurrer, see ante, § 241.  
Hearing on exceptions, see ante, § 257.  
Hearing on reference, see post, § 405.  
On bill of review, see post, § 464.  
In creditors' suits, see "Creditors' Suit," § 48.  
In interpleader proceedings, see "Interpleader," § 31.  
In suits for accounting, see "Account," § 19.  
In suits for cancellation of instruments, see "Cancellation of Instruments," §§ 49-53.  
In suits for dissolution and accounting by partnership, see "Partnership," § 329.  
In suits for divorce, see "Divorce," §§ 141-150.  
In suits for infringement of patents, see "Patents," §§ 314, 315.  
In suits for infringement of trade-marks or trade-names or for unfair competition, see "Trade-Marks and Trade-Names," § 99.  
In suits for injunction, see "Injunction," § 130.  
In suits for partition, see "Partition," §§ 65-67, 70-72.  
In suits for reformation of instruments, see "Reformation of Instruments," § 46.  
In suits for relief against judgment, see "Judgment," § 463.  
In suits for specific performance, see "Specific Performance," § 123.  
In suits to enforce mechanics' liens, see "Mechanics' Liens," §§ 287-290.  
In suits to enforce vendors' liens, see "Vendor and Purchaser," § 284.  
In suits to establish and enforce trusts, see "Trusts," § 373.  
In suits to foreclose mortgages, see "Mortgages," §§ 475-482.  
In suits to quiet title, see "Quieting Title," § 47.  
In suits to redeem from mortgage sales, see "Mortgages," § 618.  
In suits to set aside fraudulent transfers, see "Fraudulent Conveyances," §§ 306-310.  
New trial in equity actions under codes and practice acts, see "New Trial."  
Stay of proceedings in equity pending determination of action at law, see "Courts," § 479.  
Trial by court without jury in equitable actions in code states, see "Trial," §§ 367-405.

**§ 369. Condition of cause.**

(a) Code 1904, art. 16, § 241, providing that evidence taken and returned shall be opened by the clerk and remain in court 10 days, subject to exceptions, before the cause shall be taken up for hearing, but that after that time the cause shall stand for hearing, contemplates a case where evidence has been taken and returned, and cannot be invoked to prevent action by the court, where no evidence has been taken, or where a party is in default, having failed to comply with the order limiting the time for the closing of testimony.—*Moody v. Moorman*, 107 Md. 242, 68 Atl. 547. (See Code 1911, art. 16, § 259.)

(b) A commission was sued out on the 14th, and returned on the 17th, of the month. The cause was removed from the county court to the court of chancery on the 22d, and a decree passed on the 24th, of the same month. *Held*, that the decree was premature, since no cause, under the chancery practice, is ready for hearing until the commission under which testimony has been taken has been returned to the chancery office and there remained for one entire term.—*Richardson v. Stillinger*, 12 G. & J. 477.

**§ 370. Hearing of causes together.**

*Cross-Reference.*

Consolidation of actions, see "Action," § 57.

(a) Where different parties, by separate petitions in the Orphans' Court, are resisting a claim upon the same grounds, and ask for issues to try its validity, it is proper for the court to order the parties and proceedings to be joined on the trial of the issues sent.—*Yingling v. Hesson*, 16 Md. 112.

**§ 371. Separate hearings in same cause.**

*Cross-Reference.*

Separate decisions, see post, § 389.

**§ 372. Setting down cause for hearing.**

(a) Under Equity Rule 3, Balto. City Rules of Court, providing that, after the general replication has been entered to the answer, either party may apply to have the case set for hearing, and unless within five days after service of notice of such application leave to take testimony be asked by either party, the case shall be placed upon the trial

calendar and heard upon the pleadings, where a case is set for hearing and either party asks leave to take testimony but neither takes any, the court can proceed to hear the case on the pleadings.—*Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85.

(b) After the return of a commission from chancery to take testimony has remained in the office of the register in chancery or clerk of the county court the term prescribed by the rules or practice of the court, it is competent for either the complainant or defendant to set the cause down for a final hearing; but, when a cause stands without further proceedings than the bill and answer, the complainant is the only party competent to set the cause down for such hearing.—*Somerville v. Marbury*, 7 G. & J. 275.

### § 373. Hearing on bill and answer.

#### Cross-Reference.

Pleadings as evidence, see ante, §§ 337, 339-345.

(a) Where a cause was submitted on bill and answer, the answer is to be accepted as true as to all matters susceptible of proof by legitimate evidence.—*Hodson v. Nelson*, 122 Md. 330, 89 Atl. 934.

(b) Where suit to enjoin street widening was set for hearing on the bill and answer, the answer denying the allegations of fraud contained in the bill held admitted.—*Evans v. City of Crisfield*, 122 Md. 184, 89 Atl. 430.

(c) While, if a plaintiff wishes to set the cause for hearing on the bill and answer after replication has been filed, the better practice is to first obtain leave of court to withdraw the replication, where without doing so, the case, by agreement, is set for hearing on the bill and answer, the replication will be treated as never filed.—*Evans v. City of Crisfield*, 122 Md. 184, 89 Atl. 430.

(d) Where a case is submitted on bill and answer, plaintiff admits the truth of all matters stated in the answer which are susceptible of proof by legitimate evidence, and all the averments of the answer, whether responsive to the allegations of the bill, or in avoidance of it, are to be taken as true, though plaintiff does not thereby admit a mere conclusion of law stated in such answer.—*Ætna Indemnity Co. v. Baltimore S. P. & C. Ry. Co.*, 112 Md. 389, 76 Atl. 251.

[Cited and annotated in 28 L. R. A. (N. S.) 828, 883, 887, 918, on relief from mistake of law as to effect of instrument.]

(e) A bill alleged that defendant construction company agreed to furnish a bond on undertaking certain work for plaintiff; that the bond was given with defendant indemnity company as surety, but by mistake the principal failed to sign it; that the bond was filed among plaintiff's papers; that thereafter, in order to complete the work, it was agreed that plaintiff should co-operate with the construction company, to which agreement the indemnity company consented; that a receiver was appointed for the construction company, and plaintiff was compelled to contract with others for the completion of the work at an additional cost; and prayed that the construction company be required to execute the bond. The indemnity company answered, alleging that it never consented to be bound until after the bond was executed by the construction company, nor to the delivery of the bond, prior to such execution, and denied that plaintiff was compelled to pay more for the work than the original price agreed on. It also averred that plaintiff was guilty of laches and negligence. Held, that, on submission on bill and answer, reformation of the bond would not be decreed; it not clearly appearing that such relief was warranted.—*Ætna Indemnity Co. v. Baltimore S. P. & C. Ry. Co.*, 112 Md. 389, 76 Atl. 251. [Cited and annotated, see supra.]

(f) Where a case is submitted on the bill and answer, the averments in the answer are taken as proven.—*Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85.

(g) Where a case is submitted on a petition and answer, the truth of the facts alleged in the answer is taken as admitted.—*Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442.

(h) The privilege of having a case heard on petition and answer belongs to the petitioner only.—*Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442.

(i) Where the plaintiff sets down an equity cause for hearing on the bill and answer, the truth of averments of the answer in

avoidance of, as well as those responsive to, the allegations of the bill, is admitted.—*Read v. Reynolds*, 100 Md. 284, 59 Atl. 669.

(j) In an equity case, if the final hearing is on bill and answer, the answer is to be considered as true in regard to all matters capable of proof by legitimate evidence; and, if any material matter charged in the bill of complaint has been neither denied nor admitted by the answer, it stands for naught.—*Crowe v. Wilson*, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343.

(k) Though act 1852, c. 133, provides that no answer of any defendant to any bill shall be evidence against complainant, unless the bill requires it to be under oath of the respondent, or at the hearing the complainant shall read the answer as evidence, when a cause is heard on bill, answer, and exhibits, the answer is admitted to be true, though it may not have been called for under oath, nor read at the hearing as evidence by the complainant.—*Mickle v. Cross*, 10 Md. 352. (See Code, art. 16, § 168.) [Cited and annotated in 31 L. R. A. (N. S.) 360, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(l) Where an equity cause is set down for hearing on bill and answer alone, the answer is taken to be true in all points.—*Craig v. Ankeney*, 4 Gill 225; *Contee v. Dawson*, 2 Bland 264; *McKim v. Odom*, 3 Bland 407; *In re Wheeler's Estate*, 1 Md. Ch. 80; *Mason v. Martin*, 4 Md. 124; *Warren v. Twilley*, 10 Md. 39.

(m) Plaintiff, by setting the cause down for hearing on bill and answer, admits the truth only of the pertinent and material facts set out in the answer, and not mere matters of opinion and inference.—*Contee v. Dawson*, 2 Bland 264.

(n) If a defendant, in his answer to a bill for a partition of lands, alleging seisin in the complainant with others, does not respond to the averment of seisin, and the case is set down for hearing upon bill and answer, the silence of the defendant is no admission of the fact; and, no proof of it being given by the complainant, his bill will be dismissed.—*Warfield v. Gambrill*, 1 G. & J. 503.

(o) Where a general replication is put in, and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill will be taken as true, unless they are disproved by two witnesses, or by one witness with corroborating circumstances.—*Hagthorp v. Hook*, 1 G. & J. 270.

§§ 374, 375. (See Analysis.)

### § 376. Submission of issues to jury.

#### Cross-References.

Constitutional right to trial by jury, see "Jury," §§ 13, 14.

In probate proceedings and suits relating to wills or probate, see "Wills," §§ 316-318.

In suits for divorce, see "Divorce," § 144. In suits for partition, see "Partition," § 70.

In suits to foreclose mortgages, see "Mortgages," § 480.

On motion to vacate judgment by confession, see "Judgment," § 68.

Review of rulings involving discretion of lower court, see "Appeal and Error," § 974.

### § 377.—In general.

(a) A court of equity can submit matters of fact to the jury or not, in its discretion.—*Baker v. Safe Deposit & Trust Co.*, 93 Md. 368, 48 Atl. 920, 49 Atl. 623.

(b) The awarding of an issue to try a question of fact is within the discretion of a court of equity.—*Fornshill v. Murray*, 1 Bland 479, 18 Am. Dec. 344. [Cited and annotated in 25 L. R. A. 801, on jurisdiction of chancery to decree nullity or dissolution of marriage; in 57 L. R. A. 156, on law governing validity of marriage; in 38 L. R. A. (N. S.) 961, on power, in absence of statute, to decree alimony or maintenance, independently of proceedings for divorce.]

(c) A court of chancery has full power to decide all questions of law and fact which arise in that court, and the reference of such questions to courts of law or to juries is at the discretion of the court.—*Hilleary v. Crow*, 1 H. & J. 542. [Cited and annotated in 31 L. R. A. 751, 753, on injunction against judgments for defenses existing prior to rendition; in 7 L. R. A. (N. S.) 450, on injunction against collecting purchase money where title defective.]

### § 378.—Issues proper for jury.

(a) In consolidated suits by a mortgagor for an accounting and a release of the mort-



gage because paid, and to annul a deed purporting to have been executed by the mortgagor, the issues involving the amount due on the mortgage and the validity of the deed are not such issues as must be submitted to a jury under Code, art. 16, § 31.—*Wilmer v. Placide*, 118 Md. 305, 84 Atl. 491.

(b) The chancellor, upon an allegation of fraud in obtaining a deed, is not bound to send the facts to be tried by a jury, if he can determine the matter himself, to his own satisfaction, upon the evidence.—*Stewart v. Iglehart*, 7 G. & J. 132, 28 Am. Dec. 202.

(c) The chancellor, by act 1801, c. 18, co-operating with the law of the United States, had power to direct issues in a summary way to inquire whether a debtor, who applied to him for relief under the insolvent law, was liable to be made a bankrupt under the law of the United States.—*Clarke v. Ray*, 1 H. & J. 318. (See Code, art. 47, §§ 1, et seq.) [Cited and annotated in 45 L. R. A. 189, on relation of bankrupt law to insolvent proceedings under state laws.]

### § 379.—Proceedings for award and framing of issues.

(a) Where all the issues in a suit in equity should not be submitted to the jury, a motion to submit the issues was properly refused, though one or more of the issues should be so submitted.—*Wilmer v. Placide*, 118 Md. 305, 84 Atl. 491.

(b) A court of equity, in framing issues of fact to be tried by a jury, should so condense them as to present some proposition which the jury can neither affirm nor deny without finding all the other facts necessary to a conclusion.—*Barth v. Rosenfeld*, 36 Md. 604.

(c) The following issues were framed and sent from the Orphans' Court to the Superior Court without objection from defendant: First, whether defendant is indebted as alleged; and, second, if indebted, to what amount? Before the trial of these issues defendant filed a plea of the statute of limitations. *Held*, that the plea, being a qualification of the issues submitted, was properly stricken out, since neither party could, by plea or otherwise, change or quali-

fy the issues as submitted.—*Cook v. Carr*, 20 Md. 403, 412.

(d) The Orphans' Court cannot revoke or remodel issues after they have been transmitted.—*Cook v. Carr*, 20 Md. 403, 412.

(e) The same issue will not be presented to the jury at the instance of several different parties, unless they are joined as plaintiffs or defendants, so that there shall be but one verdict.—*Pegg v. Warford*, 4 Md. 385. [Cited and annotated in 21 L. R. A. 680, 682, on conclusiveness of probate as res judicata.]

### § 380.—Proceedings at trial.

(a) The court of law has nothing to do with the petition and answer upon which the issues are framed. Its province is simply to submit to the jury the determination of the issues, without reference to the question whether they were properly presented by the proceedings in the Orphans' Court, and any evidence legally admissible and pertinent to the issues should be submitted to the jury.—*Cooke v. Cooke*, 29 Md. 538.

### § 381.—Verdict and findings.

#### Annotation.

Permitting chancery to set aside a verdict upon an issue directed by it to a law court, as an unconstitutional infringement upon the powers of the latter.—8 L. R. A. (N. S.) 866, note.

(a) An issue was sent to a jury to determine whether a will was signed by the witnesses in the presence of the testatrix, as required by statute. The court directed the jury that "if, from the evidence, they were of opinion that the situation of the witnesses and of the testatrix, at the time of the attestation, was such that the testatrix might have seen the witnesses subscribe as such, the execution of the will was proper and legal, although the testatrix did not actually see the witnesses subscribe their names; otherwise not,"—and afterwards added, in explanation, "that it was necessary the testatrix, at the time of attesting the said will by the witnesses, might, without changing her position, have seen them sign the same." The jury found as follows: "We, the jurors, are of opinion that the testatrix might have seen the witnesses sign her will, from the room wherein she lay, provided she had

made such an exertion, and therefore, agreeably to the direction, find a verdict for the plaintiff." *Held*, that the verdict was not agreeable to the direction of the court.—*Russell v. Falls*, 3 H. & McH. 457, 1 Am. Dec. 380.

### § 382.—New trial.

### § 383. Direction of action at law.

(a) It is the course of the court of chancery, in ordinary applications for a decree for dower, and rents and profits, when the seisin of the husband is denied, to send the parties to law to litigate the legal question, and in the meantime to retain the bill.—*Sellman v. Bowen*, 8 G. & J. 50, 29 Am. Dec. 524.

### § 384. Conduct of hearing in general.

(a) Where all the facts charged in the bill were admitted to be true by the pleadings, no replication was filed, and the cause set down for hearing, by agreement, on the proceedings in the case, it was *held* unnecessary to determine the nature of the defense, whether a plea, answer, or partly both, as, the cause having been set down for hearing, the question was upon its legal sufficiency to bar the plaintiff's claim.—*Tiernan v. Poor*, 1 G. & J. 216, 19 Am. Dec. 225.

(b) Where new parties defendant are added in a cause after the testimony is taken, the cause should be heard on bill and answer as to such new defendants.—*Smith v. Baldwin*, 4 H. & J. 331.

### § 385. Reception of evidence.

*Cross-Reference.*

On reference, see post, § 404.

(a) Where one of the two complainants in a suit to set aside a purchase of stock of a manufacturing company for fraudulent representations was not called to testify until after defendants had concluded their testimony, and after his co-complainant had testified in rebuttal, the court properly refused to receive the testimony, though equity should not draw fine distinctions between evidence that is properly in chief and that properly in rebuttal.—*Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983.

(b) Where witnesses are examined in open court, under Code 1904, art. 16, § 243, the

testimony, if incompetent and irrelevant, should not be received without restriction, but the court may by special rule or general order direct that, when a question propounded to any witness is objected to and ruled inadmissible, the answer need not be written down or included in the record except at the request and expense of the party propounding the same.—*Schnepfe v. Schnepfe*, 108 Md. 139, 69 Atl. 829. (See Code 1911, art. 16, § 261.)

(c) In a suit to set aside a deed, the court, having decided to set it aside, gave the complainant leave to amend by making the executrix and trustee under the will of the grantor, his father, a party as such executrix, she being the grantee in the deed, and already a party in her own right. After the executrix was served, the court refused to hear further testimony, or delay the passage of the decree. *Held*, that, as the grantee had taken much testimony in her own behalf, and needed none to sustain her title as executrix, if the deed was set aside, the order of the court was a proper one.—*Canton v. McGraw*, 67 Md. 583, 11 Atl. 287.

### § 386. Arguments of counsel and briefs.

### § 387. Submission of cause.

(a) Where the facts charged in a bill were all admitted to be true by the pleadings, and there was no replication, and the parties agreed that the chancellor might take the papers and decide the case, the case is thereby set down for hearing, whether the proceedings by defendant be regarded as a plea or answer, and the question submitted is on their legal sufficiency to bar plaintiff's claim.—*Tiernan v. Poor*, 1 G. & J. 216, 19 Am. Dec. 225.

(b) When a cause is "submitted," it is meant that the parties leave it to the chancellor to determine without argument.—*Ridgely v. Carey*, 4 H. & McH. 167.

### § 388. Dismissal at final hearing.

*Cross-References.*

Dismissal before hearing, see ante, §§ 359-368.

Parol evidence to rebut presumption as to finality of dismissal, see "Judgment," § 951.

(a) A. conveyed land to B. in consideration of a promise of support for life, and of the

payment by B. of certain debts due to third parties from A. The consideration named in the deed was \$5,000. *Held*, in a suit in equity brought by A. to compel a sale of the land for the payment of \$5,000, which A. alleged to be unpaid, that, it clearly appearing what the real consideration was between the parties, the bill should be dismissed without prejudice to A.'s right to file another bill to have the trusts upon which B. held the land declared.—*Benscoter v. Green*, 60 Md. 327.

### § 389. Decision.

#### Cross-Reference.

Verdict as affecting decision, see ante, § 381.

### § 390. Objections and exceptions.

#### Cross-References.

Necessity of exceptions for purpose of review, see "Appeal and Error," § 250.

Necessity of motion for new trial for purpose of review, see "Appeal and Error," § 283.

### § 391. Waiver and correction of irregularities and errors.

### § 392. Rehearing.

#### Cross-References.

On setting aside interlocutory decree, see post, § 421.

In probate proceedings and suits relating to wills or probate, see "Wills," § 337.

In suits for divorce, see "Divorce," § 151.

In suits for infringement of patents, see "Patents," § 315.

In suits for partition, see "Partition," § 72.

New trial in equity actions under codes and practice acts, see "New Trial."

Suit for new trial of action at law, see "New Trial," § 167.

(a) Under Code 1904, art. 16, § 177, providing that all final decrees shall be considered as enrolled after 30 days from their date, decrees are under the control of the court until enrollment, and may be revised by a petition for a rehearing filed in the same proceeding, if the errors are not merely clerical or accidental; an original bill for that purpose only being proper after enrollment.—*George Long Contracting Co. v. Albert*, 116 Md. 111, 81 Atl. 265. (See Code 1911, art. 16, § 186, Rule 50.)

(b) Judgment having been rendered more than 30 days (and so deemed enrolled, under Code 1888, art. 16, §§ 164, 166), the court granted a rehearing, on which two reargu-

ments were had and no objection raised. *Held*, that such silence waived the objection, and precluded review in the Court of Appeals.—*Cherbonnier v. Goodwin*, 79 Md. 55, 28 Atl. 894; *Blandin v. Same*, Id.; *Emory v. Same*, Id. (See Code 1911, art. 16, §§ 186, 188, Rules 50, 52.)

(c) Where the right of appeal from an order duly entered, after a hearing, has been lost by delay, a rehearing on the subject-matter of such order cannot be obtained by a petition for its revocation, on the ground that it was improvidently and irregularly passed.—*Megary v. Shipley*, 72 Md. 33, 19 Atl. 151.

(d) The court is at liberty to look into all the circumstances of the case, and if, upon full consideration of them all, it comes to the conclusion that opening the decree and rehearing the cause would be productive of mischief to innocent parties, or is for any other reason inexpedient, it may refuse to do so, though the facts, if admitted, would vary the decree.—*Hughes v. Jones*, 2 Md. Ch. 289. [Cited and annotated in 30 L. R. A. (N. S.) 1032, 1039, on bill of review for newly discovered evidence.]

(e) A case had been pending for nearly 11 years, a great amount of testimony had been taken, and at great expense, and with the consent of both parties had been submitted to the court after full argument by counsel, and the witness whose newly discovered testimony was sought to be introduced lived in the family of the uncle of the party making the application from and before 1815 till 1821, and did not remove from the county where the cause originated until long after its pendency, and had since resided in Baltimore, and the petition did not state that by the use of reasonable diligence the knowledge of the new matter might not have been acquired in time to be used when the decree passed. *Held*, that, under these circumstances, it would be contrary to settled rules of the court upon this subject to grant the application for a rehearing.—*Hughes v. Jones*, 2 Md. Ch. 289. [Cited and annotated, see supra.]

(f) The regular mode for presenting an application for rehearing is by petition.—

*Hughes v. Jones*, 2 Md. Ch. 289. [Cited and annotated, see *supra*.]

(g) A court of chancery has power to grant applications to rehear causes and for liberty to file supplemental bills in the nature of bills of review upon the ground of new matter discovered since the decree.—*Hughes v. Jones*, 2 Md. Ch. 289. [Cited and annotated, see *supra*.]

(h) An application for a rehearing, made after the term at which a final decree is rendered, is too late.—*Pfeltz v. Pfeltz*, 1 Md. Ch. 455. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1032, 1038, on bill of review for newly discovered evidence.]

(i) Where a decree is obtained and enrolled, it cannot be reheard on petition.—*Pfeltz v. Pfeltz*, 1 Md. Ch. 455. [Cited and annotated, see *supra*.]

(j) Where a claim has been submitted to and adjudicated upon by the court, and finally rejected through the negligence of the owner, he will not be allowed to reopen the judgment of the court, and ask for and obtain a rehearing upon additional proof; but where no adjudication has been had upon the claim, and the fund for distribution remains in court, equity requires that the new proof should be considered, and, if found sufficient to remove the objection, the claim should be allowed.—*Dixon v. Dixon*, 1 Md. Ch. 271.

(k) On a petition for a rehearing, it is not sufficient to show that injustice has been done; but it must appear that it occurred under circumstances authorizing the court to interfere, that the petitioner has not been guilty of laches, and that the matter on which he relies could not have been obtained by reasonable diligence at the former hearing.—*Walsh v. Smyth*, 3 Bland 9.

(l) Where the term has not passed, and the decree is still under the control of the court, it may be reheard on petition.—*Dawes v. Thomas*, 4 Gill 333.

(m) Where a bill had been dismissed by the court of chancery on evidence taken under an ex parte commission, the defendant not having answered, and the appellate court held that the complainant was not en-

titled to the principal relief prayed by his bill for the want of sufficient averments and proofs thereof, but was entitled to other relief also prayed, the cause was remanded to the court of chancery, with liberty to the complainants to amend their proceedings and to produce further proof, that such relief might be extended to them as justice and equity should require.—*Boyd v. Boyd*, 6 G. & J. 25.

## IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

### Cross-References.

- Reference on plea, see ante, § 174.
- Taking and filing proofs, see ante, § 349.
- Assessor's report in action on guardian's bond, see "Guardian and Ward," § 182.
- Authority in attachment proceedings, see "Attachment," § 70.
- Authority to administer oath as affecting responsibility for perjury, see "Perjury," § 9.
- In creditors' suits, see "Creditors' Suit," § 49.
- In suits for divorce, see "Divorce," §§ 143, 150.
- In suits for infringement of patents, see "Patents," § 322.
- In suits for injunction, see "Injunction," § 131.
- In suits for partition, see "Partition," § 69.
- In suits for specific performance, see "Specific Performance," § 124.
- In suits to enforce mechanics' liens, see "Mechanics' Liens," § 285.
- In suits to foreclose mortgages, see "Mortgages," § 479.
- In suits to redeem from mortgage sales, see "Mortgages," § 619.
- In suits to set aside fraudulent transfers, see "Fraudulent Conveyances," § 307.
- Mandamus to control action of master, see "Mandamus," § 3.
- Necessity of filing opinion on overruling of auditor's report, see "Courts," § 104.
- Practice in federal courts, see "Courts," § 352.
- Reference to take and state account, see "Account," § 20.
- Reference under codes and practice acts, see "Reference."
- Review of decisions relating to reference, see "Appeal and Error," § 198.
- Review of questions of fact, see "Appeal and Error," §§ 1016-1022.
- Taxation of property in hands of officers of the court, see "Taxation," § 87.
- To make judicial sale, see "Judicial Sales," § 4.

### § 393. Appointment, qualification, and tenure.

(a) If a special auditor, who is required by the order appointing him to take an oath for

the faithful performance of the duties of his office, neglects to do so, his proceedings are irregular, and do not furnish the foundation for a decree.—*Walker v. House*, 4 Md. Ch. 39.

#### § 394. Compensation and fees.

*Cross-Reference.*

Fees as items of costs, see "Costs," § 191.

#### § 395. Powers and functions in general.

(a) Where there are no masters attached to the court of chancery, it is competent for an auditor to take testimony, state an account, or frame any statement which may be necessary or proper to enable the court correctly to dispose of any case in which it has the power to grant relief.—*Townshend v. Duncan*, 2 Bland 45.

#### §§ 396-400. (See Analysis.)

#### § 401. Questions and matters proper for reference.

(a) Where a proceeding in equity to enforce a vendor's lien is ex parte, upon default of defendant's appearance, the cause is not ready for a final decree, but should be referred to an auditor, and an account stated between the parties, more especially where the complainant sets out in the bill the defendant's refusal to come to a settlement because there were unsettled accounts between them, and in the prayer of the bill prays for an account.—*Bratt v. Bratt's Adm'x*, 21 Md. 578.

#### § 402. Application for reference and proceedings thereon.

#### § 403. Order of reference.

#### § 404. Evidence on reference.

*Cross-Reference.*

Hearing, see post, § 405.

(a) Code 1860, art. 16, § 144, gives an examiner in equity the right to have a clerk write down the testimony. *Held*, that this provision of the Code is still in force, and has not been affected by any equity rule.—*Canton v. McGraw*, 67 Md. 583, 11 Atl. 287. (See Code 1911, art. 16, § 266.)

(b) Where a witness who has been examined before the auditor applied to be allowed to correct his testimony, the court, if satisfied on a preliminary examination of the witness that there is a real mistake, and that

there is no collusion, may permit him to appear in open court and there correct his previous testimony by answering over a particular interrogatory propounded by the direction of the court.—*Barnum v. Barnum*, 42 Md. 251.

#### § 405. Hearing.

*Cross-References.*

Evidence on reference, see ante, § 404.

Master's summons, see ante, § 119.

Reconsideration, see post, § 412.

Right of guardian ad litem to notice of proceedings, see "Infants," § 84.

(a) As a general rule, no claim should be stated or noticed by the auditor, unless filed in the cause in which the fund is to be distributed; but when he is referred to claims filed in another cause by some sufficient designation, and is instructed to state them, there can be no reason why he should not do it, as it would prevent the necessity of shifting claims or the vouchers of claims from one cause to another, and thereby obviate much inconvenience.—*Winn v. Albert*, 2 Md. Ch. 169.

#### §§ 406-409. Report.

*Cross-Reference.*

Implied repeal of act relating to report by adoption of Code, see "Statutes," § 167.

(a) The report of the auditor may be in exact conformity with a preceding order, yet it is competent for the court of chancery to reject the report, and order another to be made upon different principles, or adopt any other mode of disposing of the case which justice may require.—*Peyton v. Ayres*, 2 Md. Ch. 64. [Cited and annotated in 37 L. R. A. 747, on proceedings to enforce mortgage for part of debt.]

(b) An auditor is a mere ministerial officer of the court, and, though he has power to administer an oath, his decisions have no validity until confirmed by the court.—*Dorsey v. Hammond*, 1 Bland 463.

(c) Accounts stated by the auditor which have not been affirmed by the chancellor, are no evidence of the truth of the facts assumed by the auditor in stating them.—*Diffenderffer v. Winder*, 3 G. & J. 311.

### § 410. Objections and exceptions to report and hearing thereof.

#### Cross-References.

Reopening case by master, see ante, § 405.  
Right to jury trial on exceptions to auditor's report, see "Jury," § 13.

(a) Exceptions of a mortgagor to an auditor's account of the amount due the mortgagee savings association, that the account is not stated in accordance with Robertson's Case, 10 Md. 397, 69 Am. Dec. 145, or with any other decision of the Court of Appeals, or in accordance with the terms and conditions of the mortgage, as required by the Court of Appeals, are too general and vague to be considered.—*O'Sullivan v. Traders' & Mechanics' Permanent Sav. Ass'n*, 107 Md. 55, 68 Atl. 349.

(b) An exception to an auditor's report "for other and various reasons apparent on the face of said report" is too general to authorize the appellate court to review any objection raised under it.—*Young v. Omo-hundro*, 69 Md. 424, 16 Atl. 120.

(c) Where a bill in equity does not allege a certain claim against a defendant, but such claim appears in proof, he may, by way of exception to the auditor's report, rely upon the act of limitation; and it is no objection to the exception that it was not taken in the answer.—*Berry v. Pierson*, 1 Gill 234.

(d) A mistake in the calculation of interest in the auditor's report ought, according to the act of 1825, to be pointed out to the court by exception.—*Lyles v. Hatton*, 6 G. & J. 122. (See Code, art. 5, § 36.)

(e) A complainant filed exceptions to an answer, and the court below, without deciding upon it, referred the case to an auditor, who stated an account, rejecting a credit claimed by the defendant's answer. To this exceptions were also filed and overruled, and the account ratified. Upon appeal, it was held that the court below had acted prematurely, and that, after the exceptions to the answer had been decided upon, the case should have been set down for argument on bill and answer, or a replication to the answers put in, and an opportunity afforded to the respondent to make out his case by proof.—*Egerton v. Reilly*, 1 G. & J. 385.

(f) Exceptions to a master's report must show definitely the part of the report excepted to, or they will be disregarded as too general.—*Scrivener v. Scrivener*, 1 H. & J. 743.

### § 411. Disposition of report in general.

#### Cross-Reference.

Hearing, see ante, § 410.

### § 412. Recommittal.

#### Cross-Reference.

Exceptions to second report, see ante, § 410.

(a) A court of equity, on rejecting an account of mesne profits stated by the auditor, and returning the case to him for restatement, may properly allow additional proofs to be taken, notwithstanding a restriction in the decree as to time.—*Worthington v. Hiss*, 70 Md. 172, 16 Atl. 534.

(b) While equity will not open an auditor's account at the instance of a party in default, it will, where the accounts have to be remanded to the auditor for a restatement for other causes, permit such party to produce his evidence to entitle him to a credit for which he claims an allowance.—*Barnum v. Barnum*, 42 Md. 251.

(c) Where funds are in court for distribution among creditors, and certain claims are rejected by the auditor for want of sufficient proof to establish the same, the owners of such claims may, before the confirmation of the auditor's report, on petitions stating facts sufficient to entitle them to benefit of proof since taken, be entitled to another hearing on which to furnish the full proof of their claims.—*Dixon v. Dixon*, 1 Md. Ch. 271.

### § 413. Confirmation of report.

(a) A decretal order, ratifying an auditor's report and account after the term at which such order has been made and also a succeeding term have expired, cannot be revised and modified on petition suggesting fraud and malpractice, not in reference to obtaining the order of ratification, but in regard to the claim allowed by the order.—*Thruston v. Devecmon*, 30 Md. 210.

(b) When funds are in the court of chancery for distribution among creditors, and the auditor reports that certain claims have not been proved, or objections for want of

proof made to their allowance by parties interested, the case is again referred to the auditor with directions to state a final account, from which all claims then not sufficiently proved are to be excluded, and leave is given to supply the proof upon such terms as to notices as may be deemed reasonable. Upon the coming in of the report of the auditor, made pursuant to the order, and after the usual time given for filing exceptions, the report may be submitted for ratification, and, when ratified, all parties are concluded, and the litigation is terminated.—*Dixon v. Dixon*, 1 Md. Ch. 271.

#### § 414. Setting aside report.

##### *Cross-Reference.*

Consent as curing defects in general, see "Stipulations," § 14.

(a) Where funds are in the court of chancery, and a party petitions to have them applied in discharge of his claim, though the papers on which the claim is founded are prima facie evidence, the opposite party may demand proof, and may file exceptions to the report of the auditor upon such claim, and, even if it has been confirmed upon petition, the court will direct it to be opened and require legal proof.—*Maccubbin v. Cromwell*, 2 H. & G. 443.

### X. DECREE AND ENFORCEMENT THEREOF.

##### *Cross-References.*

Decision on demurrer, see ante, §§ 241-247.

Decision on plea, see ante, § 176.

On bill of review, see post, § 465.

Application of doctrine of lis pendens, see "Lis Pendens."

Conclusiveness, see "Judgment," § 645.

Entry of decree on Sunday, see "Sunday," § 30.

Establishment of title to land after loss or destruction of record, see "Records," § 18.

Lien of decree, see "Judgment," § 764.

Presumption in support of decree, see "Evidence," § 82.

Under codes and practice acts, see "Judgment."

##### *In particular proceedings.*

See "Cancellation of Instruments," §§ 55-60; "Creditors' Suit," §§ 51, 53-55; "Divorce," §§ 152-174; "Injunction," §§ 208-212; "Interpleader," § 33; "Partition," §§ 73, 95; "Quieting Title," § 52; "Reformation of Instruments," § 48; "Specific Performance," §§ 131, 132.

By married woman to become sole trader, see "Husband and Wife," § 95.

By or against husband or wife, see "Husband and Wife," §§ 238-240.

By owner of property taken for public use, see "Eminent Domain," § 308.

For accounting, see "Account," § 19.

For dissolution and accounting by partnership, see "Partnership," §§ 330, 344.

For dissolution or partition of community, see "Husband and Wife," § 272.

For establishment and protection of easements, see "Easements," § 61.

For infringement of copyright, see "Copyrights," § 89.

For infringement of patent, see "Patents," §§ 321, 323.

For infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 100.

For reformation of instruments, see "Reformation of Instruments," § 47.

For registration of title, see "Records," § 9.

For relief against judgment, see "Judgment," § 466.

For subrogation, see "Subrogation," § 41.

For unfair competition in trade, see "Trade-Marks and Trade-Names," § 100.

Probate proceedings, see "Courts," § 202.

To abate or restrain liquor nuisance, see "Intoxicating Liquors," § 278.

To abate or restrain nuisances in general, see "Nuisance," §§ 36, 37.

To determine right to custody of children, see "Parent and Child," § 2.

To enforce charitable trust, see "Charities," § 50.

To enforce liability of stockholders, see "Corporations," §§ 274, 275.

To enforce mechanic's lien, see "Mechanics' Liens," § 291.

To enforce testamentary charge, see "Wills," § 826.

To enforce vendor's lien, see "Vendor and Purchaser," § 285.

To establish and enforce trust, see "Trusts," § 375.

To expunge claim against bankrupt's estate, see "Bankruptcy," § 339.

To foreclose mortgage, see "Building and Loan Associations," § 39; "Chattel Mortgages," § 283; "Mortgages," §§ 483-500.

To redeem from mortgage sale, see "Mortgages," § 621.

To remove disabilities of coverture, see "Husband and Wife," § 66.

To restrain collection of tax, see "Taxation," § 611.

To set aside fraudulent transfers, see "Fraudulent Conveyances," §§ 312-315.

#### § 415. Nature and essentials in general.

##### *Cross-Reference.*

Final decree, see post, § 422.

(a) Where a pro forma decree disallowed a certain claim, and claimant did not sign the agreement except as solicitor for another party, but had himself, by answer previously filed, consented to submit the question he was

interested in to the court, he cannot object to the decree, provided the part of it affecting him was right, his appeal having been taken in ample time.—*Owens v. Barroll*, 88 Md. 204, 40 Atl. 880.

(b) Where a cause has been heard in the court below on a motion to dissolve an injunction, and not upon final hearing, it is error to pass a final decree.—*Huston v. Ditto*, 20 Md. 305. [Cited and annotated in 31 L. R. A. 772, on injunction against judgments for defenses existing prior to rendition; in 32 L. R. A. 324, 326, on equitable jurisdiction as to injunctions against judgments.]

(c) A bill charged an executor and trustee with neglect to pay rents and profits, failure to invest a legacy, and a refusal to deliver to plaintiff a certain note claimed as a gift from the testator. The bill, so far as it sought recovery for the note, was dismissed in 1851, and in 1852 the case was sent to the auditor for an account as to the other matters. *Held*, that the court could not order an amendment, so as to present the question of the applicability of the note as assets; the dismissal of 1851 being a final adjudication as to the note.—*Hitch v. Davis*, 3 Md. Ch. 266.

(d) A decree may refer to the bill for a description of the lands on which it is intended to operate.—*Jones v. Belt*, 2 Gill 106.

(e) Objections to a decree on account of a variance between the allegations of the bill and the proofs in the cause cannot be considered on appeal, unless exceptions have been filed, as required by act 1832, c. 302, § 5.—*Harwood v. Jones*, 10 G. & J. 404, 32 Am. Dec. 180; *Hardesty v. Jones*, *Id.*; *Jones v. Hardesty*, *Id.* (See Code, art. 5, § 36.)

#### § 416. Decree on consent.

##### Cross-References.

Right to review consent decree, see post, § 443.

In actions for divorce, see "Divorce," §§ 160, 161.

#### § 417. Decree pro confesso.

##### Cross-References.

Decree pro confesso on failure to verify plea, see ante, § 314.

Entry on overruling plea, see ante, § 175.  
In suits for divorce, see "Divorce," §§ 160, 161.

Proof of cause of action to support judgment on failure to answer, see "Judgment," § 126.

#### § 418.—Requisites and validity.

(a) Where defendants appear by counsel in an equity case in which the bill is taken pro confesso, they are charged with knowledge that the law requires them to answer the bill, and that plaintiffs will proceed to final decree on default of answer.—*Bailey v. Jones*, 107 Md. 405, 68 Atl. 881.

(b) Under Code 1888, art. 16, § 127, providing that in default of appearance the bill may be taken pro confesso, no notice thereof need be served on defendants.—*Harrison v. Morton*, 87 Md. 671, 40 Atl. 897. (See Code 1911, art. 16, § 149, Rule 12.)

(c) A decree taking a bill pro confesso is erroneous when passed on an order of publication directing publication for three weeks only, instead of one month, as required by act 1842, c. 229.—*Central Bank v. Copeland*, 18 Md. 305. (See Code, art. 16, § 135.)

(d) An interlocutory order, under act 1820, c. 161, against a defaulting defendant, does not preclude him from the benefit of having testimony which he may produce considered before final decree.—*Benson v. Ketchum*, 14 Md. 331. (See Code, art. 16, §§ 149, 152.)

(e) Where defendant appears, but does not answer, notice of the order for taking the bill pro confesso must be served on him before final decree.—*Wampler v. Wolfinger*, 13 Md. 337.

(f) Where a bill was filed to enjoin proceedings at law on several bonds given for the purchase money of land, and held by several assignees thereof on the ground of want of consideration originally, and a part of the bonds were sustained on the answers of defendants interested in them, it was held that, as all the bonds were founded on the same consideration, all must be sustained, and the bill must be dismissed as to all the defendants, though some of them had failed to answer on publication of notice; they being nonresidents.—*Walsh v. Smyth*, 3 Bland 9.

(g) Where a part only of the defendants have answered, if their answers show a good defense to those who have not answered, as



well as themselves, and it is sustained, the bill must be dismissed as to all the defendants, although it stands in a situation to be taken for confessed as to those who have not answered.—*Walsh v. Smyth*, 3 Bland 9.

(h) Where defendant appeared, but failed to answer, it was ruled that, if no answer in six months, the bill might be taken as confessed.—*Chew v. Moore*, 2 Bland 451, note.

(i) Where defendant put in two insufficient answers and then failed to answer further, and complainant had run out all the process of contempt, the bill might be taken pro confesso.—*Parron v. Brannock*, 2 Bland 450, note.

(j) A plaintiff may in some cases have relief against a part of the defendants only; but, where the answer of one defendant goes to defeat the whole bill, relief will not be granted against the other defendants, though the bill is taken pro confesso as to them.—*Lingan v. Henderson*, 1 Bland 236.

(k) There can be no final decree until all the defendants have answered, or the case is in a situation to have the bill taken pro confesso against those defendants who have not answered.—*Hoye v. Penn*, 1 Bland 28.

(l) Act 1820, c. 161, § 3, providing that defendant may appear and answer between the time of entering the interlocutory decree for an ex parte commission because of his refusal to appear and answer, and the final decree, contemplated a reasonable length of time between the times of entering them, and is not intended to give complainant opportunity to conclude the rights of defendant by obtaining a final decree on the same day the interlocutory decree is recorded.—*Oliver's Ex'rs v. Palmer*, 11 G. & J. 426. (See Code, art. 16, § 152.)

(m) The recital in a decree that an order to take a bill pro confesso has been duly served is sufficient evidence of the fact before the appellate court, in the absence of all direct proof to the contrary.—*Fitzhugh v. McPherson*, 9 G. & J. 51.

(n) An order to take a bill pro confesso, unless answered before a day fixed, cannot be anticipated, and a decree pro confesso passed before the day, although fixed be-

yond the period allowed by act 1799, c. 79, § 2.—*Fitzhugh v. McPherson*, 9 G. & J. 51. (See Code, art. 16, § 152.)

(o) Under act 1820, c. 161, § 1, the chancellor is not authorized to take a bill pro confesso, and entirely disregard the testimony which the interlocutory order, directed in that act, requires to be taken under an ex parte commission, to support the allegations of the bill. The final decree must be sanctioned by the evidence taken under the commission.—*Purviance v. Barton*, 2 G. & J. 311. (See Code, art. 16, § 149, Rule 12.)

### § 419.—Opening or setting aside.

#### Cross-References.

In proceedings for registration of title to land, see "Records," § 9.

In suit for accounting, see "Account," § 25.

(a) A decree pro confesso was filed prior to the time prescribed by the court rules. Defendants, who had appeared by counsel, had actual notice thereof before any proceedings were taken thereunder. The testimony was taken on notice to defendants and filed, and remained in court, subject to exceptions, until, defendants having failed to make any defense, final decree was passed. Held, that, as the decree pro confesso did not prevent defendants from coming in and asserting their defense, the decree should not be vacated because of such irregularity, no substantial injury therefrom being claimed.—*Bailey v. Jones*, 107 Md. 405, 68 Atl. 881.

(b) Where defendant has been permitted to answer a bill after an order pro confesso has been taken, he is not precluded by reason of such order from relying on the statute of limitations as a defense.—*Belt v. Bowie*, 65 Md. 350, 4 Atl. 295.

(c) An interlocutory decree for nonappearance after summons was obtained against defendant, and the case was proceeded with ex parte to a final decree. More than three months after such final decree, and after execution had been issued thereon, defendant filed a petition to vacate the decree. There was no charge of fraud or irregularity in obtaining it, but the sole ground of the application was surprise to defendants by reason of the failure or neglect of their solicitor to appear in the case, as he was

authorized and had promised to do. *Held*, that an order vacating the decree was improperly granted.—*Rust v. Lynch*, 54 Md. 636.

(d) Where a decree has been passed by default without a hearing on the merits, the court may, on petition, without a bill of review or an original bill for fraud, in the exercise of a sound discretion, vacate the enrollment in order to let in a meritorious defense.—*First Nat. Bank v. Eccleston*, 48 Md. 145.

(e) Where a decree has been passed by default, without a hearing upon the merits, a court of equity has power, in the exercise of a sound discretion, to vacate the enrollment in order to let in a meritorious defense; and this may be done upon petition, without a bill of review or an original bill for fraud. So *held* where a nonresident, a wife, after the death of her husband, sought to have a pro confesso decree for the sale of land under a deed of trust executed by them vacated, on the ground that she had signed the deed under duress of his threats.—*First Nat. Bank v. Eccleston*, 48 Md. 145.

(f) Where the plaintiff, in a decree obtained on the failure of the defendant to answer, admitted that the amount of the decree was for too large a sum, and it did not appear that he had lost any evidence to sustain his case, it was *held*, on a bill filed by the defendant, alleging on oath that he had a good defense to the whole claim on the merits, that the complainant in the latter bill might come in and answer the first on payment of costs.—*Burch v. Scott*, 1 Bland 112. (Compare *Burch v. Scott*, 1 G. & J. 393.)

#### § 420.—Effect.

#### § 421. Interlocutory decree.

##### Cross-References.

See post, § 230.

In suit for accounting, see "Account," § 19.

(a) A decree in an interpleader suit, appointing a trustee to receive a fund and referring the claims upon such fund to an auditor for determination, is necessarily an interlocutory decree, subject to revision and alteration, and any phraseology which tends

to give it the effect of a final decree settling the rights of the parties is to be rejected.—*Owings v. Rhodes*, 65 Md. 408, 9 Atl. 903.

(b) Where a decree on a creditors' bill is rendered by agreement of the parties, on bill and answer, decreeing a sale of the property, and in effect reserving the equities of the parties in the distribution of the proceeds for some future decree of the court, such decree is not final and conclusive as to the rights of the parties to the proceeds, but such rights are open for adjudication on an appeal from the decree ratifying the auditor's account distributing the proceeds of sale.—*Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

#### § 422. Final decree.

##### Cross-References.

See ante, § 421.

Nature and essentials of decree in general, see ante, § 415.

In actions for accounting, see "Account," § 22.

(a) Code 1888, art. 16, § 223, requiring evidence to remain in court 10 days, subject to exceptions, before the hearing of the cause, does not apply where, after hearing and argument, a case is remanded, for formal proof of plaintiff's claims, to the examiner before whom the parties appeared, and defendants did not desire to take further evidence; and hence a decree may be entered on the report of the examiner made the day after the remanding of the case and the making of such proof.—*Chatterton v. Mason*, 86 Md. 236, 37 Atl. 960. (See Code 1911, art. 16, § 259, Rule 43.)

(b) Where a cause has been heard in the court below on a motion to dissolve an injunction, and not upon final hearing, it is error to pass a final decree.—*Huston v. Ditto*, 20 Md. 305. [Cited and annotated in 31 L. R. A. 772, on injunction against judgments for defenses existing prior to rendition; in 32 L. R. A. 324, 326, on equitable jurisdiction as to injunctions against judgments.]

#### § 423. Nature and extent of relief in general.

##### Cross-References.

See post, § 427.

Alternative legal relief, see ante, § 41.

Complete relief, see ante, § 39.

Conformity to pleadings and proofs, see post, § 427.

(a) Where, in an equity suit against several defendants, complainant's right to relief is not questioned, and the only question is as to the adjustment of the liabilities as between the defendants themselves, in which complainant is in no wise interested, the court may grant relief to complainant, reserving the other matters for further proceedings and orders.—*City of Baltimore v. Ketchum*, 57 Md. 23.

(b) A decree in equity should determine the rights and liabilities of all the parties to the cause. Hence, upon a bill to foreclose a mortgage, executed by H. and wife and B. and wife, all of whom had been made defendants, a decree directing the sale of the interest of H. alone is erroneous.—*Hurt v. Crane*, 36 Md. 29.

(c) Where the relief required by a bill is the sale or delivery of property, with rents and profits during its unlawful detention, the sale or delivery should be first decreed, and afterwards an account of the rents and profits.—*Neale v. Hagthorpe*, 3 Bland 551.

(d) In a proceeding against a partnership for an accounting, the difficulties to be encountered in stating the accounts are no grounds why an accounting ought not to be decreed, where the court perceives that it is necessary to the rights of the parties.—*Bevans v. Sullivan*, 4 Gill 383.

(e) A decree is erroneous which, in opposition to the prayer of the bill, directs payment of the proceeds of an estate bequeathed in trust for the sole and separate use of a wife to be made to the husband and wife, although both are complainants.—*Clagett v. Hall*, 9 G. & J. 80.

#### § 424. Incidental or alternative relief.

##### Cross-References.

Retention of jurisdiction, once acquired, to give relief, see ante, §§ 38-41.

In suits for injunction, see "Injunction," § 194.

In suits for specific performance, see "Specific Performance," §§ 127, 128.

In suits to quiet title, see "Quieting Title," § 50.

#### § 425. Denial of relief.

#### § 426. Relief to defendant.

##### Cross-References.

Necessity of cross-bill, see ante, § 196.

In suits for injunction, see "Injunction," § 199.

In suits for specific performance, see "Specific Performance," § 130.

In suits to foreclose mortgages, see "Mortgages," § 491.

In suits to quiet title, see "Quieting Title," § 51.

(a) In a suit in equity for an accounting concerning certain alleged usurious loans, equity had jurisdiction to grant relief as between codefendants.—*Horner v. Nitsch*, 103 Md. 498, 63 Atl. 1052.

(b) On a bill by the beneficiaries in a will against the trustee, and against the residuary legatees to whom such trustee had, through mistake, wrongfully distributed the trust fund, the court may, while providing for payment to complainants, also give the trustee relief over against his codefendants.—*Hanson v. Worthington*, 12 Md. 418.

(c) It is the constant practice to make a decree between codefendants, founded upon the pleadings and proofs between the plaintiff and defendants, or upon the allegations in the bill, admitted by the defendant, sought to be charged by his codefendant, either expressly or by suffering the bill to be taken as confessed.—*Contee v. Dawson*, 2 Bland 264.

(d) A decree between codefendants, grounded upon the pleadings between the complainants, may be made; but such decree, to be binding, must be founded on, and connected with, the subject-matter in litigation between the complainant and one or more of the defendants.—*Gibson v. McCormick*, 10 G. & J. 65.

#### § 427. Conformity to pleadings and proofs.

##### Cross-References.

Cross-bill as necessary to entitle defendant to relief, see ante, § 196.

Decree pro confesso, see ante, § 418.

Nature and extent of relief in general, see ante, § 423.

Variance between pleadings and proof, see ante, § 327.

(a) A specific prayer held not necessary to warrant equity in establishing a trust.—*Book Depository, etc., of M. E. Church v.*

*Trustees of Church Rooms Fund of M. E. Church*, 117 Md. 86, 83 Atl. 50.

(b) It is the duty of the court to decree according to the proof in the absence of proper exceptions, and hence, in an action by an heir against a former executor to recover certain property alleged to be wrongfully withheld from the estate, the decree properly allowed under the prayer for general relief a certain claim established by the evidence, although the bill made no claim therefor.—*Gerting v. Wells*, 103 Md. 624, 64 Atl. 298, 433.

(c) Complainant sought to restrain the execution of a judgment against him on the ground that an agreement was made between the attorneys of the parties to extend the time for having a bill of exceptions signed, and through the act of the defendant's attorney the judge to whom the bill was sent was induced not to sign it, and prayed for general relief. *Held*, that, under such prayer, complainant was not entitled to have a compulsory writ requiring the judge to seal the bill of exceptions, as such relief to be granted must be specifically prayed in a proper proceeding for that purpose against the judge.—*Ruppertsberger v. Clark*, 53 Md. 402. [Cited and annotated in 30 L. R. A. 562, on injunction against judgment for matters subsequent to rendition; in 31 L. R. A. 36, on negligence as cause for, and as bar to, injunctions against judgments.]

(d) Where a bill merely asks for a decree settling the respective rights of the parties in certain leasehold property (said parties including a minor), and the granting of an injunction until such rights are determined, and, in the meantime, the appointment of a receiver to collect the rents, the court has no jurisdiction, under Code 1860, art. 16, §§ 36, 99, to decree a sale.—*Fox v. Reynolds*, 50 Md. 564. (See Code 1911, art. 16, §§ 57, 137.)

(e) Where a bill in equity filed for relief in one character alleges facts showing the complainant to be entitled to relief in another, relief will be granted according to the allegations and the proof.—*Ridgely v. Bond*, 18 Md. 433.

(f) Where there is a prayer for specific, and also a prayer for general, relief, the court may, if it refuse the specific relief, grant any other appropriate relief under the general prayer.—*Dunnoch v. Dunnoch*, 3 Md. Ch. 140.

(g) Where complainants by their bill asserted their title under the will of a testator, and claimed relief accordingly, and likewise stated every fact necessary to enable them to recover as his personal representatives, it was *held* that, under the prayer for general relief, they were entitled to recover as the personal representatives of the testator, though they might not be so entitled according to the specific prayer, or the precise character in which they present their claims.—*Wootten v. Burch*, 2 Md. Ch. 190.

(h) The only limitation on the power of the court of equity to grant relief under the general prayer is that it must be agreeable to the case made by the bill, and not different from or inconsistent with it.—*Crain v. Barnes*, 1 Md. Ch. 151.

(i) A prayer for general relief is sufficient to support any decree warranted by the allegations of the bill.—*Crain v. Barnes*, 1 Md. Ch. 151.

(j) The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs.—*Ringgold v. Ringgold*, 1 H. & G. 11, 18 Am. Dec. 250; *Berry v. Pierson*, 1 Gill 234; *Hilleary v. Hurdle*, 6 Gill 105; *Lingan v. Henderson*, 1 Bland 236; *Townshend v. Duncan*, 2 Bland 45; *Contee v. Dawson*, 2 Bland 264.

(k) Under a prayer in a bill for general relief, no decree can be made on proofs entirely outside of the pleadings, on a case not made or contemplated by the bill.—*Gibson v. McCormick*, 10 G. & J. 65; *Lingan v. Henderson*, 1 Bland 236.

(l) A decree not justified by the bill cannot be entered even by consent of parties.—*Iglehart v. Armiger*, 1 Bland 519.

(m) A party cannot in his bill claim of his guardian, and at final hearing insist that the answers of other defendants entitle him to abandon the claim against the guardian, and prefer the same claim against co-lega-tees.—*Hilleary v. Hurdle*, 6 Gill 105.

(n) The complainant is not confined to the specific relief asked for in his bill.—*Hilleary v. Hurdle*, 6 Gill 105.

(o) Although there is no formal prayer for an account in a bill, yet, if facts authorizing it are sufficiently charged, the prayer for general relief will entitle complainant to an account, as where facts are charged which make defendant an executor de son tort.—*Bentley v. Cowman*, 6 G. & J. 152.

(p) Where a bill alleged a contract for the conveyance of the whole of a tract of land, which was admitted as to part, but not proved as to the residue, a conveyance of such part was decreed.—*Graham v. Yates*, 6 H. & J. 229.

(q) Where a bill to have a mortgage recorded, which has been omitted to be recorded, prays for other and further relief, a decree that the mortgaged premises be sold is erroneous, as not within the relief sought.—*Chalmers v. Chambers*, 6 H. & J. 29.

#### § 428. Entry and record.

##### Cross-References.

Entry of default judgment, see "Judgment," § 123.

Entry on Sunday, see "Sunday," § 30.

Mandamus to compel entry, see "Mandamus," § 4.

(a) A decree in chancery is not considered as enrolled until the expiration of the term at which it was passed.—*Tabler v. Castle*, 12 Md. 144.

(b) A decree of the court of chancery is not considered as enrolled until the close of the term at which it was passed, which term does not expire until the commencement of the ensuing term.—*Nowland v. Glenn*, 2 Md. Ch. 368.

(c) A decree is to be considered and taken as enrolled, when it is signed by the chancellor and filed by the registrar, and the term during which it was made has elapsed.—*Burch v. Scott*, 1 G. & J. 393. [Cited and annotated in 28 L. R. A. 623, on entry or record necessary to complete judgment or order; in 36 L. R. A. 386, on right to bill of review as dependent upon interest.]

(d) A decree is considered as enrolled after it is signed by the chancellor and filed by the registrar.—*Hollingsworth v. McDonald*, 2 H. & J. 230, 3 Am. Dec. 545. [Cited and

annotated in 30 L. R. A. (N. S.) 1031, 1032, on bill of review for newly discovered evidence.]

#### § 429. Amendment or modification.

##### Cross-References.

Of consent decree, see ante, § 416.

Of interlocutory decree, see ante, § 421.

In suits for divorce, see "Divorce," §§ 163, 164.

In suits to foreclose mortgages, see "Mortgages," § 495.

In suits to modify decrees as ancillary proceeding conferring jurisdiction on federal court, see "Court," § 264.

Of judgment in general, see "Judgment," §§ 294-335.

Of order, see "Motions," § 58.

(a) Where, subsequent to the passage of a decree reforming a policy of fire insurance, and requiring the insurer to pay the insured \$1,500, the amount named in the policy, the defendant moves to strike out so much of the decree as fixes the amount of the loss, and for permission to file an amended and supplemental answer alleging the value of the property to be \$400, the motion will be denied, where the defendant had an opportunity on the trial to offer evidence of overvaluation, but neglected to do so.—*Maryland Home Fire Ins. Co. v. Kimmell*, 89 Md. 437, 43 Atl. 764.

(b) The rule that, after a final decree has been enrolled, the court will not vary it without the consent of the parties, is, it seems, not inexorable, and may be departed from under special circumstances.—*Pfeaff v. Jones*, 50 Md. 263.

(c) Though a bill to enforce payment of unpaid purchase money, and, in default of the payment, praying for a sale of the lands, was filed before all the unpaid purchase-money notes were due, yet a decree for the payment of all the purchase-money notes, and, in default thereof, for a sale of the lands, will not be modified, where the whole money has since become due.—*Mailhouse v. Frazier*, 25 Md. 96.

(d) A final decree cannot be modified after the term.—*Williams v. Banks*, 19 Md. 524.

(e) An application to alter a decree cannot be granted after the term has passed and the application has been enrolled.—*Williams v. Banks*, 19 Md. 524.

(f) In correcting a clerical error in a de-

cree, it is not necessary to pass a new order or decree, but the court may direct the clerk to bring before them the original decree and the enrollment thereof, and in their presence to correct the same.—*Lovejoy v. Irelan*, 19 Md. 56.

(g) Where a decree has been enrolled, the court will not vary it, except on the consent of all parties.—*Lovejoy v. Irelan*, 19 Md. 56.

(h) The court may, after a decree has been enrolled, correct a manifest clerical error, and in making such correction it need not pass a new decree, but may correct the original and the enrollments thereof.—*Lovejoy v. Irelan*, 19 Md. 56.

(i) A final decree does not pass beyond the power of the court to modify or vacate it until after the expiration of the term at which it was entered.—*Burch v. Scott*, 1 Bland 112.

(j) The rule that a decree cannot be altered after it is enrolled, except by a bill of review or by a petition in writing for a rehearing, if the term has not passed, and the decree is still under the court's control, relates only to the decree so far as it acts on the subject of the bill, and does not apply to that part of it which is merely directory as to the mode in which it is to be enforced.—*Dawes v. Thomas*, 4 Gill 333.

### § 430. Opening or vacating.

#### Cross-References.

Bill of review, see post, §§ 442-466.

Consent decree, see ante, § 416.

Decree pro confesso, see ante, § 419.

Interlocutory decree, see ante, § 421.

Recommittal to commissioner, see ante, § 412.

Rehearing, see ante, § 392.

In equitable action for accounting, see "Account," § 25.

In suits for divorce, see "Divorce," §§ 161, 165.

In suits to foreclose mortgages, see "Mortgages," § 496.

Judgments in general, see "Judgment," §§ 336-402.

Registration of title, see "Records," § 9.

(a) The general rule that the remedy to set aside decree after its enrollment is by bill of review or original bill, and not by petition, held not to apply in cases not heard on their merits, where the decree was entered by mistake or surprise, or under circumstances satisfying the court that the

enrollment ought to be discharged and the decree set aside.—*Foxwell v. Foxwell*, 122 Md. 263, 89 Atl. 494.

(b) The rule that a final decree cannot, after enrollment, be called in question by petition, does not apply where a decree in a cause not heard on the merits was entered by mistake or surprise, in which case relief may be by petition.—*Foxwell v. Foxwell*, 118 Md. 471, 84 Atl. 552.

(c) The court has power to vacate an enrolled decree on petition on the ground of fraud, surprise, or mistake, without gross laches on the part of the petitioner.—*Foxwell v. Foxwell*, 118 Md. 471, 84 Atl. 552.

(d) An order ratifying an audit has the effect of a final decree, and cannot be set aside at the motion of a co-trustee, at whose instance it was made, and who had previously examined the audit, where there was no surprise, fraud, or mistake.—*Barroll v. Forman*, 88 Md. 188, 40 Atl. 883.

(e) The annulment of a decree obtained in an ex parte proceeding, not claimed to have been secured by fraud, but the effect of which is a fraud on the rights of interested parties without notice of the hearing, may be had on a petition in the original cause, rather than by original bill.—*Mallery v. Quinn*, 88 Md. 38, 40 Atl. 1079.

(f) After a decree or decretal order has been enrolled, it can only be vacated where fraud in obtaining it is charged by an original bill filed for that purpose.—*United Lines Tel. Co. v. Stevens*, 67 Md. 156, 8 Atl. 908.

(g) A decree cannot be reviewed and vacated upon petition, after enrollment, and after the end of the term at which it was entered; no surprise, mistake, or fraud being alleged.—*Downes v. Friel*, 57 Md. 531; *Trayhern v. National Mechanics' Bank*, Id. 590.

(h) The court, for good cause shown, may revoke interlocutory orders at any time during the progress of the cause, and especially where they were passed on a false and erroneous representation of the facts on which they were based.—*Waring v. Turton*, 44 Md. 535.

(i) A decree in equity requiring money to be paid into court by the complainant, en-

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

joining the defendants from further proceedings at law against the complainant, and requiring them to interplead in answer, is merely interlocutory, and subject to alteration and revision at any time prior to final decree. Such a decree, therefore, if prematurely passed, may with propriety be rescinded.—*Barth v. Rosenfeld*, 36 Md. 604.

(j) Where a cause is submitted on what defendant deems sufficient proof to disclose the merits of his defense, and the court decides adversely, he cannot have the decree reopened, as his only remedy is by appeal.—*Herbert v. Rowles*, 30 Md. 271.

(k) If a complainant in chancery can open a decree, because of its being based upon a claim affected by usury, he must do so within nine months after the decree, or within the same time subsequent to his being informed of the usury.—*Hitch v. Fenby*, 6 Md. 218. [Cited and annotated in 31 L. R. A. 762, on injunction against judgments for defenses existing prior to rendition.]

(l) Seven years after a decree was passed for the sale of certain mortgaged property to pay a balance claimed in the bill to be due on the mortgage debt, which sum was admitted by defendant's answer under oath to be due, defendant filed a bill to open the decree on the ground that it was passed, in pursuance of an agreement, as a mere security for any balance that might be found due on a settlement of mutual dealings, and then charged usury and other objections against the claim. *Held*, that, not having set up the defense of usury at the time the decree was passed, though he was well aware of the facts on which the charge was based, and having offered no satisfactory excuse why he did not make the defense then, he could not be allowed now to open the decree and make such defense.—*Hitch v. Fenby*, 4 Md. Ch. 190. [Cited and annotated in 13 L. R. A. (N. S.) 580, on relief from judgment suffered in reliance on unkept promise; in 30 L. R. A. (N. S.) 1039, on bill of review for newly discovered evidence.]

(m) If a term has intervened after the making of an order, it will be considered as enrolled, and cannot be revoked upon petition, but only on a bill of review for error

appearing on its face, or because of new matter since discovered.—*In re Young's Estate*, 3 Md. Ch. 461.

(n) An order ratifying the auditor's account, distributing the proceeds of sale under a creditors' bill, cannot be vacated on petition, after enrollment, on the ground that the petitioning creditor did not know that any surplus would remain after satisfying the preferred claim of the complainant.—*Stewart v. Beard*, 3 Md. Ch. 227.

(o) While it may be competent for the court to vacate a decree, upon petition, after its enrollment, upon the ground that it was obtained by surprise, yet the general rule is the other way. The remedy is by bill of review.—*Stewart v. Beard*, 3 Md. Ch. 227.

(p) Since a decree is not considered as enrolled until the close of the term at which it was passed, which does not expire until the commencement of the ensuing term, a decree passed during the sittings of a term may be opened and set aside on a bill filed before the close of the term, though not until after the close of the sittings of that term.—*Nowland v. Glenn*, 2 Md. Ch. 368.

(q) A decree or order, after delay and lapse of time, cannot be set aside, except upon very strong grounds.—*Barry v. Barry*, 1 Md. Ch. 20.

(r) The enrollment of a decree in equity obtained by surprise may be vacated either upon a bill or petition.—*Barry v. Barry*, 1 Md. Ch. 20.

(s) A decree confirming an auditor's report, though not a final judgment strictly, is conclusive of the matter which it affirms, and cannot be opened except as in cases of final judgment.—*Contee v. Dawson*, 2 Bland 264.

(t) A petition that a decree might be opened, and that defendants might have leave to amend their answer, will not be complied with where there is no affidavit of the truth of the matters stated in or annexed to the petition.—*Meluy v. Cooper*, 2 Bland 199, note.

(u) A mere application to set aside a decree regularly passed on bill, answer, and proof will not be considered as the appli-

cant should resort to an application for rehearing or a bill for review.—*Meluy v. Cooper*, 2 Bland 199, note.

(v) While orders and decrees are under the control of the court during the term at which they are rendered, and may be altered, revised, or revoked on petition or motion, after the term, a bill of review must be filed, or an original bill for relief.—*Burch v. Scott*, 1 Bland 112. (Compare *Burch v. Scott*, 1 G. & J. 393.)

### § 431. Construction and operation.

#### Cross-References.

Conclusiveness, see "Judgment," § 645.

Suit for construction of decree as ancillary proceeding conferring jurisdiction on federal court, see "Courts," § 264.

(a) The decree in an equity case recited that the cause standing ready for hearing and being considered on the bill and answer, and plaintiff not appearing and no evidence being offered to sustain the allegations of the bill, and the answer denying the equities of the bill, it was decreed that the bill be dismissed at plaintiff's cost. Baltimore City Circuit Court Rule 3 provides that, after the general replication is entered to the answer, either party may apply to have the case set for hearing, and, unless within five days after service of notice of such application leave to take testimony be asked by either party, the case shall be heard upon the pleadings. *Held*, that the decree decided the case on the pleadings, and did not dismiss the bill for plaintiff's default in appearance.—*Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85.

(b) The phrase "claiming by, from, or under them," in an equity decree for the sale of land, which provides that the premises shall be conveyed free from all claim of parties to the cause, or those "claiming, etc.," operates only on those who claim under conveyances made pendente lite.—*Walster v. Riehl*, 38 Md. 211.

(c) An interlocutory decree of a court of equity, referring the matters in dispute to an auditor, with authority to take testimony and state an account, but without settling any right or declaring the principle upon which the account is to be stated, leaves the

whole case open to be disposed of on final hearing.—*Wilhelm v. Caylor*, 32 Md. 151.

(d) A decree in equity for a sale of land, directing the proceeds to be brought into court for distribution, fixes no rights as between parties to the bill.—*Ridgely v. Bond*, 18 Md. 433.

(e) A bill was on its face a creditors' bill for the sale of a deceased's real estate. The answer denied the liability of the estate to be sold for the debts, and did not admit the insufficiency of the personalty, but stated that the real estate was not susceptible of division, and assented to its being sold by a decree, and that the proceeds should be brought into court to be distributed according to the respective titles of the parties. No replication was put in, and no proof offered. It was then agreed that the cause should be submitted on bill and answer, without argument, for a decree, and a decree accordingly passed directing a sale and that the proceeds be brought into court, and the sale was then made, and, by agreement of parties, ratified by the court. It was *held* that, though this decree passed a good title to the purchaser as against the parties to the proceedings, yet it does not conclude the rights of the parties to the fund arising from the proceeds of sale, and such rights are open for adjudication on appeal from the decree ratifying the auditor's account distributing the proceeds.—*Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

### §§ 432-436. Performance and satisfaction.

#### Cross-Reference.

Time for performance of consent judgment, see "Judgment," § 91.

(a) Where, in a chancery suit, it is necessary that a conveyance should be made, and the party who should make it is incompetent to contract, a trustee may be appointed to make the conveyance.—*In re Owings*, 1 Bland 370, 17 Am. Dec. 311.

### § 437. Enforcement in general.

(a) A fieri facias cannot issue on an order in equity directing a defendant to pay money into court to be paid to a complainant, although it may when the order directs that the money shall be paid directly to complainant; and, when it is necessary to issue a



*feri facias*, the complainant must have the order amended so as to make it payable directly to him.—*United Lines Tel. Co. v. Stevens*, 67 Md. 156, 8 Atl. 908.

(b) It is well-established that the High Court of Chancery has power in a proper case to put the purchaser of lands under its decrees in possession by an order passed upon the petition of a purchaser; such an authority being indispensable to the full and complete administration of justice.—*Oliver v. Caton*, 2 Md. Ch. 297.

#### § 438. Execution.

(a) A judicial attachment in execution is not a proper means of enforcing a decree in equity.—*Watkins v. Dorsett*, 1 Bland 530. [Cited and annotated in 63 L. R. A. 691, on equitable remedy to subject choses in action to judgment after return of no property found.]

#### § 439. Attachment against the person.

#### § 440. Sequestration.

(a) The writ of sequestration is in full force, both as a mesne process against a party in contempt and as a judicial writ to enforce the performance of a decree, and in its latter office may be said to be analogous to an execution at law.—*Keighler v. Ward*, 8 Md. 254.

#### § 441. Bill to enforce decree.

(a) Where, upon a cause in equity, a certain sum of money was assigned by the auditor in his report to one of the parties in interest, and the report was confirmed by the chancellor, upon a bill filed by the administrator of such party in interest to enforce the payment of said sum, it was held that the regular and proper course of proceeding was by a petition in the first cause to enforce the order of the chancellor ratifying the report of the auditor, and not by filing an independent bill.—*Frieze v. Glenn*, 2 Md. Ch. 361.

(b) The legal presumption, when three years from the date of the decree have elapsed, is that it has been executed or satisfied; and the appropriate remedy is to revive it by a bill of revivor.—*Franklin v. Franklin*, 1 Md. Ch. 342.

(c) Act 1820, c. 161, relative to the revival of suits, does not apply to cases of abatement after decree.—*Allen v. Burke*, 1 Bland 544. (See Code, art. 16, §§ 1, et seq.)

(d) Where a suit abates after a final decree by the death of either party, it may be revived by a subpoena scire facias.—*Allen v. Burke*, 1 Bland 544.

(e) Where a decree has been passed affecting both real and personal estate, and the cause abates on the death of either party, it may be partially revived by, or against, the heir or personal representative of such party.—*In re Owings*, 1 Bland 370, 17 Am. Dec. 311.

(f) Where a trustee, appointed to make a conveyance under a decree to sell real estate, refused to convey, after ratification of the sale and enrollment of the decree, it is error, on a bill filed by a devisee of the purchaser under such decree, to adjudge the decree erroneous and invalid, since, where a bill is filed to carry a decree into execution, the law of the decree is not examinable, and will be enforced, unless stayed for rehearing, if not enrolled, or, if enrolled, for a bill of review.—*Tomlinson v. McKaig*, 5 Gill 256.

(g) Where one of complainants died after a decree for the sale of property, but before the sale was made, and the sale was afterwards made without a revival of the suit, the sale was set aside.—*Glenn v. Clapp*, 11 G. & J. 1. [Cited and annotated in 21 L. R. A. 50, on purchaser at judicial sale as bona fide purchaser; in 33 L. R. A. (N. S.) 410, on applicability of caveat emptor rule to partition sales.]

### XI. BILL OF REVIEW.

#### Cross-References.

Original bill to set aside decree, see ante, § 430.

Actions and other proceedings to review judgments, see "Judgment," § 335.

Application for leave to file after remand from appellate court, see "Appeal and Error," § 1217.

Authority of court to which causes have been transferred from other court on abolition thereof to vacate judgment entered by latter court, see "Courts," § 52.

By infant, see "Infants," § 110.

Effect on time for taking appeal or other proceeding for review, see "Appeal and Error," § 345.

Equitable relief against judgment, see "Judgment," § 454.

Granting leave to apply to trial court for leave to file bill of review in trial court after decision on appeal, see "Appeal and Error," § 1121.

In accounting by executor or administrator, see "Executors and Administrators," § 510.

In probate courts, see "Courts," § 202.

In suits for divorce, see "Divorce," § 166.

In suits for partition, see "Partition," § 95.

Time of taking appeal, see "Appeal and Error," § 347.

#### § 442. Nature and scope of remedy.

##### Cross-References.

Cross-bill to review decree in former suit, see ante, § 195.

Bill of review as affecting lis pendens, see "Lis Pendens," § 11.

(a) The proper mode of revising and modifying a decretal order ratifying an auditor's report and account, after the term at which such order has been made, and also the succeeding term, have expired, in the absence of surprise or irregularity in obtaining such order, is by bill of review for errors apparent on the face of the proceedings, or for some new matter discovered after the order or decree passed, or by original bill for fraud.—*Thruston v. Devecmon*, 30 Md. 210.

(b) A petition asking leave to file a supplemental bill in the nature of a bill of review may be filed at any time before the decree is enrolled.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

(c) A supplemental bill in the nature of a bill of review for the want of proper parties will not be available after a decree has been signed and enrolled.—*Burch v. Scott*, 1 G. & J. 393. [Cited and annotated in 28 L. R. A. 623, on entry or record necessary to complete judgment or order; in 36 L. R. A. 386, on right to bill of review as dependent upon interests.] (Compare *Burch v. Scott*, 1 Bland 112.)

(d) A bill of review is proper after a decree is enrolled; a supplementary bill in the nature of a bill of review, before the enrollment.—*Hollingsworth v. McDonald*, 2 H. & J. 230, 3 Am. Dec. 545. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1032, on bill of review for newly discovered evidence.]

(e) The decree of a court of chancery is subject to its control only upon a bill of review or a bill in the nature of a bill of review.—*Hollingsworth v. McDonald*, 2 H. & J. 230, 3 Am. Dec. 545. [Cited and annotated, see supra.]

#### § 443. Decrees reviewable.

#### § 444. Grounds.

#### § 445.—In general.

(a) A bill of review can be brought only for error in law appearing on the face of the proceeding, or upon discovery of new matter subsequent to the period when it could have been used.—*Lanahan v. Lanahan*, 110 Md. 176, 72 Atl. 672. [Cited and annotated in 30 L. R. A. (N. S.) 1032, on bill of review for newly discovered evidence.]

(b) Any matter clearly showing that a decree is improper, though not obtained by fraud, collusion, or surprise, may be made the ground for impeaching the decree by an original bill in the nature of a bill of review.—*Gregory v. Lenning*, 54 Md. 51.

(c) The fact that two of the complainants in a creditors' bill died, pending suit, and the defendants took no steps to make their personal representatives parties to the cause before laying the rule "further proceedings," which is a substitute for the motion to dismiss for want of prosecution, is no sufficient ground for a bill of review.—*Whelan v. Cook*, 29 Md. 1.

(d) An allegation "that the proof taken under a commission was in the charge and custody of the commissioner, who for several years was beyond the jurisdiction of the court, and remains in his custody up to this time; that some of the complainants have made every effort to procure the said proof from time to time, and have failed to do so; but they are now informed, and so state, that within a few weeks past the commissioner has found the proof taken by him, and that he is now able to return the same, to be used upon the hearing of the cause," is not sufficient ground for a bill of review.—*Whelan v. Cook*, 29 Md. 1.

(e) In the court of chancery a bill was filed in June, 1823, and the usual process of subpoena and attachment issued, which were

served on the defendant from term to term, until March, 1824. He did not appear, and the chancellor passed an order to take the bill pro confesso, which was served on the defendant the 1st of May following. A final decree was made in August, 1825, and a *fi. fa.* issued, returnable to the December term of the same year, at which term the original defendant, with others alleged to be interested in the decree, filed a bill to have the execution countermanded, the decree opened, and an answer of the defendant to the first bill accepted. The grounds of the application were that proper parties were not originally made, that the decree was obtained by fraud and surprise, that the claim was unfounded, and that the defendant had been prevented from putting in his answer before June, 1824, by the omissions of his counsel and by accident after that time. *Held*, upon appeal, that as there was no error apparent on the face of the decree, and no allegation of the discovery of new proof since it was rendered, there was no ground for a bill of review, nor, as the decree had been signed and enrolled, for a supplemental bill in the nature of a bill of review, that the fraud must be proved before the propriety of the decree could be investigated, and that this was not a suitable occasion for the exercise of the discretion which the court was admitted to possess upon subjects of that nature, to open or discharge the enrollment, and vacate the decree, to enable the defendant to make his defense.—*Burch v. Scott*, 1 G. & J. 393. [Cited and annotated in 28 L. R. A. 623, on entry or record necessary to complete judgment or order; in 36 L. R. A. 386, on right to bill of review as dependent upon interest.] (Compare *Burch v. Scott*, 1 Bland 112.)

#### § 446.—Errors and irregularities.

(a) A bill of review will lie to vacate a decree on the ground of errors of law on the face of the decree, in that the court was without power to make it.—*Holloway v. Safe Deposit & Trust Co.*, 122 Md. 620, 90 Atl. 95.

(b) Fraud in obtaining a decree against an infant, or the nonobservance of the statutory requirements conferring jurisdiction to pass such decree, may be made the ground for impeaching the decree by an original

bill in the nature of a bill of review.—*Gregory v. Lenning*, 54 Md. 51.

(c) A bill of review will lie for errors appearing on the face of the decree.—*Pinkney v. Jay*, 12 G. & J. 69. [Cited and annotated in 4 L. R. A. (N. S.) 866, on bill of review for newly discovered evidence.]

#### § 447.—New matter.

(a) To entitle a party to a bill of review for new matter, the matter must be new, and such as the party by reasonable diligence could not have known.—*Lanahan v. Lanahan*, 110 Md. 176, 72 Atl. 672. [Cited and annotated in 30 L. R. A. (N. S.) 1032, on bill of review for newly discovered evidence.]

(b) Where a wife's executor filed a bill for accounting for property transferred to her husband, and he made the defense that it was a gift, and after hearing a decree was rendered in favor of her executor, it was within the discretion of the court to refuse leave to file a bill of review for newly discovered evidence that the proceeds of the property had been invested in specific securities which could be transferred to the executor, which facts were not discoverable by the husband in his invalid and infirm condition of health.—*Safe Deposit & Trust Co. v. Gittings*, 102 Md. 456, 62 Atl. 1030, 4 L. R. A. (N. S.) 865. [Cited and annotated in 30 L. R. A. (N. S.) 1037, on bill of review for newly discovered evidence.]

(c) Where a decree dismissing a bill for an accounting was reversed, and the trial court entered a decree in conformity with the opinion of the appellate court, a bill of review may thereafter be allowed on the ground of newly discovered evidence.—*Safe Deposit & Trust Co. v. Gittings*, 102 Md. 456, 62 Atl. 1030, 4 L. R. A. (N. S.) 865. [Cited and annotated, see *supra*.]

(d) On a supplemental bill in the nature of a bill of review, the question always is, not what plaintiff knew, but what, by using due diligence, he might have known.—*Hitch v. Fenby*, 4 Md. Ch. 190. [Cited and annotated in 13 L. R. A. (N. S.) 580, on relief from judgment suffered in reliance on unkept promise; in 30 L. R. A. (N. S.) 1039, on bill of review for newly discovered evidence.] (See *Hitch v. Fenby*, 6 Md. 218.)

[Cited and annotated in 31 L. R. A. 762, on injunction against judgments for defenses existing prior to rendition.]

(e) On an application for leave to file a supplemental bill in the nature of a bill of review, it is not enough that the new facts are not known before the hearing, but it must appear that the party could not have known them by use of reasonable diligence, for any laches or negligence in this respect destroys the title to relief.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

(f) A party will not be allowed to file a supplemental bill in the nature of a bill of review, upon the ground that the importance of newly discovered evidence was not understood until the decree had passed, when such evidence was known to him, or might have been known by the use of reasonable diligence, in time to be used when the decree passed.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated, see supra.]

(g) The qualifications to the rule entitling a party to a bill of review, upon the discovery of new matter subsequent to the period when it could have been used, that the matter must not only be new, but such as the party could not have known by the use of reasonable diligence, is as firmly settled as the rule itself.—*Hughes v. Jones*, 2 Md. Ch. 289. [Cited and annotated in 30 L. R. A. (N. S.) 1032, 1039, on bill of review for newly discovered evidence.]

(h) In order to maintain a bill of review on the discovery of new matter, the matter must not only be new, but such as the party, by reasonable diligence, could not have known.—*Hodges v. Mullikin*, 1 Bland 503. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1041, 1043, on bill of review for newly discovered evidence.]

(i) A bill of review lies for newly discovered evidence, not known, and which by the use of due diligence could not have been known to the party in time for trial.—*Pinkney v. Jay*, 12 G. & J. 69. [Cited and annotated in 4 L. R. A. (N. S.) 866, on bill of review for newly discovered evidence.]

(j) Under act 1795, c. 88, providing that a nonresident, against whom a decree has been passed, may appear in a chancery court within a certain time and require a review of the same, a bill of review which will lie in such a case must be founded on new matter discovered since the decree.—*Pinkney v. Jay*, 12 G. & J. 69. (See Code, art. 16, § 126.) [Cited and annotated, see supra.]

§§ 448-450. (See Analysis.)

#### § 451. Jurisdiction.

(a) In view of the provision of the Constitution giving the Court of Appeals jurisdiction to review decrees of the court of chancery, the latter court has not, under its equity powers, jurisdiction of a bill of review to correct a decree of the Court of Appeals for error apparent on the face of the decree.—*Pinkney v. Jay*, 12 G. & J. 69. [Cited and annotated in 4 L. R. A. (N. S.) 866, on bill of review for newly discovered evidence.]

(b) Under act 1795, c. 88, providing that any nonresident against whom a decree is passed may appear in a chancery court within a certain time and require a review of the same, where a decree has been passed against a nonresident, and on appeal has been affirmed, no bill of review will properly lie for error apparent in such decree, as the exercise of such a jurisdiction by a court of chancery would be subversive of that subordination which has been established by the Constitution.—*Pinkney v. Jay*, 12 G. & J. 69. (See Code, art. 16, § 126.) [Cited and annotated, see supra.]

#### § 452. Limitations and laches.

(a) Complainant's laches held to prevent him from maintaining a bill of review filed on July 21, 1913, to set aside a decree made with his consent on May 29, 1911, allowing complainant's wife a separate maintenance from his income under a testamentary spendthrift trust; complainant having been informed before the decree was entered that the income from the trust could only be paid to him personally.—*Holloway v. Safe Deposit & Trust Co.*, 122 Md. 620, 90 Atl. 95.

(b) Where a bill of review is not filed in time, ignorance of facts of which their coun-

sel had notice is no excuse to complainants.—*Presstman v. Mason*, 68 Md. 78, 11 Atl. 764.

(c) A bill of review filed in December, 1885, to set aside a judicial sale had in April, 1874, is not filed in time, since bills of review cannot ordinarily be filed after nine months after decree rendered.—*Presstman v. Mason*, 68 Md. 78, 11 Atl. 764.

(d) Where, before and at the date of a decree against him, the complainant knew of the transactions constituting alleged usury, it is too late seven years afterwards for him to seek to open the decree on that ground.—*Hitch v. Fenby*, 6 Md. 218. [Cited and annotated, see supra, § 447.] (See *Hitch v. Fenby*, 4 Md. Ch. 190.) [Cited and annotated, see supra, § 447.]

(e) A bill of review, or a bill in the nature of a bill of review, cannot be filed after the time during which a writ of error might have been brought or an appeal taken.—*Pfeltz v. Pfeltz*, 1 Md. Ch. 455. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1032, 1038, on bill of review for newly discovered evidence.]

(f) A bill of review must be filed within nine months from the date of the decree.—*Pfeltz v. Pfeltz*, 1 Md. Ch. 455. [Cited and annotated, see supra.]

(g) An order sought to be set aside was passed on November 18, 1844, and no objection was made until August, 1846. Held, that, upon the ground of delay alone, there would be great difficulty in granting relief against the order, even if the merits were with the petitioner.—*Barry v. Barry*, 1 Md. Ch. 20.

(h) Act 1795, c. 88, authorizing nonresident defendants, against whom a decree pro confesso may have passed in the court of chancery for want of appearance after publication, to require a review of the same by the chancellor within 18 months from the date thereof, applies also to decrees in the Court of Appeals; and the chancellor may entertain a bill, in such case, to review a decree of that court.—*Luckett v. White*, 10 G. & J. 480. (See Code, art. 16, § 126.)

(i) A supplemental bill in the nature of a

bill of review for the want of proper parties will not be available after a decree has been signed and enrolled.—*Burch v. Scott*, 1 G. & J. 393. [Cited and annotated in 28 L. R. A. 623, on entry or record necessary to complete judgment or order; in 36 L. R. A. 386, on right to bill of review as dependent upon interest.] (Compare *Burch v. Scott*, 1 Bland 112.)

#### § 453. Leave to file bill.

#### § 454.—Necessity.

(a) A bill of review can only be filed by previous leave of court.—*O'Hara v. Shepherd*, 3 Md. Ch. 306.

(b) Bill of review filed without leave given either by petition or motion will be dismissed.—*Carroll v. Parran*, 1 Bland 125, note.

(c) Where a bill of review, or supplemental bill in the nature of a bill of review, is brought for new matter discovered since the decree, the new matter must be to prove what was before in issue; and, before filing it, leave must be obtained from the court, which will not be granted without an affidavit that the new matter could not be produced or used by the party claiming the benefit of it at the time when the decree was made.—*Burch v. Scott*, 1 G. & J. 393. [Cited and annotated in 28 L. R. A. 623, on entry or record necessary to complete judgment or order; in 36 L. R. A. 386, on right to bill of review as dependent upon interest.] (Compare *Burch v. Scott*, 1 Bland 112.)

#### § 455.—Discretion of court.

(a) The granting of a petition for leave to file a bill of review for new matter is addressed to the sound discretion of the court.—*Lanahan v. Lanahan*, 110 Md. 176, 72 Atl. 672. [Cited and annotated in 30 L. R. A. (N. S.) 1032, on bill of review for newly discovered evidence.]

(b) Granting permission to file a bill of review is not a matter of right, but rests in the sound discretion of the court.—*Pfeltz v. Pfeltz*, 1 Md. Ch. 455. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1032, 1038, on bill of review for newly discovered evidence.]

(c) In the court of chancery a bill was filed in June, 1823, and the usual process of sub-

poena and attachment issued, which were served on the defendant from term to term, until March, 1824. He did not appear, and the chancellor passed an order to take the bill pro confesso, which was served on the defendant the 1st of May following. A final decree was made in August, 1825, and a fi. fa. issued, returnable to the December term of the same year, at which term the original defendant, with others alleged to be interested in the decree, filed a bill to have the execution countermanded, the decree opened, and an answer of the defendant to the first bill accepted. The grounds of the application were that proper parties were not originally made, that the decree was obtained by fraud and surprise, that the claim was unfounded, and that the defendant had been prevented from putting in his answer before June, 1824, by the omissions of his counsel and by accident after that time. *Held*, upon appeal, that as there was no error apparent on the face of the decree, and no allegation of the discovery of new proof since it was rendered, there was no ground for a bill of review, nor, as the decree had been signed and enrolled, for a supplemental bill in the nature of a bill of review, that the fraud must be proved before the propriety of the decree could be investigated, and that this was not a suitable occasion for the exercise of the discretion which the court was admitted to possess upon subjects of that nature, to open or discharge the enrollment, and vacate the decree, to enable the defendant to make his defense.—*Burch v. Scott*, 1 G. & J. 393. [Cited and annotated in 28 L. R. A. 623, on entry or record necessary to complete judgment or order; in 36 L. R. A. 386, on right to bill of review as dependent upon interest.] (Compare *Burch v. Scott*, 1 Bland 112.)

(d) A bill of review cannot be supported for some relevant matter, existing at the time of the decree, and discovered since, without affidavit of such matter, and of its existence at the time of the decree. On petition suggesting such matter, supported by affidavit, as the ground for a bill of review, the court grants or rejects the application at its discretion.—*Hollingsworth v. McDonald*, 2 H. & J. 230, 3 Am. Dec. 545. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1032,

on bill of review for newly discovered evidence.]

#### § 456. Application and proceedings thereon.

(a) The court will not grant leave to file a bill of review, without an affidavit that the new matter, on which the application is based, could not be produced by the party claiming the benefit of it in the original cause, and stating the nature of the new matter.—*Lanahan v. Lanahan*, 110 Md. 176, 72 Atl. 672. [Cited and annotated in 30 L. R. A. (N. S.) 1032, on bill of review for newly discovered evidence.]

(b) On a petition by a widow of a deceased partner for leave to file a bill of review to open the proceedings settling the partnership affairs, on the ground that since the decree she had discovered that the trademarks, brands, and good will of the business were not valued, and through the fraud of the surviving partners she was cheated of her share in this property, evidence *held* not to sustain the allegations of the petition.—*Lanahan v. Lanahan*, 110 Md. 176, 72 Atl. 672. [Cited and annotated, see *supra*.]

(c) A petition asking leave to file a supplemental bill in the nature of a bill of review may be filed at any time before the decree is enrolled.—*Ridgeway v. Toram*, 2 Md. Ch. 303. [Cited and annotated in 30 L. R. A. (N. S.) 1040, on bill of review for newly discovered evidence.]

(d) On an application for leave to file a bill of review on the ground of newly discovered evidence, the question whether the evidence is newly discovered or not must be decided on such application, and should not be left open until the hearing on the bill.—*Hodges v. Mullikin*, 1 Bland 503. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1041, 1043, on bill of review for newly discovered evidence.]

#### § 457. Parties.

(a) Proceedings to set aside a decree of the Orphans' Court may be maintained, although certain parties to the proceedings assailed have since become nonresident, and are not made parties to the proceedings to set aside; their position being such as not to

entitle them to especial notice.—*Munnikhuy-sen v. Magraw*, 57 Md. 172.

(b) A person interested as trustee merely, and not individually, may apply for a rehearing or bill of review for the benefit of the persons in interest.—*Hodges v. Mullikin*, 1 Bland 503. [Cited and annotated in 30 L. R. A. (N. S.) 1031, 1041, 1043, on bill of review for newly discovered evidence.]

#### § 458. Process.

#### § 459. Stay of proceedings under former decree.

(a) A bill of review, or the like, does not of itself operate a suspension of the decree complained of.—*Burch v. Scott*, 1 Bland 112.

#### § 460. Form and sufficiency.

##### Cross-Reference.

Amendment for purpose of changing into bill to set aside decree, see ante, § 430.

(a) A petition for a review of an order of the chancellor, after a lapse of more than nine months, must distinctly allege fraud or mistake.—*Contee v. Pratt*, 9 Md. 67.

(b) A bill of review for new facts or newly discovered facts must aver that they came to complainant's knowledge within nine months prior to the filing of the bill, so as to show affirmatively that it is within the limitation for filing the same.—*Hitch v. Fenby*, 4 Md. Ch. 190. [Cited and annotated in 13 L. R. A. (N. S.) 580, on relief from judgment suffered in reliance on unkept promise; in 30 L. R. A. (N. S.) 1039, on bill of review for newly discovered evidence.] (See *Hitch v. Fenby*, 6 Md. 218. [Cited and annotated in 31 L. R. A. 762, on injunction against judgments for defenses existing prior to rendition.]

#### §§ 461-463. (See Analysis.)

#### § 464. Hearing and determination.

(a) On a bill of review for errors of law apparent in a decree foreclosing a vendor's lien, the true amount of the lien cannot be considered, as it is not a question of law.—*Bell v. Gosnell*, 31 Md. 568.

(b) Where the proof adduced in support of a bill of review fails to show any sufficient ground for rescinding the decree, either by reason of error or irregularity on the face of the proceedings, or on account of any

newly discovered facts, the bill will not be sustained on any other grounds.—*Billingslea v. Baldwin*, 23 Md. 85.

(c) Where, as in Maryland, the English practice of reciting the proceedings in the decree does not prevail, the proceedings themselves are the subject-matter of revision in a bill of review, to the same extent, and in the same manner, as if they were stated on the face of the decree in conformity to the English practice.—*Tomlinson v. McKaig*, 5 Gill 256.

(d) Where the exceptions to the allegations of a bill, taken in the court of chancery, pointed with sufficient certainty to the want of proper averments on a certain subject, it was held that evidence taken in support of that part of the cause must be considered as out of the case, being evidence of a fact not in issue.—*Berrett v. Oliver*, 7 G. & J. 191.

(e) Under act 1795, c. 88, providing that any person who is a nonresident, against whom a decree shall be passed, may appear in the chancery court within a limited time and require a review of the same, nothing more is authorized than a review of the decree itself according to the established principles in equity and as if the party applying for the review had appealed in the original case.—*Pinkney v. Jay*, 12 G. & J. 69. (See Code, art. 16, § 126.) [Cited and annotated in 4 L. R. A. (N. S.) 866, on bill of review for newly discovered evidence.]

#### § 465. Decree.

#### § 466. Operation and effect of reversal of former decree.

### EQUIVALENTS.\*

##### Cross-Reference.

In patent law, see "Patents," §§ 22, 178, 230, 237, 245.

### ERASURE.\*

##### Cross-References.

See "Alteration of Instruments."  
Affecting liability of surety, see "Principal and Surety," § 101.  
Cancellation of records, see "Records," § 11.  
In indictment or information, see "Indictment and Information," § 80.  
In instrument as constituting forgery, see "Forgery," § 10.  
Of names on election ballots, see "Elections," § 181.  
Of signature as release of obligation, see "Release," § 1.

\*Annotation: Words and Phrases, same title.

**ERECTIONS.\****Cross-References.*

See "Fixtures."

Buildings and liens thereon, see "Mechanics' Liens."

**EROSION.\****Cross-Reference.*

See "Navigable Waters," § 45.

**ERROR OF JUDGMENT.\****Cross-References.*

Master's liability for injuries to servant resulting from, see "Master and Servant," § 101.

Of locomotive engineer as affecting liability of railroad company, see "Railroads," § 305.

**ERRORS IN EXTREMIS.\****Cross-Reference.*

See "Collision," § 108.

**ERROR, WRIT OF.\****Cross-References.*

See "Appeal and Error"; "Criminal Law," §§ 1004-1199; "Justices of the Peace," §§ 139-191.

Coram nobis, see "Criminal Law," § 997; "Judgment," § 334.

Remedy by writ of error as affecting right to mandamus, see "Mandamus," § 4.

**ESCAPE.\****Scope-Note.*

[INCLUDES voluntary departure and attempts of prisoners to depart from lawful custody of officers or other persons, or from any place where they are lawfully confined, with or without force or fraud, and voluntary or negligent allowance by officers of such departure, aiding such escape, and concealing or harboring escaped prisoners, as offenses against public justice and authority; nature and elements of the crimes of escape, jail breaking, prison breach, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES civil liabilities of officers for permitting escape (see "*Officers*"; "*Sheriffs and Constables*"; and other specific heads); resisting or obstructing arrest (see "*Obstructing Justice*"); and delivery of prisoners from custody by others (see "*Rescue*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature and elements of offenses in general.
- § 2. Escape by prisoners without force.
- § 3. Escape suffered by officer.
- § 4. Prison breach or jail breaking.
- § 5. Aiding escape.
- § 5½. Attempts.
- § 6. Defenses.
- § 7. Persons liable.
- § 8. Preliminary proceedings in prosecution.
- § 9. Indictment or information.
- § 10. Evidence.
- § 11. Trial.
- § 12. Appeal and error.
- § 13. Sentence and punishment.



*Cross-References.*

- Aiding escape of apprentice, see "Apprentices," § 22.  
 Appellate jurisdiction in general, see "Criminal Law," § 1018.  
 As affecting defendant's right to appeal, see "Criminal Law," § 1026.  
 As affecting second appeal, see "Criminal Law," § 1014.  
 As affecting term of imprisonment, see "Criminal Law," § 1216.  
 Civil liability for escape of convict laborer, see "Convicts," § 12.  
 Civil liability of prison officers for permitting escape of prisoners arrested in civil proceedings, see "Prisons," § 16.  
 Civil liability of sheriffs and constables, for permitting escape of prisoners arrested in civil proceedings, see "Sheriffs and Constables," § 104.  
 Conspiracy to effect escape, see "Conspiracy," § 28.  
 Delivery of prisoners from custody by third persons, see "Rescue."  
 Evidence explanatory of accused's attempt to escape, see "Criminal Law," § 361.  
 Form and requisites of judgment record, see "Criminal Law," § 995.  
 Habeas corpus to release person in custody under escape warrant, see "Habeas Corpus," § 29.  
 Homicide in attempt to escape, see "Homicide," §§ 18, 235.  
 Homicide in preventing escape, see "Homicide," §§ 72, 105.  
 Imputation of crime as libelous, see "Libel and Slander," § 10.  
 Liability of city for damage arising from escape of person arrested under civil process, see "Municipal Corporations," § 723.  
 Liability of married woman for aiding escape of husband, see "Husband and Wife," § 108.  
 Of accused as evidence of guilt, see "Criminal Law," § 351.  
 Of defendant after appeal as ground for dismissal thereof, see "Criminal Law," § 1131.  
 Of gas or oil from well, see "Mines and Minerals," § 91.  
 Resisting or obstructing arrest, see "Obstructing Justice," § 1.  
 Right of review of writs of injunction and exeat by person escaping from custody thereunder, see "Appeal and Error," § 153.  
 Summary judgment on undertaking for jail liberties as depriving sureties of right to trial, see "Constitutional Law," § 306.  
 Venue, see "Criminal Law," § 108.

*Evidence.*

- Acts and declarations of conspirators and codefendants, see "Criminal Law," § 424.  
 Best and secondary evidence, see "Criminal Law," §§ 398-404.  
 Confessions, see "Criminal Law," § 535.  
 Demonstrative evidence, see "Criminal Law," § 404.  
 Documentary evidence, see "Criminal Law," § 429.  
 Res gestæ, see "Criminal Law," § 368.

*Indictment or information.*

- Amendment, see "Indictment and Information," § 161.  
 Language of statute, see "Indictment and Information," § 110.  
 Pleading conclusion, see "Indictment and Information," § 63.

*Annotation.*

- Admissibility of evidence of defendant's voluntary surrender or refusal to embrace an opportunity to escape.—20 L. R. A. (N. S.) 409, note.  
 Constitutionality of statute punishing escape by reimprisonment for term dependent upon length of original term.—22 L. R. A. (N. S.) 1123, note.  
 Liability of county for escape of prisoner.—39 L. R. A. 60, note.

## ESCHEAT. \*

*Scope-Note.*

[INCLUDES reversion of property, real or personal, to the state, for want of persons legally competent to hold or take it; and conveyance, release, and enforcement of the rights of the state.

[EXCLUDES disabilities to inherit, etc., of particular classes of persons (see "Aliens"; "Bastards").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature in general.  
 § 2. Constitutional and statutory provisions.

\*Annotation: Words and Phrases, same title.

- § 3. Property subject to escheat.
- § 4. Grounds.
- § 5. Release.
- § 6. Enforcement.
- § 7. Operation and effect.
- § 8. Disposition of property escheated.

### Cross-References.

Attainder of husband, effect on rights of wife as to property conveyed to husband and wife, see "Husband and Wife," § 14.  
 Interest on judgment to recover proceeds of escheated lands, see "Interest," § 22.  
 Payment of distributive shares into public

treasury, see "Executors and Administrators," § 303.  
 Right of state to oppose probate of will, see "Wills," §§ 220, 259.  
 Sale for taxes after escheat of land to state, see "Taxation," § 618.

### § 1. Nature in general.

(a) Land is not escheatable so long as there are heirs of the original grantee; and, until the failure of such heirs, the land cannot be again granted by the state, and if it is it passes nothing.—*Hall v. Gittings*, 2 H. & J. 112.

(b) Lands in Anne Arundel county were forfeited to the lord proprietary for not subscribing to the engagement of fidelity, and for noncompliance with the conditions of plantations.—*Anonymous*, 1 H. & McH. 2.

### § 2. Constitutional and statutory provisions.

#### Cross-Reference.

Self-executing provisions of constitution, see "Constitutional Law," § 30.

(a) Act 1873, c. 4, annexing certain territory to the city of Baltimore, and extending to riparian owners in such territory the privileges conferred by act 1745, c. 9, § 10, which authorized owners of water lots in Baltimore to acquire, without application to the land office, rights to made land created at the frontage of their holdings through improvements made by them, does not constitute evidence that the land contiguous to that of a riparian owner in such territory, and covered by water, conveyed by a former patent, had escheated to the state at the passage of the act, so as to allow the riparian owner to set up title to land made thereon, through improvements, as against the prior patentee.—*Hammond v. Inloes*, 4 Md. 138. [Cited and annotated in 34 L. R. A. 331, on conclusiveness of prior decisions on subsequent appeals.]

### § 3. Property subject to escheat.

#### Cross-Reference.

Disabilities of aliens as to ownership of property, see "Aliens," §§ 6-14.

(a) In Maryland, lands held in trust are liable to escheat, where the cestui que trust dies without heirs.—*Matthews v. Ward*, 10 G. & J. 443. [Cited and annotated in 16 L. R. A. (N. S.) 1153, on statute of uses in United States; in 35 L. R. A. (N. S.) 762, on effect of conveyance of land held adversely.]

(b) In an action of ejectment defendant claimed title to the land in question by an escheat warrant. There was evidence that the devisees of the original grantee of the land, at whose death the escheat was claimed, and persons claiming under them, had been in existence for a period of over 100 years, but had exercised no control over the property. Held, that, notwithstanding the failure to exercise acts of ownership, there never being a lack of persons qualified to take the property, it was not subject to escheat.—*Hall v. Gittings*, 2 H. & J. 112.

### § 4. Grounds.

#### Cross-Reference.

Nature in general, see ante, § 1.

### § 5. Release.

(a) The sufferance of descents cast by the lord proprietary of Maryland will constitute a waiver of the right to enforce an escheat of property embraced in such descent.—*Kelly's Lessee v. Greenfield*, 2 H. & McH. 121. [Cited and annotated in 26 L. R. A.

451, on abandonment of highway by non-user, or otherwise than by act of authorities.]

(b) Where, after property became escheatable, the lord proprietary of Maryland accepted rent from the occupants of such property, such acceptance will be *held*, after a lapse of many years, to prevent him from asserting a title by escheat.—*Kelly's Lessee v. Greenfield*, 2 H. & McH. 121. [Cited and annotated, see *supra*.]

### § 6. Enforcement.

(a) There is no rule of the land office requiring that a caveat filed to the issuance of a patent of escheated lands shall be dismissed on the caveator's failure to show an interest therein.—*Armstrong v. Bittinger*, 47 Md. 103.

(b) A prayer for an instruction asserting the escheat of a lot of land, without submitting to the jury to find that the patentee thereof died intestate, as well as without heirs, is for that cause defective.—*Peterkin v. Inloes*, 4 Md. 175.

(c) The patentee of a tract of land covered by navigable water died in 1709, having devised the same to his wife, who died the same year. No claim was made to the land by any one, under the patentee or his wife, before 1745. It was *held* that such proof was insufficient to establish the fact that the land had escheated prior to 1745; it not being a presumption of law that a person dies without heirs, and the absence of claim being accounted for by the land being covered by navigable water. It was *held*, also, that a further lapse of 28 years under like circumstances was not sufficient to authorize the finding of an escheat as of that time.—*Peterkin v. Inloes*, 4 Md. 175.

(d) A prayer for an instruction which assumes an escheat upon the death of an ancient grantee without issue is erroneous.—*Hammond v. Inloes*, 4 Md. 138. [Cited and annotated in 34 L. R. A. 331, on conclusiveness of prior decisions on subsequent appeals.]

(e) The law does not presume, in favor of an escheat, that a person who is proved to be dead left no heirs. Some negative proof

will be required.—*Hammond v. Inloes*, 4 Md. 138. [Cited and annotated, see *supra*.]

(f) Where a certificate of survey has been regularly returned on an escheat warrant from the land office for a resurvey of land, to escheat the same, and to correct and amend errors in the original survey, and to add contiguous vacancies, etc., and has remained long enough in the land office without caveat to justify the issuing of a grant, a reasonable *prima facie* presumption arises that the land is escheatable.—*Goodwin v. Caton*, 4 Md. Ch. 160.

(g) The title of an alien is good against everybody but the state, and his right and possession cannot be divested but by office found, or by some act done by the state to acquire possession.—*McCreery's Lessee v. Allender*, 4 H. & McH. 409. [Cited and annotated in 15 L. R. A. (N. S.) 381, on necessity for judicial proceeding to effect escheat.]

(h) Under King's Charter, §§ 4, 5, 16, 18, 19,—the three latter sections prescribing special privileges for the lord proprietary of Maryland, the fifth being general, and the fourth granting to him all the rights which any bishop of Durham had,—the lord proprietary of Maryland has not the same rights to exemption from the operation of a bar by prescription, preventing his asserting his title to escheated land, as are the rights of the king of England.—*Kelly's Lessee v. Greenfield*, 2 H. & McH. 121. [Cited and annotated in 26 L. R. A. 451, on abandonment of highway by non-user, or otherwise than by act of authorities.]

### § 7. Operation and effect.

(a) Where land is conveyed with a covenant of warranty to a person who dies intestate and without heirs, on his land becoming escheat, the state or a patentee under the state is not entitled to assert the covenant of warranty as against title claimed by the original grantor.—*Kelly's Lessee v. Greenfield*, 2 H. & McH. 121. [Cited and annotated, see *supra*, § 6.]

### § 8. Disposition of property escheated.

#### Cross-Reference.

Limitations applicable to proceedings to determine rights to property, see "Limitation of Actions," § 38.

**Annotation.**

Is judicial proceeding necessary to effect escheat.—15 L. R. A. (N. S.) 379, note.

Right of state to contest will so as to escheat the property.—2 L. R. A. (N. S.) 643, note.

Termination of right to declare escheat by death of alien or transfer in his lifetime.—9 L. R. A. (N. S.) 186, note.

(a) Escheated land can be taken up only under an escheat warrant.—*Armstrong v. Bittinger*, 47 Md. 103.

(b) An application to the land office for a patent of escheated lands, and the warrant issued thereon, should state that the owner of the land died seised in fee, intestate, and without heirs.—*Armstrong v. Bittinger*, 47 Md. 103.

(c) A patent of escheated lands should be refused, if any good cause be shown against it, though the interest of the caveator be not proved.—*Armstrong v. Bittinger*, 47 Md. 103.

(d) Where there is real doubt as to the validity of caveator's objections to the issuance of a patent for escheated lands, and the proceedings are otherwise unobjectionable, the general rule of the land office has been to overrule the caveat, and to allow the patent to issue, to be afterwards tried in ejectment or some other appropriate proceedings.—*Armstrong v. Bittinger*, 47 Md. 103.

(e) The issuance of a patent of escheated lands by the commissioner of the land office does not conclude any question of right, but an escheat grant is prima facie evidence, and is available for that purpose until the contrary is proved.—*Armstrong v. Bittinger*, 47 Md. 103.

(f) If there was no fraud or imposition practiced on the state, and the party purchased and paid for lands supposed to be vacant, but which in fact came to the state by escheat, and the party receiving the grant has held and exercised acts of ownership over the land long enough to give him the protection of Code 1860, art. 57, § 9, he ought not to be disturbed, or have his title clouded or brought into question, by a subsequent grant issued to another person on an escheat warrant.—*Armstrong v. Bittinger*, 47 Md. 103. (See Code 1911, art. 57, § 10.)

(g) The title of a party acquiring a patent for escheated land commences from the date of the warrant issued by the land office to escheat the same, and the patent, when granted, relates back to the date of the warrant.—*Owings v. Norwood's Lessee*, 2 H. & J. 96; *Cunningham v. Browning*, 1 Bland 299. [Cited and annotated in 15 L. R. A. (N. S.) 381, 382, on necessity for judicial proceeding to effect escheat.] *Smith's Lessee v. Devecmon*, 30 Md. 473.

(h) By Code 1860, art. 54, § 24, any one may obtain an escheat warrant by application to the commissioner of the land office, "unless some other person has obtained or is entitled to a warrant for the same land." By § 25 any escheat warrant must be executed within one year from its date, and by § 26 any person who has obtained a warrant to resurvey or escheat lands shall, within one year from its date, unless the same be renewed, pay for the land included in the certificate of the survey. *Held*, to intend that he who made the first application for an escheat warrant should have priority over all others, or, complying with the requirements of the law, and that, when such a warrant is once issued, no other warrant for the same land should be issued to any other person within one year from its date.—*Smith's Lessee v. Devecmon*, 30 Md. 473. (See Code 1911, art. 54, §§ 33, 34, 35.)

(i) Where a warrant has issued by the land office to escheat lands, a person taking out a subsequent warrant for the same land can only take under the warrant of survey and the patent a defeasible title, liable to be defeated on a compliance with the requirements of the law by the party procuring the prior warrant, and the issuing of a patent to him, if everything required to be done by the latter has been performed by him within the required time, so as to entitle him to his patent.—*Smith's Lessee v. Devecmon*, 30 Md. 473.

(j) An escheat warrant issued by the land office to resurvey or escheat lands is notice to all that it has been issued to affect the land described therein.—*Smith's Lessee v. Devecmon*, 30 Md. 473.

(k) An alien taking lands by purchase is divested of his title by the issue of an es-

cheat patent for such lands by the land office. Such patent is equivalent in effect to an inquest of office found at common law.—*Guyer v. Smith*, 22 Md. 239, 85 Am. Dec. 650. [Cited and annotated in 31 L. R. A. 177, on alien's right to inherit.]

(l) An escheat grant is prima facie evidence that the land granted is liable to escheat at the date of issuing the escheat warrant, but not that it was antecedently.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated in 18 L. R. A. 781, on what title or interest will support ejectment; in 48 L. R. A. (N. S.) 759, 768, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another.] *Wilson v. Inloes*, 6 Gill 121; *Hammond v. Same*, 4 Md. 138. [Cited and annotated in 34 L. R. A. 331, on conclusiveness of prior decisions on subsequent appeals.] *Peterkin v. Inloes*, 4 Md. 175.

(m) An escheat warrant authorized the party to take up the entire tract of land called "Bold Venture" as escheat; but the escheat patent, dated in 1759, granted to the patentee a certain number of acres of said tract, "clear of elder surveys." It was held that it might be fairly inferred from this patent that the state had, prior to the act of 1773, under which the plaintiff claimed, granted the whole tract. The recital, "clear of elder surveys," means elder surveys of "Bold Venture," and is evidence of a prior grant of the residue of the tract.—*Peterkin v. Inloes*, 4 Md. 175.

(n) An escheat grant passes all the land comprehended in the true location of the land escheated; but this rule does not apply when it clearly appears that the escheat grant was not intended to include it all, and the party who took out the escheat warrant knew that it did not.—*Jones v. Badley*, 4 Md. Ch. 167.

(o) An escheat grant is prima facie evidence that the land granted is liable to escheat.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated, see supra.] *Goodwin v. Caton*, 4 Md. Ch. 160.

(p) The recitals of an escheat warrant from the land office for a resurvey of land

to escheat the same, and to correct and amend errors in the original survey, and to add contiguous vacancies, etc., that a person died seised thereof, intestate, and without heirs, are not prima facie evidence that the land is liable to escheat, so as to throw the burden of proving the contrary on a party resisting the patent therefor.—*Goodwin v. Caton*, 4 Md. Ch. 160.

(q) On a certificate returned in chancery in consequence of an escheat warrant, it is incumbent on the caveator of the certificate to show title in himself or some other person, and if he cannot do so, the party applying for the land as escheat is entitled to a patent.—*Hammond v. Godman*, 1 Bland 318, note.

(r) An escheat grant is prima facie evidence of title.—*Clements' Lessee v. Ruckle*, 9 Gill 326; *Lee v. Hoye's Lessee*, 1 Gill 188.

(s) An escheat title accruing in 1759 will not entitle persons holding such land to recover lands as escheated under act 1745, c. 9, granting certain privileges to the inhabitants of Baltimore who were owners of water lots which had become fast land by improvements made into the water.—*Wilson v. Inloes*, 6 Gill 121.

(t) Until the occurrence of the event which constitutes the escheat, the lord proprietary cannot grant the land again, and, if he does, nothing will pass by the grant.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated, see supra.]

(u) An escheat grant relates to the original grant under which the land was held before it escheated, and passes to the escheat grantee all that was held by the original grantee, with all the rights, privileges, and appurtenances, and subject to all liens and incumbrances.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated, see supra.]

(v) An escheat grant, including land previously granted by the state which has never become subject to escheat, is void as to such land.—*Lee v. Hoye's Lessee*, 1 Gill 188.

(w) In order that an escheat grant be bona fide evidence of title, it is not necessary that it be stated therein whose lands were escheated, or the facts and circumstances that

show that such land was escheatable.—*Lee v. Hoye's Lessee*, 1 Gill 188.

(x) Land liable to confiscation was surveyed, under an escheat warrant, previous to a verbal application to the executive to purchase it. The grant obtained on the escheat certificate was held to vest a title to the land, although the composition money on the escheat was not paid, nor the grant issued, until after the application to purchase.—*Steuart v. Donaldson's Lessee*, 5 H. & J. 428.

(y) An escheat grant will pass all the land comprehended within the true location of the tract of land escheated.—*Hall v. Gittings*, 2 H. & J. 112; *Howard v. Moale*, Id. 249.

(z) Where land liable to escheat was included in a survey and grant under an escheat warrant on another tract, such grant operated to pass a good title to the land so included, if there had been possession and payment of quitrents for more than 20 years before the act of confiscation; but, if the land was not escheatable at the time the escheat grant was obtained, the state was not estopped from granting it to any other person.—*Hall v. Gittings*, 2 H. & J. 112.

(aa) A grant for land surveyed under an escheat warrant was within act 1781, c. 20, § 8, warranting the title to lands escheated, if it should afterwards appear that there was any person who might claim the land as heir, if such person was a subject of the United States, but whose claim was destroy-

ed by being a British subject, though the land was in fact confiscated by the state as belonging to a British subject.—*Owings v. Norwood's Lessee*, 2 H. & J. 96.

(bb) Where the heirs of an intestate owner of land were British subjects at the time of the passage of act 1780, cc. 45, 49, 51, confiscating all property of British subjects, such land belonged to the state as confiscated property, and a warrant of escheat could not legally issue to affect it.—*Owings v. Norwood's Lessee*, 2 H. & J. 96.

(cc) The lord proprietary could not grant an escheated estate until he had revested it in himself by entry.—*Kelly's Lessee v. Greenfield*, 2 H. & McH. 121. [Cited and annotated in 26 L. R. A. 451, on abandonment of highway by non-user, or otherwise than by act of authorities.]

(dd) A junior grant of escheat land will not relate to an elder certificate, where the purchase money has not been paid before another person has returned a certificate and compounded thereon.—*Hath v. Polk*, 1 H. & McH. 363.

(ee) The lord proprietary cannot grant by escheat, where there is an existing grant for the same land, founded on common warrant previous to the escheat having fallen.—*Carvill v. Griffith*, 1 H. & McH. 297.

(ff) An escheat grant will not be held to relate to the original certificate of survey so as to defeat mesne lawful grants.—*Bladen v. Cockey*, 1 H. & McH. 230.

## ESCROWS.\*

### Scope-Note.

[INCLUDES deeds, bonds, and other obligatory writings delivered to a person not a party thereto, to be held by him until the performance of a specified condition or the happening of a certain contingency, and then to be delivered to the grantee or obligee; and rights, duties, and liabilities of parties to such instruments and of the depositaries, as affected by the delivery thereof as escrows and the final delivery.

[EXCLUDES delivery as escrow as a compliance with the statute of frauds (see "*Frauds, Statute of*").

[For complete list of matters excluded, see cross-references, post.]

### Analysis.

- § 1. Nature and requisites in general.
- § 2. Instruments deliverable in escrow.
- § 3. Depositaries.

\*Annotation: Words and Phrases, same title.

- § 4. Delivery to depositary.
- § 5. Construction of escrow agreements in general.
- § 6. Conditions or contingencies.
- § 7. Authority of depositary to deliver.
- § 8. Operation and effect of delivery in escrow.
- § 9. Performance of conditions or occurrence of contingency.
- § 10. Delivery by depositary.
- § 11. Time when instrument takes effect.
- § 12. ——— In general.
- § 13. ——— Relation back to first delivery.
- § 14. Unauthorized or wrongful delivery by depositary.
- § 15. Redelivery to depositor.

### Cross-References.

Conditional delivery to grantee, see "Deeds," § 60.  
 Deed in escrow as conferring title sufficient to support petition for drain, see "Drains," § 14.  
 Delivery of mortgage to third party as de-

livery to mortgagee, see "Mortgages," § 69.  
 Delivery to third person for delivery to grantee on death of grantor, see "Deeds," § 61.  
 Whether escrow or mortgage, see "Mortgages," § 33.

§§ 1-5. (See Analysis.)

### § 6. Conditions or contingencies.

#### Annotation.

Delivery of deed to third person as delivery in escrow.—54 L. R. A. 865; 9 L. R. A. (N. S.) 224; 38 L. R. A. (N. S.) 941, notes.

(a) The delivery of bonds by a father to a stranger, with orders to deliver them to the obligor's sons, in whose favor they ran, in case the obligor died without a will, is not a delivery to the obligees; but, being revocable during his lifetime, by the making of a will by the father, they create no debt until his decease intestate, and then only as testamentary papers.—*Carey v. Dennis*, 13 Md. 1. [Cited and annotated in 54 L. R. A. 881, on delivery of deed to third person; or record, or delivery for record, by grantor.]

### § 7. Authority of depositary to deliver.

### § 8. Operation and effect of delivery in escrow.

#### Cross-Reference.

Effect on ownership of property charged with mechanics' liens, see "Mechanics' Liens," § 57.

#### Annotation.

Deed delivered in escrow as satisfying statute of frauds.—43 L. R. A. (N. S.) 390, note.

Delivery of deed in escrow as change of

title or interest.—38 L. R. A. (N. S.) 142, note.

Delivery of deed to a third person, or record by grantor, as a delivery to the grantee.—9 L. R. A. (N. S.) 224; 38 L. R. A. (N. S.) 941, notes.

Effect of delivery in escrow of bond unsigned by principal obligor.—12 L. R. A. (N. S.) 1120, note.

Effect of deed delivered in escrow as further security for mortgage debt.—2 L. R. A. (N. S.) 628, note.

Effect of delivery in escrow as to bona fide purchaser from grantee who has wrongfully obtained and recorded the deed.—17 L. R. A. 511, note.

### § 9. Performance of conditions or occurrence of contingency.

(a) Where an instrument is conditionally delivered to a third party, it is not operative and binding until the conditions are performed.—*Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76.

### § 10. Delivery by depositary.

#### Cross-Reference.

Delivery after death of party, see ante, § 8.

### §§ 11-13. Time when instrument takes effect.

#### Annotation.

How and when deed delivered in escrow takes effect.—54 L. R. A. 888; 38 L. R. A. (N. S.) 946, notes.

### § 14. Unauthorized or wrongful delivery by depositary.

#### Cross-References.

Defense against bona fide purchaser of note, see "Bills and Notes," § 869.  
Instructions as to unauthorized delivery of indemnity bond, see "Indemnity," § 15.

### § 15. Redelivery to depositor.

## ESTABLISHMENT.\*

#### Cross-References.

Of asylums, see "Asylums," § 1.  
Of boards of health, see "Health," § 3.  
Of boundaries, see "Boundaries," §§ 26-56; "Counties," § 8; "Municipal Corporations," § 25; "States," § 13; "Towns," § 4.  
Of bridges, see "Bridges," §§ 1-28.  
Of canals, see "Canals," §§ 1-24.  
Of cemeteries by municipalities, see "Cemeteries," § 4.  
Of constitutions, see "Constitutional Law," §§ 1-10.  
Of counties, see "Counties," §§ 1-19.  
Of county government, see "Counties," § 21.  
Of county seat, see "Counties," §§ 28-30.  
Of courts, see "Courts," §§ 41-60, 410-417, 419-426, 433, 443.  
Of customs or usages, see "Customs and Usages," § 4.  
Of drains, see "Drains," §§ 1-64.  
Of election districts, see "Elections," § 48.  
Of electric plants by public authorities, see "Electricity," § 1½.  
Of exceptions in judicial proceedings, see "Exceptions, Bill of," § 55.  
Of ferries, see "Ferries," §§ 1-26.  
Of gas plants by public authorities, see "Gas," § 3.  
Of heirship or right to share in distribution of intestate's estate, see "Descent and Distribution," § 71.

Of highways, see "Highways," §§ 1-68.  
Of homestead, see "Homestead," §§ 16-28.  
Of judicial districts, see "Courts," § 45.  
Of legitimacy or paternity, see "Bastards," § 8.  
Of levees, see "Levees."  
Of lost indictments, see "Indictment and Information," § 14.  
Of lost instruments in general, see "Lost Instruments," §§ 3-11.  
Of militia, see "Militia," § 3.  
Of municipal corporations, see "Municipal Corporations," §§ 1-22.  
Of polling places, see "Elections," § 201.  
Of prisons, see "Prisons," § 1.  
Of private roads, see "Private Roads," § 2.  
Of railroads, see "Railroads," §§ 83-117.  
Of railroad stations, see "Railroads," § 58.  
Of reformatories, see "Reformatories," § 2.  
Of right of exemption, see "Homestead," §§ 182-218.  
Of schools, see "Schools and School Districts," §§ 1, 9-20.  
Of state executive departments or boards, see "States," § 45.  
Of street railroads, see "Street Railroads," §§ 1-64.  
Of streets, see "Municipal Corporations," §§ 646-652, 654.  
Of telegraphs or telephones, see "Telegraphs and Telephones," §§ 1-25.  
Of title before partition, see "Partition," § 17.  
Of title or right by action at law as ground for relief by injunction, see "Injunction," § 37.  
Of towns, see "Towns," §§ 1-14.  
Of trusts, see "Trusts," §§ 334-377.  
Of turnpikes or toll roads, see "Turnpikes and Toll Roads," §§ 1-32.  
Of water rates, see "Waters and Water Courses," § 203.  
Of waterworks by public authorities, see "Waters and Water Courses," § 183.  
Of wharves by public authorities, see "Wharves," § 5.  
Of wills, see "Wills," §§ 203-434.

## ESTATES.\*

### Scope-Note.

[INCLUDES nature and incidents of interests in real or personal property in general, and of estates in fee or absolute ownership; and union or merger of estates.

[EXCLUDES creation and transfer of estates (see "*Deeds*"; "*Wills*"; "*Descent and Distribution*"; and other specific heads); particular estates or estates less than the fee (see "*Estates Tail*"; "*Life Estates*"; "*Dower*"; "*Curtesy*"; "*Landlord and Tenant*"; "*Reversions*"; "*Remainders*"); estates held jointly or in common (see "*Joint Tenancy*"; "*Tenancy in Common*"); and estates of decedents (see "*Executors and Administrators*"), insolvents (see "*Insolvency*"), and bankrupts (see "*Bankruptcy*").

[For complete list of matters excluded, see cross-references, post.]

### Analysis.

- § 1. Nature and incidents in general.
- § 2. Constitutional and statutory provisions.

\*Annotation: Words and Phrases, same title.



- § 3. Absolute ownership in general.
- § 4. Estates of freehold.
- § 5. Fee simple.
- § 6. Base or qualified fee.
- § 7. Conditional fee.
- § 8. Rule in Shelly's Case.
- § 9. Rent charges.
- § 10. Merger.

*Cross-References.*

Conveyance of right of way for sewer, see "Municipal Corporations," § 708.  
 Conveyances to husband and wife, see "Husband and Wife," § 14.  
 Created by conveyance by husband to or for wife, see "Husband and Wife," § 47.  
 Created by conveyance by wife to husband, see "Husband and Wife," § 48.  
 Created by deed, see "Deeds," §§ 120-136.  
 Created by marriage settlements, see "Husband and Wife," § 31.  
 Created by will, see "Wills," §§ 590-627.  
 Decedents' estates, see "Descent and Distribution"; "Executors and Administrators"; "Wills."  
 Equitable estates or interests subjects of jurisdiction in equity, see "Equity," § 19.  
 Estate as used in bankruptcy act, see "Bankruptcy," § 257.  
 Mistake as to estate held as affecting adverse possession, see "Adverse Possession," § 65.  
 Of parties in property mortgaged, see "Chattel Mortgages," §§ 129-131; "Mortgages," §§ 137-139.

Parol or extrinsic evidence as to estate or interest conveyed, see "Evidence," § 390.  
 Pleading facts or conclusions as to estate or interest, see "Pleading," § 8.  
 Reservation of rents on conveyance of fee, see "Ground Rents."  
 Restrictions on creation of future contingent estates, see "Perpetuities," § 4.  
 Subject to curtesy, see "Curtesy," § 9.  
 Subject to dower, see "Dower," §§ 12-19.  
 Transfer of future or contingent estates, see "Assignments," §§ 7-9.  
 Which may be mortgaged, see "Mortgages," § 12.

*Particular estates.*

See "Curtesy"; "Dower"; "Estates Tail"; "Homestead"; "Life Estates"; "Remainders"; "Reversions"; "Trusts," §§ 129-154.  
 Estates for years, see "Landlord and Tenant."  
 Joint tenancy, see "Joint Tenancy."  
 Tenancy in common, see "Tenancy in Common."

## § 1. Nature and incidents in general.

### *Annotation.*

Estates in remainder as assets which will pass to the trustee in bankruptcy.—47 L. R. A. (N. S.) 284, note.  
 Relationship of owners of different floors of building.—3 L. R. A. (N. S.) 510, note.  
 Character of estate in burial lot.—67 L. R. A. 118, note.  
 Estate as distinguished from title.—15 L. R. A. 68, note.

### §§ 2, 3. (See Analysis.)

## § 4. Estates of freehold.

(a) The holder of an equitable estate in fee, accompanied by possession, or by an interest equivalent to that of a tenant for 99 years, renewable forever, is an owner or proprietor within the meaning of Baltimore City Ord. 1850, No. 15, providing that when the city commisisoner shall receive an application in writing for paving from the proprietors of the majority of the feet of ground binding and fronting on said street, or part thereof to be paved, he shall give

notice, and that the several regulations prescribed by the ordinance relative to streets shall be construed to extend to all streets, lanes, and alleys which are opened, but which have not formally been condemned as public, if the proprietors of the lots on such street shall assent to the extension of such regulations.—*City of Baltimore v. Bouldin*, 23 Md. 328. [Cited and annotated in 44 L. R. A. (N. S.) 696, on right of lessee to sign petition for improvements.]

## § 5. Fee simple.

(a) An equitable estate in fee may be alienated, subject to the existing trusts, if the instrument creating it puts no restraint on the power of alienation.—*Gunn v. Brown*, 75 Md. xiv, memorandum case, 23 Atl. 462, full report.

(b) A father executed a bond to his married daughter with condition to convey certain premises without delay to her, her heirs and assigns, in fee simple. The daughter and her husband were in possession of the

premises anterior to the date of the bond, and remained in possession until her death. The father afterwards died, and by his will devised the premises to the only son and heir of the daughter. On a suit by the surviving husband against the executor of the father for breach of condition in the lifetime of the wife, it was *held* that the daughter, being in possession, had, under the bond, an equitable fee simple estate in the premises.—*Rawlings v. Adams*, 7 Md. 26. [Cited and annotated in 48 L. R. A. (N. S.) 518, on dower rights in property conveyed before marriage.]

§§ 6, 7. (See Analysis.)

### § 8. Rule in Shelley's Case.

#### Cross-References.

See post, § 10.

Application to deeds, see "Deeds," § 128.

Application to estates created by antenuptial agreement, see "Husband and Wife," § 31.

Application to wills, see "Wills," § 608.

#### Annotation.

Rule in Shelley's case abrogated by statute as to instruments executed after May 31, 1912, Code [vol. 3], art. 93, § 332A, (act 1912, c. 144), *Holmes v. Mackenzie*, 118 Md. 210, 217.

(a) When a person takes a freehold estate, legally or equitably, with a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body as a class of persons to take in succession from generation to generation, he receives the whole estate.—*Hall v. Gradwohl*, 113 Md. 293, 77 Atl. 480. [Cited and annotated in 29 L. R. A. (N. S.) 974, 1060, 1155, 1163, on rule in Shelley's Case.]

(b) The proprietary, by his agent, in 1744 leased to A. for 99 years a tract of land called "B." A., with the consent of the agent, assigned the lease to C., who conveyed to D. in 1766. D. in 1794 executed a bond of conveyance to E., conditioned to convey one-half a tract of land called "F." In May, 1789, D. had surveyed for him a parcel of reserved land, and called it "F.," which in January, 1797, he assigned to E. In February, 1797, E. assigned to G., who, as assignee, in April, 1797, had resurveyed B.,

so leased to A., and called it H., being the same land before surveyed for D., and called "F.," for which the purchase money was paid to the treasurer in November, 1797, and a patent thereon issued to G. in January, 1800. G. in August, 1800, conveyed the same land to E. *Held*, that the leasehold interest subsisted, and remained unextinguished, and was not merged in the freehold by the patent to G.—*Bradford v. McComas*, 3 H. & J. 444.

### § 9. Rent charges.

(a) A testator devised as follows: "I give and bequeath to my daughter B. the sum of \$60 as an annuity, to be paid to her out of the profits of my real estate annually." *Held*, that the legacy was not a rent charge.—*Robinson v. Townshend*, 3 G. & J. 413.

### § 10. Merger.

#### Cross-References.

Acquisition of preceding estate by remainderman, see "Remainders," § 9.

By assignment of mortgage or debt to mortgagor or owner of property, see "Mortgages," § 268.

By conveyance of mortgaged property by mortgagor to mortgagee, see "Mortgages," § 295.

Of homestead rights of surviving spouse in fee, see "Homestead," § 144.

Of lease in fee on conveyance by landlord to tenant, see "Landlord and Tenant," § 60.

Of life estate and remainder, see "Remainders," § 9.

Of trust estates, see "Trusts," § 154.

(a) Where a corporation, while holding a leasehold interest in land in trust to be used for church purposes, takes a conveyance from the reversioner, there is a complete merger; the trust is extinguished, and a subsequent deed from such corporation conveys the fee.—*Bennett v. Methodist Episcopal Church*, 66 Md. 36, 5 Atl. 291.

(b) Where an estate limited to the ancestor is an equitable or trust estate, the two estates will not coalesce in the ancestor; and so if the estate for life was a legal estate and that limited to the heirs an equitable estate.—*Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762. [Cited and annotated in 16 L. R. A. (N. S.) 1153, on statute of uses in United States; in 29 L. R. A. (N. S.) 965, 975, 978, 994, 1025, 1032, 1064, 1095, 1163, on rule in Shelley's Case.]

## ESTATES TAIL.\*

*Scope-Note.*

[INCLUDES nature and incidents of estates of inheritance limited to issue, general or special; abolition of such estates, and its effect; rights, powers, and liabilities of tenants in tail; and barring entails.

[EXCLUDES construction of grants and devises in tail (see "*Deeds*"; "*Wills*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature and incidents in general.
- § 2. Statutory modification or abolition.
- § 3. Relation of tenant in tail to issue in tail.
- § 4. Rights and liabilities of tenant in tail as to property.
- § 5. Bar or defeat.
- § 6. — In general.
- § 7. — Conveyance to bar entail.
- § 8. Estate tail after possibility of issue extinct.

*Cross-References.*

Construction of deeds, see "*Deeds*," § 127.  
Construction of wills, see "*Wills*," §§ 605-607.

Rule in Shelley's Case, see "*Deeds*," § 128; "*Estates*," § 8; "*Wills*," § 608; Code [vol. 3], art. 93, § 332A.

**§ 1. Nature and incidents in general.**

(a) Estates tail are created by deed or will, which must be produced, or a proper foundation laid for presuming that they have existed.—*Maslin v. Thomas*, 8 Gill 18.

**§ 2. Statutory modification or abolition.**

(a) Under the statute to direct descents an estate tail created by a devise to a person during "his natural life and no longer," and, after his death, "to his heirs lawfully begotten forever, to be equally divided between them," descends as an estate in fee, and is subject to the owner's debts.—*Clarke v. Smith*, 49 Md. 106. [Cited and annotated in 29 L. R. A. (N. S.) 1065, 1163, on rule in Shelley's Case.]

(b) Estates tail general being converted into estates in fee simple by operation of the acts to direct descents, a devise creating such an estate in the heir at law does not break the descent, but he takes as heir at law by descent, and not by purchase; and, in default of lineal heirs, the estate descends to the heir on the part of the ancestor from whom it was derived.—*Posey's Lessee v. Budd*, 21 Md. 477.

(c) The mode of docking estates tail by common recovery was abolished by the act of 1872, c. 23.—*Maslin v. Thomas*, 8 Gill 18. (See Code, art. 21, § 24.)

(d) Before act 1786, c. 45, estates tail were not liable for the debts of the tenants; but by that act estates tail general, created since its passage, were virtually abolished, and converted into estates in fee simple, and now have all the incidents of estates in fee. They are transferable, descendible, and devisable, and subject to debts like estates in fee.—*Newton v. Griffith*, 1 H. & G. 111. (See Code, art. 21, § 24; art. 46, §§ 1, et seq.)

(e) Act 1786, c. 45, to direct descents, changed the transmission of a tenancy in tail to the issue of the tenant only by making the land descendible to all the children of the tenant and their respective issue indefinitely, instead of the eldest son. It was not the intention of the Legislature to abolish estates tail general, or remainders limited thereon, and to convert them into estates in fee simple, by giving them the same properties.—*Smith v. Smith*, 2 H. & J. 314. (Compare *Newton v. Griffith*, 1 H. & G. 111;

\*Annotation: Words and Phrases, same title.

*Posey's Lessee v. Budd*, 21 Md. 477. See Code, art. 21, § 24; art. 46, §§ 1, et seq.)

### § 3. Relation of tenant in tail to issue in tail.

(a) Any person seised of an estate tail in possession, remainder, or reversion may convey the same in the same manner and form as a tenant in fee, since act 1783, c. 23, providing for docking estates tail by common recovery, has been abolished.—*Newton v. Griffith*, 1 H. & G. 111. (See Code, art. 21, § 24.)

(b) Estates tail generally divided among heirs, taken on execution, or sold by commissioners, are held in fee simple.—*Newton v. Griffith*, 1 H. & G. 111.

### § 4. Rights and liabilities of tenant in tail as to property.

(a) An heir or issue in tail, claiming per formam doni, is not compellable to fulfill a contract entered into by the tenant in tail for a sale of the entailed lands. Nor has the court of chancery power to decree a specific execution of such a contract against the heir or issue in tail.—*Partridge v. Dorssey's Lessee*, 3 H. & J. 302.

(b) If a limited interest is conveyed by a tenant in tail, on the expiration of the particular interest the tenant in tail again takes the estate tail as originally held. A lease for seven years, made by tenant in tail, will have the effect to pass the estate for the term therein expressed. A mortgage made by a tenant in tail defeats the estate tail for a limited time. If the money is paid, the old estate is revived.—*Laidler v. Young*, 2 H. & J. 69.

(c) A tenant in tail may mortgage his lands.—*Todd v. Pratt*, 1 H. & J. 465. [Cited and annotated in 31 L. R. A. 772, on injunction against judgments for defenses existing prior to rendition; in 32 L. R. A. 324, on equitable jurisdiction as to injunctions against judgments.]

### § 5. Bar or defeat.

#### § 6.— In general.

(a) A., by his will, in 1729, devised lands to his wife for life, with remainder in tail to his son B. In 1771, B. suffered a common recovery for docking his estate tail and for

limiting and assuring the lands to the use of C. When this recovery was suffered, A.'s wife was alive and in possession of the land, and continued in possession until after C.'s death, and C. and those claiming under him were also in possession during the life of A.'s wife. Held, that the recovery was defective; there being no proof of an actual surrender of the life estate of A.'s wife, nor any sufficient ground to presume that it had been surrendered.—*Carroll's Lessee v. Maydwell*, 3 H. & J. 292.

(b) In an action of trespass quare clausum, it appeared that the tenant in tail conveyed to those under whom defendant claimed, who entered, and had been in peaceable possession for 42 years, and that the tenant in tail died, leaving the lessor of plaintiff, his eldest son and heir, an infant, who, within 10 years after his arrival at age, brought the present action for cutting trees within one year before the suit was brought. Held, that plaintiff could not recover.—*Purnell v. Reynolds*, 4 H. & McH. 489.

(c) An heir in tail is not barred by the statute of limitations where the tenant in tail has conveyed the estate and delivered possession.—*Cheseldine's Lessee v. Brewer*, 4 H. & McH. 487. [Cited and annotated in 19 L. R. A. 849, on adverse possession against remaindermen and owners of future estates.]

(d) Twenty years' adverse possession against the tenant in tail will bar the right of entry of the issue.—*Martindale's Lessee v. Troop*, 3 H. & McH. 244.

### § 7.— Conveyance to bar entail.

(a) A deed of bargain and sale of an estate tail, under act 1782, c. 23, conveys to the grantee a fee simple, and does not let in, as a lien or incumbrance, an unsatisfied judgment against the tenant in tail.—*Maslin v. Thomas*, 8 Gill 18. (See Code, art. 21, § 24.)

(b) Under act Nov. 1782, c. 23, a tenant in tail may defeat the estate tail altogether, or convey only a limited or qualified estate. A common deed of bargain and sale operates to convey the estate and vest a fee simple in the grantee.—*Laidler v. Young*, 2 H. & J. 69. (See Code, art. 24, § 24.)

(c) Where A. holds an estate tail with a

reversion to B., the estate tail is docked by a deed from A. to B., although B. is declared to hold the land conveyed in trust for B. and those claiming under him by will.—*Brogden v. Walker*, 2 H. & J. 285.

(d) A grant was made, by the lord proprietary, to "A. and the heirs of his body, lawfully begotten forever." Held, that a deed by A. barring the estate tail destroyed the reversionary interest of the proprietary as well as the state.—*Howard v. Moale*, 2 H. & J. 249.

(e) A deed of bargain and sale by the heir in tail in the lifetime of his ancestor, when he is not tenant, will not work a discontinuance.—*Hopkins v. Threlkeld*, 3 H. & McH. 443.

(f) A deed made to bar an estate tail will not bar it if not recorded in the proper county, though, by a decree of the chancellor, it is afterwards recorded in the proper

county.—*Ridgely v. McLaughlin*, 3 H. & McH. 220.

(g) Under act 1782, c. 23, providing that persons seised of estates tail may convey them in the same manner as persons seised of estates in fee simple, a deed of bargain and sale, not indented, is not sufficient to bar an estate tail.—*Paca v. Forwood*, 2 H. & McH. 175. (See Code, art. 21, §§ 23, 24.)

(h) A bargain and sale, with warranty, by a feme covert who is tenant in tail, will not work a discontinuance of the estate.—*Mason v. Sexton*, 1 H. & McH. 275.

#### § 8. Estate tail after possibility of issue extinct.

#### ESTIMATES.\*

##### Cross-References.

For levy of school taxes, see "Schools and School Districts," § 103.

Of cost of public improvement, see "Municipal Corporations," §§ 296, 315.

## ESTOPPEL.\*

### Scope-Note.

[INCLUDES preclusion of persons from asserting or denying matters of fact, rights, or claims contrary to or inconsistent with previous allegations, admissions, denials, acts, or conduct of the same persons or those under whom they claim; nature and grounds of such preclusion; operation and effect of estoppel as to rights and titles subsequently acquired as well as those previously existing; pleading estoppel; and evidence relating thereto.

[EXCLUDES liability of particular classes of persons to be estopped (see "*Infants*," and other specific heads); estoppel of tenant to dispute landlord's title (see "*Landlord and Tenant*"); and conclusiveness and effect of judgments (see "*Judgment*").

[For complete list of matters excluded, see cross-references, post.]

### Analysis.

#### I. By Record.

- § 1. Nature and elements in general.
- § 2. Judicial records in general.
- § 3. Pleadings.
- § 4. Petitions and affidavits.
- § 5. Stipulations and admissions.
- § 6. Motions and orders.
- § 7. Verdicts and findings.
- § 8. Persons to whom estoppel is available.
- § 9. Persons estopped.
- § 10. Matters precluded.
- § 11. Pleading estoppel.

\*Annotation: Words and Phrases, same title.

**II. By Deed.****(A) CREATION AND OPERATION IN GENERAL.**

- § 12. Nature and elements in general.
- § 13. Instruments operating as estoppel.
- § 14. — In general.
- § 15. — Deeds.
- § 16. — Bills of sale.
- § 17. — Mortgages.
- § 18. — Bonds and other obligations.
- § 19. — Defective, inoperative, or invalid instruments and transactions.
- § 20. Grounds of estoppel.
- § 21. — In general.
- § 22. — Recitals.
- § 23. — Covenants.
- § 24. Operation and effect in general.
- § 25. Persons to whom estoppel is available.
- § 26. Persons estopped in general.
- § 27. Grantors or mortgagors and privies.
- § 28. Effect, as against heir, of covenant of ancestor.
- § 29. Grantees or mortgagees.
- § 30. Remote grantees.
- § 31. Persons acting in particular character or capacity.
- § 32. Matters precluded.
- § 33. Estoppel against estoppel.
- § 34. Pleading estoppel.

**(B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.**

- § 35. Estoppel as to title subsequently acquired in general.
- § 36. Instruments operating on title subsequently acquired.
- § 37. — In general.
- § 38. — Conveyances with covenants.
- § 39. — Conveyances without covenants.
- § 40. Grounds of estoppel.
- § 41. — In general.
- § 42. — Liability on covenants.
- § 43. Persons to whom estoppel is available.
- § 44. Persons estopped in general.
- § 45. Grantors or mortgagors and privies.
- § 46. Estates or rights affected.
- § 47. — In general.
- § 48. — Title acquired from or adversely to grantee.
- § 49. — Title acquired in different right.
- § 50. Actual transfer of title by operation of law.
- § 51. Pleading title by estoppel.

**III. Equitable Estoppel.****(A) NATURE AND ESSENTIALS IN GENERAL.**

- § 52. Nature and elements of estoppel in pais.
- § 53. Intent.
- § 54. Knowledge of facts.
- § 55. Reliance on adverse party.

- § 56. Acts done or omitted, and change of position.
  - § 57. Benefit to person against whom estoppel is asserted.
  - § 58. Prejudice to person setting up estoppel.
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- Validity of school district bonds, see "Schools and School Districts," § 97.
- Validity of school tax, see "Schools and School Districts," § 107.
- Validity of service of case on appeal, see "Appeal and Error," § 565.
- Validity of stock, see "Banks and Banking," § 47; "Corporations," § 243.
- Validity of stockholders' meeting, see "Corporations," § 198.
- Validity of tax collector's bond, see "Taxation," § 568.
- Validity of tax title, see "Taxation," § 796.
- Validity of title of plaintiff claiming from same source as defendant, see "Trespass to Try Title," § 11.
- Validity of town bonds, see "Towns," § 52.
- Validity of traffic contract between street railroad companies, see "Street Railroads," § 50.
- Validity of transfer of corporate stock, see "Corporations," § 141.
- Validity of transfer of liquor license, see "Intoxicating Liquors," § 103.
- Validity of trust, see "Trusts," § 53.
- Validity of will, see "Wills," § 718.
- Vendor's lien, see "Vendor and Purchaser," § 266.
- Waste by executor, see "Executors and Administrators," § 117.
- To maintain or oppose particular remedies or defenses.*
- See "Divorce," § 10; "Fraud," § 35; "Mechanics' Liens," §§ 76, 169, 216, 226, 254, 263, 314; "Reformation of Instruments," § 23; "Seduction," § 6; "Set-Off and Counterclaim," § 21; "Specific Performance," § 7.
- Action against president for loss by overdrafts, see "Banks and Banking," § 54.
- Action by or against trustee in bankruptcy, see "Bankruptcy," § 290.
- Action for infringement of trade-mark or trade-name or for unfair competition, see "Trade-Marks and Trade-Names," § 87.
- Actions against director of insolvent bank, see "Banks and Banking," § 82.
- Amendment or correction of judgment, see "Judgment," § 299.
- Appeal, by accepting pardon, see "Pardon," § 9.
- Appeal or other proceeding for review in general, see "Appeal and Error," §§ 153-168, 882-884; "Certiorari," § 34; "Criminal Law," § 1137; "New Trial," § 10.
- Attacking appointment of receiver, see "Receivers," § 57.
- Attacking sale on foreclosure of mortgage, see "Mortgages," § 528.
- Avoidance of conveyances between husband and wife, see "Husband and Wife," § 52.
- Bill of review, see "Equity," § 450.
- By election of remedy, see "Election of Remedies," §§ 14, 15.
- Change of venue, see "Criminal Law," § 145; "Venue," § 84.
- Contesting election, see "Elections," § 273.
- Contesting petition in bankruptcy, see "Bankruptcy," § 100.

Contesting will or probate, see "Wills," § 230.  
 Continuance, see "Criminal Law," § 593.  
 Defenses against assignee of mortgage, see "Mortgages," § 260.  
 Defenses against bona fide purchaser of bill or note, see "Bills and Notes," § 365.  
 Defenses to claim for price of patent right, effect, see "Patents," § 219.  
 Defenses to payment of subscription to corporate stock, see "Corporations," § 81.  
 Enforcement of claims against insolvent bank, see "Banks and Banking," § 288.  
 Equitable relief against judgment, see "Judgment," § 448.  
 Establishment of will, see "Wills," § 227.  
 Foreclosure of mortgage, see "Mortgages," § 408.  
 For wrongful attachment, see "Attachment," § 364.  
 Introduction of particular evidence at trial, see "Trial," § 37.  
 Objections in arbitration proceedings, see "Arbitration and Award," § 46.  
 Objections to account of executor or administrator, see "Executors and Administrators," § 504.  
 Objections to certificate of evidence, see "Appeal and Error," § 574.  
 Objections to change of venue, see "Venue," § 84.  
 Objections to evidence, see "Criminal Law," § 692; "Trial," § 75.  
 Objections to instructions, see "Trial," § 272.  
 Objections to jurisdiction by appearance, see "Appearance," § 19.  
 Objections to jurisdiction in general, see "Courts," § 37.  
 Objections to jurisdiction of accused, see "Criminal Law," § 105.  
 Objections to jurisdiction of appellate court, see "Appeal and Error," § 22.  
 Objections to jurisdiction of court of bankruptcy, see "Bankruptcy," § 21.  
 Objections to premature appeals, see "Appeal and Error," § 337.  
 Objections to specific performance, see "Specific Performance," § 101.  
 Objections to venue, see "Venue," §§ 17, 32.  
 Objections to verdict, see "Malicious Prosecution," § 2; "Trial," § 345.

Objection to splitting cause of action, see "Action," § 53.  
 Opening or vacating judgment, see "Judgment," §§ 343, 382.  
 Petition for adjudication of debtor as bankrupt, see "Bankruptcy," § 64.  
 Petition in bankruptcy, see "Bankruptcy," § 76.  
 Prevention of unauthorized acts of municipal officers, see "Municipal Corporations," § 987.  
 Quashing attachment, see "Attachment," § 239.  
 Redemption from execution sale, see "Execution," § 294.  
 Redemption from mortgage sale, see "Mortgages," § 597.  
 Redemption from tax sale, see "Taxation," § 698.  
 Remedies of trustee in bankruptcy as to preferences, see "Bankruptcy," § 168.  
 Rescission of contract in general, see "Contracts," § 262.  
 Rescission of contract of sale, see "Sales," §§ 101, 121; "Vendor and Purchaser," §§ 95, 114.  
 Restraining collection of levee tax, see "Levees," § 29.  
 Restraining diversion of water, see "Waters and Water Courses," § 85.  
 Restraining enforcement of corporate bonds, see "Corporations," § 487.  
 Restraining maintenance of dam, see "Waters and Water Courses," § 177.  
 Restraining pollution of water, see "Waters and Water Courses," § 75.  
 Review, correction or setting aside of assessment for taxation, see "Taxation," § 463.  
 Sale of decedent's real estate, see "Executors and Administrators," § 328.  
 Setting aside assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 342.  
 Statute of limitations, see "Limitation of Actions," § 13.  
 Title by estoppel, sufficiency to support ejectment, see "Ejectment," § 14.  
 Transfer of cause from one state court to another, see "Courts," § 488.  
 Writ of assistance in foreclosure proceedings, see "Mortgages," § 544.

## I. BY RECORD.

### Cross-References.

Bonds in legal proceedings, see post, § 18.  
 By judgment, see "Judgment," §§ 540-751.  
 By judgment included in schedule of claims in bankruptcy, see "Bankruptcy," § 31.

### § 1. Nature and elements in general.

### § 2. Judicial records in general.

### § 3. Pleadings.

### Cross-References.

As judicial admissions, see "Evidence," § 208.  
 Conclusiveness in same action, see "Pleading," § 36.

(a) Where a wife in divorce proceedings alleged that the children whose custody she sought were born to her and her husband, and afterwards, in proceedings to change their names, swore to a petition stating the same fact, she is estopped to deny such paternity.—*Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498. [Cited and annotated in 2 L. R. A. (N. S.) 620, on competency to testify as to husband's non-access; in 36 L. R. A. (N. S.) 256, 260, on proof establishing bastardy of married woman's child.]

(b) One who instigated divorce proceedings, and afterwards married the woman,

and instigated proceedings to change the surnames of children born during the former marriage to his own, is estopped to deny sworn statements in such proceedings as to the paternity of the children.—*Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498. [Cited and annotated, see supra.]

(c) Defendant in ejectment filed a sworn bill in chancery for an injunction against the prosecution of the ejectment suit. His bill averred that the legal title to the land was vested in plaintiff, and that he was powerless to defend the suit at law. Held, that he was estopped by these statements from setting up in the ejectment suit title by adverse possession.—*Mobberly v. Mobberly*, 60 Md. 376.

(d) Parties will be estopped by their admissions made in a deed, and afterwards recognized and confirmed by them in their answer in a suit in equity.—*Ridgely v. Bond*, 18 Md. 433. [Cited and annotated in 15 L. R. A. (N. S.) 76, on devise or bequest by implication.]

(e) The answer of defendant in one case, having no relation to another, can only be used and regarded as evidence, and not as an estoppel, in the latter case.—*Young v. Mackall*, 4 Md. 362.

#### § 4. Petitions and affidavits.

##### Cross-Reference.

As judicial admissions, see "Evidence," § 210.

#### § 5. Stipulations and admissions.

##### Cross-References.

Stipulations as estoppel in pais, see post, § 79.

Conclusiveness and effect of stipulations in general, see "Stipulations," §§ 17, 18. Stipulations as judicial admissions, see "Evidence," § 209.

(a) A life tenant who has appeared in an action brought by the remainderman to sell the property for a better investment, and filed an agreement to the sale, is estopped thereby to set up any claim to the property after such sale.—*Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322.

(b) Parties are bound by their written admissions made in the progress of a cause, and cannot repudiate them at pleasure.—*Elwood v. Lannon's Lessee*, 27 Md. 200.

§§ 6, 7. (See Analysis.)

#### § 8. Persons to whom estoppel is available.

(a) Estoppels by record are mutual, and cannot be insisted on by one who is himself not bound thereby.—*Groshon v. Thomas*, 20 Md. 234.

#### § 9. Persons estopped.

##### Cross-Reference.

Married women, see "Husband and Wife," § 62.

(a) Estoppels by record operate only on parties and privies in blood or estate, and can be used neither by nor against strangers.—*Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626. [Cited and annotated in 21 L. R. A. 680, 681, 682, on conclusiveness of probate as res judicata.]

§§ 10, 11. (See Analysis.)

## II. BY DEED.

##### Cross-References.

By contract of sale before conveyance, see "Vendor and Purchaser," § 189.

By patents for inventions, see "Patents," § 163.

Of tenant to dispute title of landlord, see "Landlord and Tenant," §§ 61-69.

#### (A) CREATION AND OPERATION IN GENERAL.

#### § 12. Nature and elements in general.

#### §§ 13-19. Instruments operating as estoppel.

##### Cross-References.

Equitable estoppel by inoperative deed, see post, § 74.

Estoppel to attack validity of deed, see "Deeds," § 74.

##### Annotation.

Estoppel by giving forthcoming bond to question legality of levy under an execution.—51 L. R. A. (N. S.) 635, note.

(a) Even though defendant's husband entered into a written contract with the agent of plaintiff's grantor for the purchase of land, and had paid part of the purchase money and executed notes for the balance, such fact would not estop defendant from claiming the land if her husband had good title at the time and the plaintiff's agent got him drunk, and made the arrangement by fraud, or if the arrangement was made for the purpose of avoiding a lawsuit.—*Morgan's Lessee v. Slider*, 22 Md. 267.

§ 20. Grounds of estoppel.

§ 21.— In general.

§ 22.— Recitals.

*Cross-References.*

Recitals in deed that grantor is over twenty-one years of age as constituting estoppel, see "Infants," § 29.

Recitals in municipal bonds, see "Municipal Corporations," § 943.

*Annotation.*

Right of grantee to claim estoppel as against the grantor by a call in the deed for a street or alley in which the grantor owns the fee.—14 L. R. A. (N. S.) 878, note.

(a) Decedent promised his daughter that, if she would live with him during his life, he would leave her the property in controversy. Thereafter he contracted to convey the property to plaintiff, and later, while on his deathbed, endeavored unsuccessfully to get plaintiff to surrender his rights in the property. He then conveyed the property to the daughter by a deed reciting a consideration of \$5 and love and affection, and making no reference to plaintiff's contract, and the daughter, though having full knowledge thereof, never claimed during the father's lifetime that the deed to her was based on a consideration other than that expressed. *Held*, that the daughter, after her father's death, could not contradict the consideration in the deed and claim that the same was not voluntary, but was in fulfillment of her father's previous contract to convey the property to her.—*Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938. [Cited and annotated in 14 L. R. A. (N. S.) 319, on refusal of specific performance of land contract for inadequacy of consideration; in 44 L. R. A. (N. S.) 756, on specific performance of contract to leave property in consideration of services or support; in 25 L. R. A. (N. S.) 1207, on parol evidence as to consideration of deed.]

(b) An appeal bond professed in terms to be the corporate act of the obligor, and was executed under its corporate seal. *Held*, that it was estopped, in an action on the bond, by the recitals and descriptions of itself, from alleging its name to be different from that given.—*Keen v. Whittington*, 40 Md. 489.

(c) A grantor conveyed realty to a grantee

in trust for his wife during life or widowhood, with power to the wife, with the consent of her husband, to convey it. The grantee and his wife, to secure notes given to the grantor, executed a mortgage of the property. By the mortgage the grantor was authorized to sell on default. The grantee and his wife subsequently mortgaged the property to a third person, reciting the former mortgage, and by the latter mortgage the mortgagee on default was authorized to sell the property as therein specified, and under such power the property was sold. *Held*, that the grantee and his wife were estopped by their deed from denying that they had power to mortgage.—*Warfield v. Ross*, 38 Md. 85.

(d) The obligors in a collector's bond, which recites the appointment of such collector, are estopped by such recitals from denying the appointment.—*State v. Horner*, 34 Md. 569.

(e) A surety in an injunction bond which recited that the injunction was ordered to be issued "on the complainant's filing with the clerk of the court a bond executed by himself and a surety or sureties," etc., cannot, in an action against himself on the bond, object to its admissibility in evidence, on the ground that it does not appear that the order granting the injunction required a bond to be given. Having signed and sealed the bond, he is estopped from denying it.—*Hamilton v. State*, 32 Md. 348.

(f) Where a defendant, or those under whom he claims, was not a party to a deed, he cannot claim the benefit of any recitals therein as an estoppel, as such recitals are not binding on the parties in a controversy with a stranger.—*Nutwell v. Tongue*, 22 Md. 419.

(g) The condition of a bond was that the principal obligor "shall well and faithfully execute his office as collector of the state tax of Calvert county, in district number two." *Held*, that this estopped the parties to the bond from denying that the principal obligor had been appointed collector.—*Billingsley v. State*, 14 Md. 369.

(h) The obligor in a bond conditioned to prosecute an appeal in the next succeeding County Court of Anne Arundel County is



not estopped by that recital to deny the existence of any such court.—*Tucker v. State*, 11 Md. 322.

(i) The acknowledgment in the deed by a grantor of the receipt of the consideration does not estop him from proving that it has not been received.—*Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392. [Cited and annotated in 18 L. R. A. 252, on power of corporation to deal in stock; in 20 L. R. A. 102, 106, on parol evidence as to consideration of deed; in 24 L. R. A. (N. S.) 415, on parol evidence to show true nature of transaction where recited consideration of deed shown not paid.]

(j) The obligor in an injunction bond cannot, in a suit on the bond, plead that he did not obtain any injunction.—*Lloyd v. Burgess*, 4 Gill 187.

(k) Where a condition of a guardian's bond recited that A. was guardian, etc., and he obtained possession of the property of the ward named therein, neither the principal obligor nor the surety, in an action on such bond, can deny that he was guardian in the face of such recital, nor set up as a defense any supposed irregularity in obtaining his appointment.—*Fridge v. State*, 3 G. & J. 103, 20 Am. Dec. 463.

### § 23.—Covenants.

#### Annotation.

Effect of covenants of married women and their estoppel by deed or mortgage.—22 L. R. A. 79, note.

(a) A general warranty, with a covenant of further assurance to "their heirs," constitutes an estoppel.—*Showman v. Miller*, 6 Md. 479. [Cited and annotated in 2 L. R. A. (N. S.) 178, on necessity of word "heirs" to pass fee to trustee; in 28 L. R. A. (N. S.) 788, 793, 809, 854, 913, 923, on relief from mistake of law as to effect of instrument.]

### § 24. Operation and effect in general.

### § 25. Persons to whom estoppel is available.

(a) Parties and privies alone can take advantage of an estoppel by deed or by recitals therein.—*Nutwell v. Tongue*, 22 Md. 419.

(b) Estoppels by deed bind only parties and privies.—*Cecil v. Rose*, 17 Md. 92.

(c) Estoppels by deed must be mutual, and bind both parties or neither.—*Alexander v. Walter*, 8 Gill 239, 50 Am. Dec. 688.

### § 26. Persons estopped in general.

#### Cross-Reference.

Married women, see "Husband and Wife," §§ 62, 129.

### § 27. Grantors or mortgagors and privies.

(a) A grantor is estopped to deny the title of his grantee.—*Reese v. Reese*, 41 Md. 554. [Cited and annotated in 4 L. R. A. (N. S.) 411, on sufficiency of evidence to overcome denial of contract.]

(b) A husband and wife jointly executed a deed of release to R., administrator with the will annexed of her mother's estate, stating that a sum paid by him was "in full for all sums of money belonging to the said wife as legatee under the will of" her father, under which she was given the remainder of his property after her mother's life estate should expire. The wife also executed alone, as guardian of her minor children, a deed of release to R. for money paid by him "on account of the legacies bequeathed to the said [children] by the will of" her mother. Both releases were executed and acknowledged on the same day, before the same magistrate, and attested by the same witness. The administrator then proceeded, on the faith that the releasors had discharged all further claim upon the estate, to pay the other legacies. Held, that the husband and wife were precluded from seeking a restatement of the administrator's account.—*Brown v. Rowles*, 21 Md. 11. [Cited and annotated in 28 L. R. A. (N. S.) 842, on relief from mistake of law as to effect of instrument.]

(c) A corporation, which has given a release under seal, purporting to be signed by its president, and exhibited it in court as its act, will be estopped in an action against the parties to whom it was given to deny its validity.—*Scaggs v. Baltimore & W. R. Co.*, 10 Md. 268.

(d) A deed executed by a witness at a trial in order to make him competent to testify will preclude the grantor from assailing it on the ground that it was not made in good faith.—*Pegg v. Warford*, 7 Md. 582.

## § 28. Effect, as against heir, of covenant of ancestor.

### Cross-Reference.

Estoppel as to after-acquired title, see post, § 45.

(a) Where land was devised to a daughter for life, with remainder to her child, if she should have one, and the daughter, four months before the birth of the child, conveyed the land to another with covenants of warranty, the child was not barred from recovering the land devised by the collateral warranty of his mother; such warranty being void because, at the time of the warranty, the remainder had vested in the child, and the daughter only had a life estate.—*Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480. [Cited and annotated in 21 L. R. A. 90, 92, on liability of heirs for ancestor's obligations; in 7 L. R. A. (N. S.) 434, on effect of union of life estate and remote remainder or reversion on intermediate contingent remainder; in 17 L. R. A. (N. S.) 1190, on time cause of action for breach of covenant of seisin or warranty accrues.]

## § 29. Grantees or mortgagees.

(a) Where a tenant by the curtesy without authority granted a lease, which was recorded, authorizing the lessee to remove sand and gravel from the shore of the land, subsequent deeds to the land executed by the life tenant and remaindermen, providing that they should be subject to the provisions of the lease, and referring to its public record, did not estop the grantee to deny the validity of the lease.—*Potomac Dredging Co. v. Smoot*, 108 Md. 54, 69 Atl. 507; *Smoot v. Potomac Dredging Co.*, Id. [Cited and annotated in 36 L. R. A. (N. S.) 1101, on mineral rights of life tenant.]

(b) A grantee cannot enter and hold under a deed, and at the same time repudiate the title thereby conveyed.—*Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18. [Cited and annotated in 11 L. R. A. (N. S.) 511, 519, on effect of specifying use of realty in devise to religious society.]

(c) Creditors claiming under a deed of trust are not estopped from showing that a mortgage of another creditor, referred to in the trust deed, is invalid, as such mortgage derives its validity from its merits,

independently of the deed of trust, and to question it will not invalidate the trust deed.—*Starr v. Dugan*, 22 Md. 58.

(d) Where an estate in remainder is given to persons not technically made parties to a deed, who are children of a party, that party and his grantees are estopped to deny the title of the remaindermen.—*Phelps v. Phelps*, 17 Md. 120.

(e) A party who takes a deed from a tenant in tail is not thereby estopped from asserting that the tenant in tail had only an estate tail.—*Maslin v. Thomas*, 8 Gill 18.

(f) A plaintiff who claims title under two grantors is not estopped from setting up the paramount title of one or alleging that he derived no title from the other.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated in 18 L. R. A. 781, on what title or interest will support ejectment; in 48 L. R. A. (N. S.) 759, 768, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another; in 40 L. R. A. 639, on right to erect wharves.]

## § 30. Remote grantees.

## § 31. Persons acting in particular character or capacity.

### Cross-Reference.

Estoppel as to after-acquired title, see post, § 49.

### Annotation.

Estoppel of one who executes a deed as executor or administrator to set up existing title in himself.—21 L. R. A. (N. S.) 60, note.

## §§ 32-34. (See Analysis.)

## (B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

### Cross-References.

Construction of deed as to inclusion of after-acquired property or title, see "Deeds," § 116.

Rights and liabilities of parties to contract of sale of land before conveyance, see "Vendor and Purchaser," § 190.

## § 35. Estoppel as to title subsequently acquired in general.

(a) A conveyance of the legal title to one who has conveyed the land inures to the benefit of his grantee, under act 1856, c. 154, then in force.—*Williams v. Peters*, 72 Md. 584, 20 Atl. 175.

### §§ 36-39. Instruments operating on title subsequently acquired.

#### Cross-Reference.

Grantee in quitclaim deed as bona fide purchaser, see "Vendor and Purchaser," § 224.

#### Annotation.

Effect of quitclaim deed upon after-acquired title.—35 L. R. A. (N. S.) 1182, note.

Effect of covenants to carry title to a future or subsequently acquired interest of the grantor, where he had a present interest which passed by the deed.—13 L. R. A. (N. S.) 1003, note.

### §§ 40-44. (See Analysis.)

### § 45. Grantors or mortgagors and privies.

#### Cross-References.

Husband or wife by conveyance of community property, see "Husband and Wife," § 267.

Married women, see "Husband and Wife," § 129.

### §§ 46-49. Estates or rights affected.

#### Annotation.

Effect of warranty deed to prevent grantor from asserting title by adverse possession subsequently initiated as against his grantee or his privies.—25 L. R. A. (N. S.) 129, note.

### § 50. Actual transfer of title by operation of law.

### § 51. Pleading title by estoppel.

(a) Where, in ejectment, defendant claimed that the plaintiffs were estopped from asserting title because of covenants of warranty in a deed from their father to defendant's grantor, and in his plea did not allege that the title under which the plaintiffs sought to eject him was older and better than that of the covenantors, or was in existence at the time the covenant was made, the plea was fatally defective.—*Michael v. Jay*, 91 Md. 75, 46 Atl. 385.

## III. EQUITABLE ESTOPPEL.

#### Cross-References.

See Cross-References following Analysis.

### (A) NATURE AND ESSENTIALS IN GENERAL.

### § 52. Nature and elements of estoppel in pais.

#### Annotation.

Actions or suits in which equitable estoppel involving title or interest in real property is available.—49 L. R. A. (N. S.) 775, note.

(a) The doctrine of equitable estoppel, or estoppel in pais, is based upon the grounds of public policy and good faith, and is interposed to prevent injustice and to guard against fraud, by denying to a party the right to repudiate his admissions when those admissions have been acted upon by persons to whom they were directed, and whose conduct they were intended to influence.—*Carroll Springs Distilling Co. v. Schnepfe*, 111 Md. 420, 74 Atl. 828; *Johnson v. Frisbie*, 29 Md. 76; *Alexander v. Walter*, 8 Gill 239, 50 Am. Dec. 688. See also, *Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Bramble v. State*, 41 Md. 435; *Homer v. Grosholz*, 38 Md. 520; *Stallings v. Ruby*, 27 Md. 149.

(b) Estoppels are not favored, but are odious, in the eyes of a court of equity.—*Collinson v. Owens*, 6 G. & J. 4.

### § 53. Intent.

#### Cross-Reference.

See ante, § 52.

### § 54. Knowledge of facts.

(a) Where one who holds a mortgage for indemnity from liability on a bond in attachment against the mortgagor, and who has had other claims against the latter which have been paid, states that the mortgagor has paid him in full, but his attention is not directed to the pendency of negotiations for the purchase of the mortgaged premises, nor to the attachment proceedings in which verdict, but not judgment, has been rendered, and he afterwards pays the judgment, he is not estopped, as against the purchaser, to enforce the mortgage.—*Shipley v. Fox*, 69 Md. 572, 16 Atl. 275. [Cited and annotated in 48 L. R. A. (N. S.) 763, 769, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another.]

(b) When a landlord leaves cattle on which he has distrained for rent in the possession of the tenant, who sells and delivers the same to a bona fide purchaser, the fact that such purchaser, under a mistake as to his rights, assists the landlord in driving the cattle from his premises, does not prevent him from asserting his claim to the cattle.—*Lamotte v. Wisner*, 51 Md. 543.

(c) A devisee, supposing that, by the terms of the will, he took title only in case another devisee died without issue, was a privy to a sale of the property by the latter, who had issue, for a valuable consideration, and permitted the purchaser to take and remain in possession for many years, until he learned that he had taken title on the death of the testator. *Held*, that, as he acted under a clear mistake of his own title, he was not affected by the knowledge of the sale and his long acquiescence under it.—*Lammot's Heirs v. Bowly's Heirs*, 6 H. & J. 500. [Cited and annotated in 48 L. R. A. (N. S.) 774, on estoppel against assertion of title or interest in realty by concealing or representing it to be another; in 28 L. R. A. (N. S.) 888, on relief from mistake of law as to effect of instrument.]

#### § 55. Reliance on adverse party.

##### Cross-References.

Relying and acting on apparent title in another than owner, see post, § 76.

Relying on contract, see post, § 78.

Relying on representations, see post, § 87.

(a) There can be no equitable estoppel to an assertion of title, where the party claiming to have been influenced by the conduct of another to his injury had convenient and available means of ascertaining the true state of the title.—*Mountain Lake Park Ass'n v. Shartzer*, 83 Md. 10, 34 Atl. 536.

(b) Plaintiff sought to recover of a bank a balance of his deposit. The bank had paid several forged checks, which had been returned to the depositor with his regular check book, which was balanced by him and returned to the bank; and subsequently other forged checks were paid by the bank. All of such forgeries were perpetrated by a confidential clerk of the depositor, and without his knowledge until after all such checks had been cashed. *Held*, that, to work an estoppel precluding his recovery, it must be found that the bank acted, and was misled in honoring and paying the forged checks, in reliance on the conduct of the depositor in failing to make known the objection to the account as balanced, including previous forgeries.—*Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325. [Cited and annotated in 27 L. R. A. 426, 430, on depositor's duty as to forged checks charged

to him by bank; in 36 L. R. A. 539, on liability on forged commercial paper; in 7 L. R. A. (N. S.) 750, on effect of intrusting examination of vouchers to guilty employee, on right to recover amount of forged or raised checks paid by bank; in 20 L. R. A. (N. S.) 80, on loss or prejudice from negligent failure to give prompt notice of forgery of check as condition of bank's exoneration from liability; in 29 L. R. A. (N. S.) 339, 349, on effect of retaining statement of account to render it an account stated.]

#### § 56. Acts done or omitted, and change of position.

##### Cross-References.

See ante, § 52.

Acting on representations, see post, § 87. Annotation.

Bringing suit or other legal proceeding as change of position within law of estoppel.—52 L. R. A. (N. S.) 1185, note.

(a) There must be some act done or omitted, or a change of position made by the person claiming the estoppel.—*Homer v. Grosholz*, 38 Md. 520; *Grosholz v. Homer*, Id.; *Bramble v. State*, 41 Md. 435. [Cited and annotated in 25 L. R. A. (N. S.) 190, on application to existing judgments of statute abolishing or diminishing exemptions.]

#### § 57. Benefit to person against whom estoppel is asserted.

##### Cross-Reference.

As element of estoppel by acquiescence, see post, § 92.

#### § 58. Prejudice to person setting up estoppel.

#### § 59. Default or wrongful act of person setting up estoppel.

(a) In an action to recover the sum awarded by commissioners appointed by the parties to divide real estate, to be paid by the defendant, he cannot set up in defense that his wife, whom he had induced to become a party to the division, was at the time an infant, as it would be allowing him to take advantage of his own fraud.—*Ridgeley v. Crandall*, 4 Md. 435.

§§ 60, 61. (See Analysis.)

#### § 62. Estoppel against public, government, or public officers.

##### Cross-References.

Construction of bridges, see "Bridges," § 20.

Construction of railroad crossing, see "Railroads," § 94.

Contribution to expense of constructing bridge, see "Bridges," § 10.

Creation of charities, see "Charities," § 26.

To assert invalidity of warrants issued in excess of constitutional limit of indebtedness, see "Counties," § 150.

To attack corporate existence of school district, see "Schools and School Districts," § 24.

To claim title by adverse possession, see "Adverse Possession," § 50.

To deny correctness of county treasurer's account, see "Counties," § 94.

To deny correctness of established boundaries, see "Counties," § 7.

To deny existence of county, see "Counties," § 3.

To deny grant to street railroad company, see "Street Railroads," § 22.

To deny liability on contract, see "Counties," § 124.

To deny performance of contract, see "Counties," § 128.

To deny right of railroad company to cross highway, see "Railroads," § 93.

To deny validity of act detaching territory, see "Counties," § 10.

To deny validity of bonds, see "Counties," § 183.

To deny validity of orders of county court, see "Counties," § 57.

To deny validity of tax sale of public lands, see "Taxation," § 796.

To deny validity of warrant, see "Counties," § 165.

To exercise taxing power, see "Taxation," § 33.

To urge that appeal is not taken in time, see "Criminal Law," § 1069.

#### Annotation.

Estoppel of municipality to open or use street.—46 L. R. A. (N. S.) 1211, note.

May estoppel to deny authority to receive money alleged to have been embezzled be invoked against public officer charged with the embezzlement.—23 L. R. A. (N. S.) 761, note.

(a) The expenditure of money on the faith of a contract made with a municipal corporation does not estop the corporation from pleading that the contract is ultra vires.—*Mealey v. City of Hagerstown*, 92 Md. 741, 48 Atl. 746.

#### (B) GROUNDS OF ESTOPPEL.

#### § 63. Inconsistency of conduct and claims in general.

#### Annotation.

Estoppel of school district to deny residence of child within district.—36 L. R. A. (N. S.) 344, note.

Estoppel to deny validity of liens when property taken by eminent domain subject to certain liens.—21 L. R. A. (N. S.) 72, note.

(a) In ejectment to recover a tract of land, a grant to plaintiff was no surrender of the grant to plaintiff's father under which plaintiff claimed by descent.—*Tyler's Lessee v. Carroll*, 1 H. & McH. 78.

§§ 64-67. (See Analysis.)

#### § 68. Claim or position in judicial proceedings.

#### Cross-References.

Assent to or participation in judicial proceedings, see post, § 91.

Stipulations and consents in judicial proceedings, see post, § 79.

Estoppel of assignee to attack attachment of assigned property, see "Assignments for Benefit of Creditors," § 193.

(a) A writ was served on the solicitor of defendant corporation, who subscribed an admission of service. Complainants asked for an interlocutory decree for want of appearance, and obtained a decree for sale, which at their instance was carried out. Several years after some of complainants sought to set aside the decree on the ground that the corporation was never summoned. *Held*, that having taken advantage of the service they could not complain of the manner in which it was effected.—*Presstman v. Mason*, 68 Md. 78, 11 Atl. 764.

(b) On a bill against the sureties on an executor's bond, the principal being both a trustee and executor under the will, it was alleged that the executor received money belonging to the estate, which was lost; that the Orphans' Court, on his application, directed him to transfer to himself as trustee the amount remaining in his possession as executor; that under the will the executor was bound to keep the estate until the happening of a certain contingency, which had not happened when the order was passed; that the order was not complied with by the executor, nor any security given for the money transferred to him as trustee, except an unrecorded conveyance of certain realty to himself as trustee for the parties in interest under the will, which was found after his death; that under a creditors' bill by the executor's creditors such lots were sold and brought into court for distribution, the complainants coming in by petition and claiming as general creditors of the executor, and also claiming under the unrecorded deed a specific lien on the proceeds of the sale of the

lots; that the specific lien so claimed was allowed by the court, and the entire proceeds of the sale were paid to them, and the defendants had personal knowledge of such facts, and had advised him in regard to the transaction. *Held*, that, having claimed and received the proceeds from the sale of the property conveyed by the unrecorded deed on the ground that it was executed by the executor to secure the complainants, they could not deny such facts in a suit against the sureties on the administrator's bond.—*Edes v. Garey*, 46 Md. 24.

### § 69. Testimony as witness.

### § 70. Failure to assert title or right.

#### Cross-References.

Acquiescence, see post, §§ 89-94.

Title to property as subject of estoppel in general, see post, § 101.

Retention of possession or apparent title by grantor affecting validity of conveyance as to creditors or purchasers, see "Fraudulent Conveyances," §§ 131-154.

#### Annotation.

Estoppel of wife who conceals her interest in property to assert it as against one who purchases it as property of husband.—48 L. R. A. (N. S.) 757, note.

Estoppel of possessor to assert claim to land.—13 L. R. A. (N. S.) 135, note.

(a) A mortgagor gave the mortgagee a note for back interest which had been permitted to run because of friendship between the two. The mortgagor then contracted to convey the premises, subject to the mortgage, the purchaser knowing nothing of the back interest. When conveyance was about to be made to the purchaser the mortgagee asked him what he was going to do about the back interest, and the purchaser then asked the mortgagor concerning the same, who said that it was all right, that it had been fixed up, and the purchaser accepted conveyance. Thereafter the purchaser asked the mortgagee if the interest had been fixed up and he answered, "Yes." The mortgagor had previously asked the mortgagee not to say anything about the interest, and gave a new note covering the amount due, on which he paid interest to the time of his death. Receipts for the interest on the mortgage were generally given reciting "in full." After the death of the mortgagor, the mortgagee claimed that the note for interest was

a charge covered by the mortgage. *Held*, that the mortgagee was estopped by his conduct from claiming that the back interest was covered by the mortgage, since otherwise the purchaser might have protected himself before accepting conveyance.—*Eareckson v. Rogers*, 112 Md. 160, 75 Atl. 513. [Cited and annotated in 48 L. R. A. (N. S.) 761, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another.]

(b) Where, by written agreement of the creditors, the court has permitted the receiver of an insolvent to borrow money to complete certain houses in course of erection by insolvent (it being agreed that the money borrowed should be a first lien upon the proceeds of the sale of the property), a lienholder who was present and took part at the meetings of the creditors, and who promised at various times to sign the agreement, but never did, is estopped from later asserting his lien against the proceeds of the sale in preference to that of the borrowed money, where he had full knowledge that such money was to be paid back first out of the proceeds of the sale, and that the other claims were to be postponed; it being shown that he gave his aid to the receiver in completing the buildings under the arrangement, and was one of the auditing committee authorizing the expenditure of the money.—*Goldman v. Brinton*, 90 Md. 259, 44 Atl. 1029; *Drovers' & Mechanics' Nat. Bank v. Same*, *Id.*

(c) A mortgagee offered to receive his debt of the mortgagor's executrix, but she, being unwilling or unable to pay it, consented to his selling under the power in the mortgage, but without his knowledge secured an order of sale from the Orphans' Court, under her power in the will, and refused to co-operate with the mortgagee, and insisted on the right to sell alone. He thereupon proceeded in equity to foreclose his mortgage. *Held*, that his delay did not estop him to execute his power.—*Mish v. Lechliden*, 89 Md. 275, 43 Atl. 57.

(d) A loan by a banking firm to a corporation, all of the stock in which was practically owned by a member of the firm, having been treated by the bank and by such partner as the latter's individual debt, for the

purpose of increasing the credit of the corporation, the bank and its trustee in insolvency are estopped to claim to share in the assets of the corporation as for a corporate debt.—*Pott v. Schmucker*, 84 Md. 535, 36 Atl. 592, 35 L. R. A. 392, 57 Am. St. Rep. 415. [Cited and annotated in 1 L. R. A. (N. S.) 178, on fiction of incorporation to evade law.]

(e) A party in whom the equitable title to land was vested at the time another obtained a patent therefor forfeited such equitable title by permitting the patent to issue to the other person without making any objection.—*Attorney-General v. Biggs*, 2 Bland 262, note.

### § 71. Disclaimer.

#### Cross-Reference.

In pleading, see ante, § 3.

(a) By the will of appellant's father, his property was to be equally divided among his children, all of whom, including appellant, had received various advances. Pending litigation as to whether certain advances would be held debts or technical advancements, appellant turned over to the executor certain stock which had been advanced by his father, and the present value of which he feared to be less than the amount charged against him on his father's books; claiming that such shares had been merely loaned to him. *Held*, that after a holding that the amounts advanced were technical advancements, and not loans, appellant could not seek to recover the stock on the ground that it was an advancement.—*Baker v. Baker*, 94 Md. 627, 51 Atl. 566.

### § 72. Acts making injury possible as between actor and another equally blameless.

(a) Where defendant was not induced by plaintiff's representations to believe that certain property belonging to plaintiff, which he permitted B. to use, belonged to B., defendant could not attach such property to satisfy B.'s debt to it, the rule, that whenever one of two innocent persons must suffer by the act of a third person he who has enabled such third person to occasion the loss must sustain it, not applying.—*William J. Lemp Brewing Co. v. Mantz*, 120 Md. 176, 87 Atl. 814.

### § 73. Clothing another with apparent title or authority.

#### Cross-Reference.

Title to property as subject of estoppel in general, see post, § 101.

### § 74.— Real property.

#### Cross-Reference.

Estoppel to attack validity of deed as between original parties, see "Deeds," § 74.

#### Annotation.

Estoppel of one who permits title of real property to stand in another's name, to assert title as against the latter's creditors.—30 L. R. A. (N. S.) 1; 46 L. R. A. (N. S.) 1097, notes.

Estoppel of landowner by allowing record title to remain in another.—22 L. R. A. 256, note.

### § 75.— Personal property.

#### Annotation.

Effect of putting paper or securities transferable by delivery or indorsed or assigned in blank, into another's possession, to estop owner as against purchaser in good faith.—29 L. R. A. (N. S.) 252, note.

Right of one leaving his chattels in another's possession to claim title against the latter's vendees or creditors.—25 L. R. A. (N. S.) 760, note.

(a) The mere fact that a wagon and harness, etc., was placed in B.'s possession, and he was permitted to use it in business, would not estop the owner from asserting title though B.'s name, as "distributor" was on one of the wagons.—*William J. Lemp Brewing Co. v. Mantz*, 120 Md. 176, 87 Atl. 814.

(b) An army officer took a horse belonging to the government, and, after using him as his individual property for some time, sold him to B., who for nearly a year hired him out as a public livery horse to persons, both civil and military, in that locality. No steps were taken during this time by any agent of the government to recover the horse, and B. finally sold him to C. *Held*, in an action by C. against B. for what C. had paid for the horse, that the government was not estopped to reclaim the horse as its property; there being no evidence that it ever assented to or permitted any one to act on the declarations of the officer.—*Johnson v. Frisbie*, 29 Md. 76, 96 Am. Dec. 508.

(c) Certain depositors in the Maryland Savings Institution, incorporated in December, 1826, agreed with the institution that

their deposits, which they were at liberty to withdraw at pleasure, should be converted into permanent stock. They afterwards received increased dividends thereon, and participated in the entire profits of the institution, and large amounts of special deposits were made on the security of this stock. *Held*, that they were bound by an equitable estoppel from claiming an equality with the special depositors, on the insolvency of the institution, in the payment of their claims based on their original deposits, or from making any attempt to shield the fund created by the conversion of their deposits into stock from a liability to debts of the institution contracted on the faith of its responsibility therefor.—*Maryland Sav. Inst. v. Schroeder*, 8 G. & J. 93, 29 Am. Dec. 528.

**§ 76.—Relying and acting on apparent title or authority.**

**§ 77. Dealing with person asserting title or exercising authority.**

**§ 78. Contracts.**

*Cross-References.*

See "Compromise and Settlement."

Estoppel to deny validity of assent to contract, see "Bills and Notes," § 115; "Contracts," § 97; "Vendor and Purchaser," §§ 41-43.

*Annotation.*

Estoppel to deny liability for injuries resulting from breach of gratuitous promise as to lateral support.—48 L. R. A. (N. S.) 475, note.

Effect of acts or agreement with respect to real property made by one while a tenant of such property, to estop him after he has purchased the fee.—7 L. R. A. (N. S.) 614, note.

(a) A., the owner of the eastern of three adjoining lots, had paid for the other two, but had not taken a conveyance therefor, and, on the middle one being conveyed to B., received back the purchase price he had paid. At the time of this conveyance, the middle lot had a way over the eastern one which was in active use. *Held*, that A. was estopped to question this right of way.—*Burns v. Gallagher*, 62 Md. 462. [Cited and annotated in 8 L. R. A. (N. S.) 340, on implication from necessity of easement other than of way; in 26 L. R. A. (N. S.) 317, 333, 334, 349, on easements created by severance of tract with apparent benefit existing.]

(b) Certain parties entered into an agreement whereby one was to superintend certain work and to receive from the other a portion of the net price received from a contract with a city. It was further agreed that the party so superintending was to have the privilege of drawing a certain amount per month, to be charged against his portion, and also to have the privilege of inspecting the books of account relative to the work, but it was also stated in the agreement that such superintendent was not a partner with the other person in the work, nor was he to be liable for any damages growing out of its prosecution, other than as superintendent. In a bill against the other contracting party the superintendent sought an accounting and a decree for the amount due him and for general relief. *Held*, that as such party signed the agreement with a knowledge of its stipulations, and did not by his bill seek to reform the contract, but made it a part of the foundation of the relief prayed for, he must accept the consequences of the stipulations, one of which was that he was not a partner.—*Reddington v. Lanahan*, 59 Md. 429. [Cited and annotated in 18 L. R. A. (N. S.) 980, 1034, on effect of agreement to share profits to create partnership.]

**§ 79. Stipulations and consents in judicial proceedings.**

(a) Where an executrix, with power under the will to sell realty, agreed with a mortgagee that he should proceed in equity to foreclose his mortgage, she was estopped from afterwards enjoining him in the same court from doing so.—*Mish v. Lechliden*, 89 Md. 275, 43 Atl. 57.

**§ 80. Official certificates or acts.**

(a) Where the certificate of a justice of the peace is offered in evidence against him in any cause where he is a party, the certificate being his official act, done under the sanction of his oath in the performance of a duty imposed on him by law, though under some circumstances it may be impeached by others, he is precluded from denying the truth of what he has official certified.—*Matthews v. Dare*, 20 Md. 248. [Cited and annotated in 35 L. R. A. (N. S.) 9, on payment by commercial paper.]



### § 81. Requests.

### §§ 82-87. Representations.

#### Cross-References.

Estoppel between original parties in general, see "Bills and Notes," § 113.

Promise to pay or partial payment as estoppel between original parties, see "Bills and Notes," § 98.

Time of maturity of stock, see "Building and Loan Associations," § 12.

#### Annotation.

Estoppel to contest commercial paper by representations to prospective purchasers.—50 L. R. A. (N. S.) 1023, note.

(a) Declarations, to create an estoppel, must be made by a party whose duty it is to know and state the truth, and must be relied on by one who has no other means of information, or is justified in relying upon such declarations.—*Hambleton v. Central Ohio R. Co.*, 44 Md. 551. [Cited and annotated in 19 L. R. A. 333, on corporate liability for officers' fraud or forgery in issue of stock; in 45 L. R. A. (N. S.) 1078, on liability of corporation to true owner for unauthorized stock transfer.]

### § 88. Admissions and receipts.

#### Cross-References.

By municipal corporation, see ante, § 62.  
Title to property as subject of estoppel in general, see post, § 101.

(a) Where there was no evidence that plaintiff had done or omitted to do anything which he otherwise would have done or omitted to do, nor any suggestion of any possible prejudice resulting to him from an admission made by defendant in bankruptcy proceedings instituted against her by plaintiff, but, on the contrary, plaintiff was informed by defendant's pleading in such proceedings that she claimed that her alleged signature to a note was a forgery, and he prayed leave to dismiss such proceeding because defendant could prove her solvency, there was no estoppel on defendant to explain, in a subsequent suit on the note, her alleged admissions of liability in the bankruptcy proceedings.—*Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484.

(b) Admissions which have been acted on by others are conclusive against the party making them in all cases between him and the party whose conduct he has thus influenced.—*McClellan v. Kennedy*, 8 Md. 230.

[Cited and annotated in 25 L. R. A. (N. S.) 286, 300, on void, invalid, or unfounded claim as subject of valid compromise.]

(c) Verbal admissions made by a party respecting property which is the subject of a suit, tending to show a sale to the other party, cannot estop him from showing the true nature of his right.—*Isaac v. Williams*, 3 Gill 278.

### § 89. Acquiescence.

#### Cross-References.

Estoppel of municipal corporation, see ante, § 62.

Failure to assert title or right in general, see ante, § 70.

Recognition of title as affecting adverse possession, see "Adverse Possession," § 50.

### § 90.— Assent to or ratification of acts of others in general.

#### Cross-References.

Sale or mortgage of land or personalty, see post, § 94.

Of unauthorized delivery of escrow, see "Escrows," § 14.

#### Annotation.

Liability of sureties on bond of bank as depository of public funds as affected by acquiescence or connivance of public officials in misuse of the funds.—26 L. R. A. (N. S.) 865, note.

Estoppel to question pollution of stream.—22 L. R. A. (N. S.) 282, note.

Laches or acquiescence by stockholder as affecting his right to complain of act by which corporation divests itself of title or control of its entire property.—9 L. R. A. (N. S.) 606, note.

Estoppel to claim damages for obstruction of waters of stream.—59 L. R. A. 904, note.

Estoppel to deny liability on forged paper.—36 L. R. A. 540, note.

Estoppel of corporation to deny liability on contracts of promoter.—26 L. R. A. 550, note.

Estoppel to deny liability as partner.—20 L. R. A. 598, note.

(a) Where an annuitant acquiesces in payment to her of the income of a fund for seven years, it will be inferred that she was not entitled to take from the corpus any deficiency in her annuity.—*Robinson v. Singlerly Pulp & Paper Co.*, 110 Md. 382, 72 Atl. 828.

(b) In a suit in equity to recover the amount of an alleged wrongful reduction of rent which had been accruing for many years, the fact that complainant executed a covenant to reduce the rent, although in-

sufficient to accomplish the purpose designed, and her continued acquiescence in the receipt of the diminished rent, of which she had full knowledge, and the fact that she had a trustee and other agents learned in the law to look after her interests, and was entitled herself beneficially to the property, with power to execute acquittances to her trustee or lessee, estopped her from successfully invoking the aid of a court of equity.—*Frazier v. Gelston*, 35 Md. 298.

(c) A. executed a bond conditioned for the return to the estate of B. certain property, or to pay part of the debt secured by the bond to other persons and to retain the balance due. By B.'s will A. was appointed executor, and he returned a list of the debts due the estate, in which he included the debt due by him on the bond, and charged himself in his account with interest thereon. *Held*, that, having thereby assented to the disposition by the will of the amount due on the bond, he was estopped from denying that the sum due on it was assets belonging to B.'s estate.—*Daingerfield v. May*, 31 Md. 340.

### § 91.— Assent to or participation in judicial proceedings.

#### Cross-References.

Acceptance of benefits of partition sale, see post, § 92.  
Judicial sale of property, see post, § 94.  
Partition by act of parties, see post, § 94.  
Stipulations and consents in judicial proceedings, see ante, § 79.

#### Annotation.

Right of party obtaining or consenting to divorce to contest its validity.—51 L. R. A. (N. S.) 534, note.

Participation by indemnity insurer in defense of suit against insured as estoppel to assert that latter's liability was predicated on ground not covered by policy.—34 L. R. A. (N. S.) 491, note.

(a) Where a judgment creditor files a bill for the application of the estate of the debtor to the payment of a debt, and the validity of the debt is not denied, but it is treated in all respects as a valid and subsisting incumbrance on the estate of the debtor, and property is decreed to be sold for the payment of the debt and full and ample opportunity is afforded to contest the debt and defeat it if there is sufficient ground therefor, a party to the proceedings possessed of information,

or who could by reasonable diligence have become possessed of information to enable him to contest the validity of the claim, is estopped from subsequently impeaching its validity upon the charge of usury.—*Boulden v. Lanahan*, 29 Md. 200.

### § 92.— Acceptance of benefits.

#### Cross-Reference.

As ratification of contract invalid for illegality of object or consideration, see "Contracts," § 134.

#### Annotation.

Estoppel to set up defects or irregularities in replevin bond which has served its purpose.—29 L. R. A. (N. S.) 747, note.

Estoppel of grantee in possession to question grantor's right to collect purchase money.—21 L. R. A. (N. S.) 399, note.

Estoppel to deny jurisdiction of court after receiving benefit of court taking.—15 L. R. A. 274, note.

### § 93.— Permitting improvements or expenditures.

#### Cross-References.

Permitting improvements in streets or on other municipal property, see ante, § 62.  
Consent to or acquiescence in taking of property for public use, see "Eminent Domain," § 280.

On separate property of married woman, see "Husband and Wife," § 198.

#### Annotation.

Estoppel against assertion of title or interest in real property against one making improvements thereon.—48 L. R. A. (N. S.) 759, note.

Estoppel to revoke license to maintain burden on land after licensee has incurred expense in reliance thereon.—19 L. R. A. (N. S.) 700; 25 L. R. A. (N. S.) 727, notes.

Effect of improvement by abutting owner with reference to what is erroneously supposed to be street boundary line to estop municipality from asserting true line.—7 L. R. A. (N. S.) 243, note.

Effect of acquiescence to defeat particular remedies of abutting owner who has consented to construction of railroad or street railway in street or highway.—7 L. R. A. (N. S.) 995, note.

Effect of acquiescence by town or municipality to construction of railway in street or highway to estop it from objecting thereto.—7 L. R. A. (N. S.) 1187, note.

(a) Plaintiffs' easement in an alley across defendant's land, being a matter of record and also known to defendant, they are not estopped to assert it, though they made no formal written protest against its obstruction till three months after defendant com-

menced to erect a house across it, but merely proposed to him to furnish a substitute, which he failed to do.—*Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590; *Same v. Hane*, Id.

(b) Where defendant constructed a passageway over a street so as to shut out the light from plaintiffs' premises, and thereby become a nuisance, plaintiffs' failure to object to the passage of an ordinance authorizing the construction of such passageway did not estop them from afterwards maintaining injunction to compel its removal.—*Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441. [Cited and annotated in 22 L. R. A. (N. S.) 24, on judicial power over eminent domain; in 48 L. R. A. (N. S.) 174, on special damage from awning or structure overhanging street, which will sustain private action to abate nuisance; in 36 L. R. A. (N. S.) 1116, on right of abutter to compensation for vacation of highway; in 23 L. R. A. (N. S.) 159, on right of municipality, without express power, to permit private overhead bridge across street.]

(c) Where defendant erected a passageway across a street so as to obstruct the light from plaintiffs' premises, the fact that plaintiffs did not object until the structure was completed did not estop them from maintaining injunction to compel its removal.—*Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441. [Cited and annotated, see supra.]

(d) The building of an elevated road being authorized by law, it is no defense to an action for damages to abutting property that the plaintiff stood by and saw the structure erected without making complaint.—*Lake Roland El. Ry. Co. v. Hibernian Soc.*, 83 Md. 420, 34 Atl. 1017. [Cited and annotated in 36 L. R. A. (N. S.) 804, 834, on abutter's right to compensation for railroads in streets.]

(e) A plaintiff who allows defendant to erect a building across his right of way without asserting his claim is not thereby estopped from subsequently bringing suit to have the obstruction removed, where it is shown that defendant had full knowledge of plaintiff's claim to the right of way, and knew he did not intend to relinquish it.—

*Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669. [Cited and annotated in 20 L. R. A. 634, on exception and reservation of easements; in 7 L. R. A. (N. S.) 73, 77, on injunctive relief as to fences or gates; in 22 L. R. A. (N. S.) 885, 886, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(f) A party fully cognizant of his rights, having permitted a corporation to expend large sums in laying down and completing its railroad tracks in contravention of his rights, and having made no complaint, nor attempted to interfere, till many years had elapsed, held to be estopped by such acquiescence from relief by injunction.—*Baltimore & O. R. Co. v. Strauss*, 37 Md. 237. [Cited and annotated in 7 L. R. A. (N. S.) 996, on effect of abutter's consent to track in street or highway; in 36 L. R. A. (N. S.) 776, 834, on abutter's right to compensation for railroads in streets.]

(g) One who, without objection, suffers another claiming title to the land to enter thereon and make improvements, will be estopped from asserting his own title.—*Browne v. Trustees of M. E. Church*, 37 Md. 108. [Cited and annotated in 44 L. R. A. (N. S.) 90, on easement by prescription where original use was licensed; in 22 L. R. A. (N. S.) 882, 883, 888, 889, on abandonment or loss of private way by nonuser or improvements inconsistent with use.]

(h) Where one stands by and sees another expending money on property to which he has some claim, and does not give notice of it, he cannot afterwards set up such claim, unless the encroachment is on land the title to which is equally well known to both parties.—*Browne v. Trustees of M. E. Church*, 37 Md. 108. [Cited and annotated, see supra.]

(i) Suffering another to improve one's land is not an estoppel to a claim of legal title thereto under wills and deeds duly recorded, though the title depends on an instrument difficult of construction, and at the time understood by the owner to be adverse to any claim by him.—*Tongue v. Nutwell*, 17 Md. 212, 79 Am. Dec. 649. [Cited and annotated in 48 L. R. A. (N. S.) 768, on estoppel against assertion of title or inter-

est in realty by concealing or representing it to be in another.]

(j) The father and mother of defendants in 1824 executed a deed for lots to indemnify plaintiff against any loss that he might sustain by his becoming security for defendants' father. In 1826 there was a partition of the lots, and some of the parties exchanged lots and executed conveyances accordingly. In 1838 defendants' father and mother united in a note which ascertained the sum due to plaintiff. *Held*, in an action commenced in November, 1845, to enforce plaintiff's lien on the lots, that defendants could not insist that plaintiff forfeited his title by standing by and remaining silent while innocent parties were expending their money on and improving the property, since the title of defendants was equally known to both parties, and the condition of defendants was not affected.—*Hoffman v. Smith*, 1 Md. 475.

(k) The principle that, where one stands by and sees another laying out money upon property to which he has himself some claim or title, and does not give notice of it, he cannot afterwards, in equity and good conscience, set up such claim or title, does not apply to an act of encroachment on land, the title to which is equally well known, or equally open to the notice of both parties; but the principle applies only against one who claims under some trust, lien, or other right, not equally open and apparent to the parties, and in favor of one who would be misled or deceived by such want of notice.—*Casey's Lessee v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated in 18 L. R. A. 781, on what title or interest will support ejectment; in 48 L. R. A. (N. S.) 759, 768, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another; in 40 L. R. A. 639, on right to erect wharves.]

#### § 94.—Permitting sale or mortgage of property.

##### Cross-References.

Acceptance of benefits, see ante, § 92.

Permitting improvements or expenditures, see ante, § 93.

(a) Bonds held for safe-keeping were sold by the holder, and the proceeds appropri-

ated, and, with knowledge of such fact, the owner accepted a note of the holder and others for the value of the bonds, and, after collecting the interest on the note for two years, sued to recover the value of the bonds. *Held*, that such owner was estopped by his ratification from asserting that the sales were wrongful or fraudulent.—*Troup v. Appleman*, 52 Md. 456.

(b) Standing by at a sale, without objection, does not amount to an estoppel, where the title depends on the construction of a will, the existence of which is known to both parties, though both suppose that by force of it the title passes by the sale.—*Tongue v. Nutwell*, 17 Md. 212, 79 Am. Dec. 649. [Cited and annotated, see supra, § 93.]

(c) The owner of property, who stands by and sees a third person selling it under claim of title, without asserting his own title or giving the purchaser any notice thereof, is estopped, as against such purchaser, from afterwards asserting his title.—*Funk v. Newcomer*, 10 Md. 301. [Cited and annotated in 22 L. R. A. 257, on estoppel by allowing record title to remain in another.]

(d) A debtor conveyed land to a trustee, in trust to sell and dispose of the same, and from the proceeds to pay the debts of the grantor, and to hold the surplus for the benefit of the grantor during life, and after his death to go as he should direct by will. The trustee conveyed the land in consideration of the grantee's assuming to pay the debts of the grantor. *Held*, that the original grantor, having encouraged the trustee to make the second conveyance, stating often to persons who had bought land of such second grantees that the fee was in such grantees and that he was glad to be relieved from his debts, which the said grantees had agreed to pay on account of the property conveyed to them, was estopped to dispute such grantees' title.—*Funk v. Newcomer*, 10 Md. 301. [Cited and annotated, see supra.]

(e) Where judgment creditors, having a lien on land, assent to a deed conveying the same land in trust to pay the debts of the owners, and by their conduct induce others to purchase the lands bound by their judgments, and to believe that they would look

to the trustees for the payment of their claims, and not to their judgment liens, such conduct furnishes a valid equitable defense against the enforcement of the judgment liens by execution.—*Doub v. Mason*, 2 Md. 380.

(f) Defendant conveyed by deed a large amount of real and personal property, in trust to sell the same and out of the proceeds to pay creditors without priority or preference, except as the same might exist at law, and the trustees, in executing their trust, sold parcels thereof to complainant and others. At the time the deed was executed there were unsatisfied judgments to a large amount against the grantors, on some of which writs of sci. fa. were issued, and fiats rendered against the original defendants in the judgments and the terretenants, the purchasers from the trustees, and on these fiats writs of fi. fa. were issued and made on the lands purchased by complainant. Held, that if the judgment creditors assented to the deed of trust, and by their conduct induced complainant and others to become purchasers of the land bound by their judgments, and to believe that they would look to the trustees for the payment of their claims, and not to their judgment liens, such conduct would furnish an equitable defense to the enforcement of such liens as against complainant and the other purchasers.—*Doub v. Barnes*, 1 Md. Ch. 127.

### § 95. Silence.

#### Cross-References.

Failure to assert title or right, see ante, §§ 70, 94.

Construction of contract of employment, see "Master and Servant," § 68.

(a) Plaintiff would not be estopped from recovering from defendant one-half of notes executed by himself and defendants, for the purpose of assisting a corporation of which they were officers, upon plaintiff paying the notes, because of the fact that when another contributed a sum on behalf of defendant to a fund to discharge the company's debts plaintiff did not inform him of the existence of such notes.—*Warfield v. Keyser*, 119 Md. 158, 86 Atl. 152.

(b) Estoppel by silence can only arise where the silence would amount to a fraud,

actual or constructive.—*Carroll Springs Distilling Co. v. Schnepfe*, 111 Md. 420, 74 Atl. 828.

(c) If a company creates a nuisance, it is chargeable with knowledge that any person injured would have a right to complain; and the mere silence of a neighboring owner upon the company's purchasing additional property to enable it to enlarge its plant, which created the conditions complained of, would not estop such owner from seeking damages for the alleged nuisance.—*Carroll Springs Distilling Co. v. Schnepfe*, 111 Md. 420, 74 Atl. 828.

(d) Plaintiff volunteered to assist defendant's agent in selling a steel safe, and claimed that the agent promised that, if the sale was made, plaintiff should receive compensation. The price asked was \$18,000, but the buyer offered \$13,000, and defendant finally acceded to these terms. The agent on several occasions told plaintiff that, if defendant was compelled to cut the price to the lower figure, there would be no commission for either. Held, that plaintiff by remaining silent when such statements were made, thereby permitting the agent to conclude the sale on terms he might not otherwise have made, was estopped to claim commission.—*Carroll v. Manganese Steel Safe Co.*, 111 Md. 252, 73 Atl. 665.

(e) A tenant of a farm for three years, beginning March 1st, paid an annual rent. It was the understanding of both parties when the lease was executed that the tenant should have the crops maturing after the termination of the lease. In the fall of the year preceding the termination of the tenancy in the spring following, the landlord denied the right of the tenant to remove the crops maturing after the termination of the lease, because of the refusal of the tenant to sow grass seed. The tenant concluded to sow grass seed, and while he was sowing wheat and rye and grass seed the landlord appeared, and the lessee remarked to him that he did not anticipate any trouble in harvesting the crops, to which remark the landlord made no reply. Held, that the landlord was equitably estopped from preventing the tenant from harvesting the crops maturing after the termination of the lease.—

*Carmine v. Bowen*, 104 Md. 198, 64 Atl. 932.

(f) One failing to disclose his full claims when interrogated concerning them is not thereby estopped from maintaining his rights by litigation.—*Diffenbach v. New York Life Ins. Co.*, 61 Md. 370.

### § 96. Negligence.

#### Annotation.

Effect of negligence of purchaser of real property on right to rescind because of misstatement as to title.—39 L. R. A. (N. S.) 1143, note.

Estoppel to set up original obligee's breach of condition to make future advances as against assignee of contract for payment of money, not protected by the law merchant.—23 L. R. A. (N. S.) 178, note.

Estoppel to enforce contract of suretyship or guaranty released through mistake.—13 L. R. A. (N. S.) 576, note.

Failure to read contract as affecting right to relief therefrom on the ground of fraud of other party.—6 L. R. A. (N. S.) 463, note.

(a) A bank made a loan on certain forged assignments of certificates of stock of an insurance company to a firm of which the real owner of the certificates was a member, in ignorance of the forgery. The certificates were presented to the insurance company and canceled, and new certificates issued in the name of, and delivered to, the bank. Subsequently the firm failed, and notice was given to the bank and to the insurance company that the assignments were forged. The assignee in bankruptcy of the firm sued the bank and insurance company to compel the former to deliver the certificates issued to him and the latter to issue a new certificate to complainant. *Held*, that if the insurance company was negligent in issuing the new certificate without detecting the forgery, unless that was the occasion of the loss to the bank, it was not sufficient to shift the loss on it, as negligence to operate as an estoppel must be the proximate cause of loss.—*Brown v. Howard Fire Ins. Co.*, 42 Md. 384, 20 Am. Rep. 90. [Cited and annotated in 45 L. R. A. (N. S.) 1077, on liability of corporation to true owner for unauthorized stock transfer; in 19 L. R. A. 333, on corporate liability for officers' fraud or forgery in issue of stock.]

(b) A large stockholder of a corporation resided in B. up to his death. His widow,

some years afterwards, removed into another county. She did not notify the company of her change of residence, and they did not know of such change, and had no reason to believe that she was not a resident of the city. She collected dividends in person at the office of the company, which were announced to be "clear of all taxes," and she was not called on in the county of her residence to pay taxes. The company took advantage of a statute, and commuted with the tax authorities of the city for the payment of city taxes held by residents, and included her stock in the city list, and commuted for it as stock held by a citizen. *Held*, that due diligence and good faith required the widow to notify the company of her change of residence, and to assert her rights at the time the first dividend was declared and paid to her; and having failed to so notify the company, and having received the dividends without protest and with knowledge of her liability to taxation as to the stock in her place of residence, and not in the locality from which she removed, she was estopped to set up a claim against the company for such taxes commuted by it.—*Donovan v. Firemen's Ins. Co.*, 30 Md. 155.

### (C) PERSONS AFFECTED.

#### Cross-Reference.

Estoppel of owner of land as affecting right of occupant to sue for trespass, see "Trespass," § 23.

### § 97. Persons to whom estoppel is available.

#### Annotation.

Estoppel of beneficiaries to charge personal representative with losses sustained in carrying on business.—40 L. R. A. (N. S.) 234, note.

Right of bank in action by holder for proceeds of commercial paper collected by it, to avail itself of defenses that would have been available in an action on the paper.—26 L. R. A. (N. S.) 1098, note.

(a) By estoppel a mortgagee of land precluded himself as against a purchaser of the land from asserting that certain back interest evidenced by a note of the mortgagor was covered by the mortgage. The purchaser then conveyed the premises to his wife, subject to the mortgage. *Held*, that the wife being in privity of estate with the purchaser could assert that the estoppel operated in her favor.—*Eareckson v. Rogers*,

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

112 Md. 160, 75 Atl. 513. [*Cited and annotated* in 48 L. R. A. (N. S.) 761, on estoppel against assertion of title or interest in realty by concealing or representing it to be in another.]

(b) After the payee had taken a note, one of the makers admitted that it was his true signature that was on the note. The payee afterwards passed it for value, making no representations as to whether the signatures were genuine or not, and saying nothing about the admission of the maker. It being proved that the signature in question was a forgery, it was held that the maker was not estopped to deny the signature in a suit by the indorsee, as the indorsee had not relied on the admission.—*Starr v. Yourtee*, 17 Md. 341.

### § 98. Persons estopped.

#### Cross-References.

See ante, § 97.

Assignors and assignees of patents, see "Patents," § 202.

Estoppel of principal by knowledge of agent obtained while attempting to defraud principal, see "Principal and Agent," § 181.

Of licensor and licensee of patent rights, see "Patents," § 211.

(a) A. assigned to B. all right and title to a survey of land described in a certificate of survey. This was returned to the land office with the assignment indorsed thereon, and a patent was issued to B. under the rules of the office. Held, that A. and all claiming under him were estopped by the assignment from denying B.'s title.—*Stallings v. Ruby's Lessee*, 27 Md. 149.

### (D) MATTERS PRECLUDED.

### §§ 99, 100. (See Analysis.)

### § 101. Title or claim to property.

#### Annotation.

Title by estoppel, as marketable title.—38 L. R. A. (N. S.) 26, note.

Estoppel in pais against defendant as basis for action to recover real estate.—16 L. R. A. 813, note.

### §§ 102-105. (See Analysis.)

### § 106. Availability at law.

#### Cross-References.

Extent of estoppel in general, see ante, § 99.

Pleading, see post, §§ 110-113.

\*Annotation: Words and Phrases, same title.

### (E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

#### Cross-References.

Pleading estoppel by deed, see ante, § 34.  
Effect of failure to interpose defense of estoppel on right to equitable relief against judgment, see "Judgment," § 429.

Evidence as to estoppel in actions on insurance policies, see "Insurance," § 664.  
Pleading in justice's court, see "Justices of the Peace," § 47.

Review as dependent on presentation of question in lower court, see "Appeal and Error," § 173.

### § 107. Pleading as element of cause of action.

### § 108. Demurrer raising defense.

### §§ 109-113. Pleading as defense.

#### Cross-Reference.

Availability of estoppel at law, see ante, § 106.

(a) An estoppel in pais cannot be pleaded, though it may be given in evidence, and thus made operative under the direction of the court.—*National Shutter Bar Co. v. G. F. S. Zimmerman & Co.*, 110 Md. 313, 73 Atl. 19.

(b) Facts constituting an estoppel in pais to plead limitation to notes sued on may be given in evidence by the plaintiff, and given effect by the court, without being pleaded.—*Babylon v. Duttera*, 89 Md. 444, 43 Atl. 938.

(c) Estoppels in pais cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel, under the direction of the court.—*Alexander v. Walter*, 8 Gill 239, 50 Am. Dec. 688.

### §§ 114-121. (See Analysis.)

### ESTOVERS.\*

#### Cross-References.

See "Landlord and Tenant," § 137.

Alimony on limited divorce, see "Divorce," § 232.

Allowance to surviving wife, husband, or children from estate of decedent, see "Executors and Administrators," §§ 173-201.

### ESTRAYS.\*

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See "Animals," §§ 59-65.

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See "Ejectment," § 56; "Waste," § 16.

**EVICTION.\****Cross-References.*

As breach of covenant of warranty, see "Covenants," § 102.  
 Of tenant in general, see "Landlord and Tenant," §§ 171-180.  
 Of tenant as affecting estoppel to dispute

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 Of tenant as affecting liability for rent, see "Landlord and Tenant," § 190.  
 Of tenant as termination of tenancy, see "Landlord and Tenant," § 99.  
 Of tenant under mining lease, see "Mines and Minerals," §§ 67, 76.

**EVIDENCE.\****Scope-Note.*

[INCLUDES means of ascertaining the truth respecting matters of fact in issue in civil actions and proceedings in general; admissibility for that purpose of relevant facts, statements, oral or written, opinions, character, reputation, etc.; modes of proof and production of evidence other than testimony of witnesses, particularly documentary evidence, and exclusion of oral by documentary evidence; burden of making proof, and operation of presumptions; and sufficiency and effect of evidence in civil cases in general.

[EXCLUDES competency of witnesses, attendance, and production of documents, etc., by witnesses, and examination and credibility of witnesses (see "Witnesses"); taking and use of written testimony (see "Depositions"; "Affidavits"); acknowledgment and record of written instruments (see "Acknowledgment"; "Records"); estoppel to assert or deny matters of fact (see "Estoppel"); discovery of evidence (see "Discovery"); evidence to sustain particular causes of action or defenses thereto (see "Contracts"; "Torts"; and specific heads); evidence in particular forms of civil actions (see titles of various forms of action); evidence to sustain or defeat particular remedies in actions (see "Arrest"; "Attachment"; and other specific heads); evidence in actions for particular forms of relief (see "Divorce"; "Ejectment"; "Replevin"; "Specific Performance"; and other specific heads); evidence in civil proceedings other than actions (see "Habeas Corpus"; "Mandamus"; and titles of other special proceedings); rules of evidence peculiar to procedure in equity (see "Equity"), in admiralty (see "Admiralty"; "Shipping"; "Collision"), or under insolvent acts (see "Insolvency") or bankrupt acts (see "Bankruptcy"); evidence in criminal prosecutions (see "Criminal Law"; and titles of particular crimes); admissibility of evidence as dependent on pleadings, and what constitutes variance and its effect (see "Pleading"); practice in reception of evidence (see "Trial"; "Reference"); province of court and jury as to questions of fact, and instructions to juries on weight, etc., of evidence (see "Trial"); correction of errors and review of decisions in regard to admission or rejection of evidence or involving sufficiency or weight of evidence (see "Exceptions, Bill of"; "New Trial"; "Appeal and Error").

[For complete list of matters excluded, see cross-references, post.]

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- § 231. Sellers or mortgagors of chattels.
- § 232. Bankrupts and assignors for benefit of creditors.
- § 233. Donors.
- § 234. Assignors of rights in action in general.
- § 235. Former holders of bills or notes.
- § 236. Testators and intestates.

**(D) BY AGENTS OR OTHER REPRESENTATIVES.**

- § 237. Authority in general.
- § 238. Authority at time of admission.
- § 239. Interest of party or representative.
- § 240. Agents or employees.
- § 241. — In general.
- § 242. — Scope and extent of agency or employment.
- § 243. — Admissions before or after transaction or event.
- § 244. Corporate officers or agents.
- § 245. Public officers or agents.
- § 246. Attorneys.
- § 247. Persons referred to for information.
- § 248. Husband or wife.
- § 249. Partners and joint contractors.
- § 250. Principal or surety.
- § 251. Trustee or beneficiary.
- § 252. Insured or beneficiary.
- § 253. Conspirators and persons acting together.

**(E) PROOF AND EFFECT.**

- § 254. Laying foundation for impeachment of testimony of party.
- § 255. Preliminary evidence.
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**VII. Admissions—Continued.****(E) PROOF AND EFFECT—Continued.**

- § 257. — Identity of title or interest.
- § 258. — Existence and extent of agency or authority.
- § 259. — Existence of partnership.
- § 260. — Existence of conspiracy or common purpose.
- § 261. Determination of question of admissibility.
- § 262. Mode and requisites of proof of admissions.
- § 263. Explanation or limitation.
- § 264. Construction.
- § 265. Conclusiveness and effect.

**VIII. Declarations.****(A) NATURE, FORM, AND INCIDENTS IN GENERAL.**

- § 266. Nature and grounds for admission in general.
- § 267. Making of statement fact in issue.
- § 268. Statements showing physical or mental condition.
- § 269. Statements showing intent, motive, or nature of act.
- § 270. Difficulty of producing direct evidence.
- § 271. Self-serving declarations in general.
- § 272. Declarations against interest in general.
- § 273. Declarations of person in possession or control as to title or possession.
- § 274. Declarations as to boundaries.
- § 275. Declaration in course of business or performance of duty.

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- § 276. Declarations against interest in general.
- § 277. Disparagement of title.
- § 278. Statements as to fact or nature of transfer or gift.
- § 279. Knowledge as to subject-matter.
- § 280. Motive in making declaration.
- § 281. Time of making declaration.
- § 282. Relation of declaration to controversy.
- § 283. Mode and form of declaration.
- § 284. Death of person making declaration.

**(C) AS TO PEDIGREE, BIRTH, AND RELATIONSHIP.**

- § 285. Nature of questions of pedigree and matters relating thereto.
- § 286. Matters of pedigree facts in issue.
- § 287. Family records.
- § 288. General and family reputation.
- § 289. Declarations by members of family.
- § 290. — In general.
- § 291. — By deceased members.
- § 292. — Necessity that declarant be dead.
- § 293. — Relationship to family.
- § 294. — Knowledge as to subject-matter.
- § 295. — Time of making declaration.
- § 296. — Relation of declaration to controversy.
- § 297. — Mode and form of declaration.

**VIII. Declarations—Continued.****(D) AS TO MATTERS OF PUBLIC OR GENERAL RIGHT OR INTEREST.**

- § 298. Matters of public right or interest.
- § 299. Matters of general right or interest.
- § 300. Matters of private interest involved with public right or interest.
- § 301. Public records.
- § 302. General reputation.
- § 303. Declarations as to specific facts.
- § 304. — In general.
- § 305. — Knowledge as to subject-matter.
- § 306. — Time of making declaration.
- § 307. — Relation of declaration to controversy.
- § 308. — Mode and form of declaration.

**(E) PROOF AND EFFECT.**

- § 309. Preliminary evidence.
- § 310. Determination of question of admissibility.
- § 311. Mode and requisites of proof of declarations.
- § 312. Construction.
- § 313. Conclusiveness and effect.

**IX. Hearsay.**

- § 314. In general.
- § 315. Statements by persons other than parties or witnesses.
- § 317. — Oral statements.
- § 318. — Writings.
- § 319. Evidence founded on hearsay.
- § 320. — In general.
- § 321. — Testimony of person as to his age.
- § 322. — Reputation as to persons.
- § 323. — Market value shown by sales, offers to purchase or sell, or market quotations.
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- § 325. Public records, documents, and publications in general.
- § 326. State papers.
- § 327. Laws.
- § 328. — In general.
- § 329. — Private statutes.
- § 330. — Ordinances.
- § 331. — Foreign laws.
- § 332. Judicial acts and records.
- § 333. Official records and reports.
- § 334. Official certificates.
- § 335. Grants and patents for land, and proceedings in land office.
- § 336. Records of conveyances and other private writings.
- § 337. Municipal records.



**X. Documentary Evidence—Continued.****(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.**

- § 338. Necessity and admissibility in general.
- § 339. Statutory provisions.
- § 340. Judicial records and proceedings.
- § 341. Official documents, records, and proceedings in general.
- § 342. Records and proceedings in land office.
- § 343. Records of conveyances and other private writings.
- § 344. Municipal records.
- § 345. Requisites of exemplification or certificate.
- § 346. Acts, records, and judicial proceedings of other states.
- § 347. — In general.
- § 348. — Requisites of exemplification or certificate.
- § 349. Acts, records, and judicial proceedings of foreign countries.

**(C) PRIVATE WRITINGS AND PUBLICATIONS.**

- § 350. Unofficial writings in general.
- § 351. Unofficial records.
- § 352. Corporate records and proceedings.
- § 353. Conveyances, contracts, and other instruments.
- § 354. Books of account.
- § 355. Private memoranda and statements in general.
- § 356. Statements prepared for use at trial.
- § 357. Letters, telegrams, and other correspondence.
- § 358. Maps, plats, and diagrams.
- § 359. Photographs and other pictures.
- § 360. Books and other printed publications.
- § 361. — In general.
- § 362. — Statutes, law, reports, and legal text-books.
- § 363. — Scientific and technical works.
- § 364. — Mortality tables and tables of expectancy of life.
- § 365. — Annuity tables.

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- § 366. Public documents, records, exemplifications, or official copies.
- § 367. Examined copies of records.
- § 368. Compelling production by adverse party.
- § 369. Preliminary evidence for authentication.
- § 370. — Necessity in general.
- § 371. — Writings collateral to issues.
- § 372. — Ancient documents.
- § 373. — Form and sufficiency in general.
- § 374. — Attesting witnesses.
- § 375. — Handwriting.
- § 376. — Books of account.
- § 377. — Memoranda and statements.
- § 378. — Letters, telegrams, and other correspondence.
- § 379. — Maps, plats, and diagrams.
- § 380. — Photographs and other pictures.
- § 381. — Books and other printed publications.
- § 382. Determination of question of admissibility.
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**XI. Parol or Extrinsic Evidence Affecting Writings.****(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.**

- § 384. Grounds for exclusion of extrinsic evidence.
- § 385. Writings excluding extrinsic evidence in general.
- § 386. Judicial records and proceedings.
- § 387. Official records and documents.
- § 388. Unofficial records.
- § 389. Corporate records and proceedings.
- § 390. Deeds.
- § 391. Bills of sale.
- § 392. Assignments.
- § 393. Leases.
- § 394. Charter parties.
- § 395. Mortgages.
- § 396. Pledges.
- § 397. Contracts in general.
- § 398. Contracts of employment.
- § 399. Contracts for buildings and other works.
- § 400. Contracts of sale or exchange.
- § 401. Bonds.
- § 402. Bills and notes.
- § 403. Indorsements and transfers of bills or notes.
- § 404. Contracts of guaranty and suretyship.
- § 405. Contracts of insurance.
- § 406. Contracts for storage.
- § 407. Contracts of carriage.
- § 408. Receipts.
- § 409. Releases.
- § 410. Memoranda not constituting contract or disposition of property.
- § 411. Writing incomplete on its face.
- § 412. Writing showing alteration.
- § 413. Evidence extrinsic to writing in general.
- § 414. Date of instrument.
- § 415. Sustaining validity of instrument.
- § 416. Connection of contemporaneous writings.
- § 417. Matters not included in writing or for which it does not provide.
- § 418. Parties to instrument or obligation.
- § 419. Nature of consideration.
- § 420. Existence of condition or contingency.
- § 421. Existence of custom or usage.
- § 422. Existence or accrual of liability.
- § 423. Nature and extent of liability.
- § 424. Effect of writing as to persons not parties thereto or privies.
- § 425. Writings collateral to issues in general.
- § 426. Existence of relation created by writing.
- § 427. Evidence for purpose other than varying rights or liabilities dependent upon terms of writing.

**XI. Parol or Extrinsic Evidence Affecting Writings—Continued.****(B) INVALIDATING WRITTEN INSTRUMENT.**

- § 428. Grounds for admission of extrinsic evidence.
- § 429. Matters affecting validity in general.
- § 430. Incapacity of parties.
- § 431. Insufficiency or irregularity of execution or delivery.
- § 432. Want or failure of consideration.
- § 433. Mistake.
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- § 437. Illegality.

**(C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.**

- § 439. Grounds for admission of oral evidence.
- § 440. Prior and contemporaneous collateral agreements.
- § 441. — In general.
- § 442. — Completeness of writing.
- § 443. — Relation of oral agreement to writing.
- § 444. — Condition precedent to obligation under writing.
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**(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.**

- § 448. Grounds for admission of extrinsic evidence.
- § 449. Nature of ambiguity or uncertainty in instrument.
- § 450. — In general.
- § 451. — Patent ambiguity.
- § 452. — Latent ambiguity.
- § 453. Writing illegible or unintelligible.
- § 454. Meaning of words, phrases, signs, or abbreviations.
- § 455. — In general.
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- § 458. Relation and application of language to facts in general.
- § 459. Identification of parties.
- § 460. Identification of subject-matter.
- § 461. Showing intent of parties as to subject-matter.
- § 462. Showing purpose of writing.
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**(E) SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION.**

- § 464. Grounds for admission of extrinsic evidence.
- § 465. Agreement as to performance or enforcement.
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- § 467. Estoppel or waiver.
- § 468. Performance.
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**XII. Opinion Evidence.****(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.**

- § 470. Grounds for admission.
- § 471. Conclusions and matters of opinion or facts.
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- § 473. Inferences or impressions from collective facts.
- § 474. Special knowledge as to subject-matter.
- § 474½. Subjects of opinion evidence in general.
- § 475. Personal identity and characteristics.
- § 476. Age.
- § 477. Bodily appearance or condition.
- § 478. Mental condition or capacity.
- § 479. Pecuniary condition.
- § 480. Handwriting.
- § 481. Due care and proper conduct.
- § 482. Custom or usage.
- § 483. Nature, condition, and relation of objects.
- § 484. Quantity.
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- § 486. — In general.
- § 487. — Services.
- § 488. — Real property.
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- § 490. Space or distance.
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- § 492. Rate of speed.
- § 493. Cause and effect.
- § 494. Damages.
- § 495. — In general.
- § 496. — Injuries to the person.
- § 497. — Injuries to property.
- § 498. — Breach of contract.
- § 498½. Determination of question of competency.
- § 499. Examination of witnesses.
- § 500. — Testimony in general.
- § 501. — Facts forming basis of opinion.
- § 502. — Cross-examination and re-examination.
- § 503. Corroboration.

**(B) SUBJECTS OF EXPERT TESTIMONY.**

- § 505. Matters of opinion or facts.
- § 506. Matters directly in issue.
- § 507. Matters of common knowledge or observation.
- § 508. Matters involving scientific or other special knowledge in general.
- § 509. Bodily condition.
- § 510. Mental condition or capacity.
- § 511. Handwriting.
- § 512. Due care and proper conduct in general.
- § 513. Construction and repair of structures, machinery, and appliances.

**XII. Opinion Evidence—Continued.****(B) SUBJECTS OF EXPERT TESTIMONY—Continued.**

- § 514. Management and operation of vehicles, machinery, and appliances.
- § 515. Conduct of business.
- § 516. Custom or usage.
- § 517. Laws of other states or countries.
- § 518. Construction of written instruments.
- § 519. Nature, condition, and relation of objects.
- § 520. Quantity or capacity.
- § 521. Value.
- § 522. — In general.
- § 523. — Services.
- § 524. — Real property.
- § 525. — Personal property.
- § 526. Cause and effect.
- § 527. — In general.
- § 528. — Injuries to the person.
- § 529. — Injuries to property.
- § 530. Damages.
- § 531. — In general.
- § 532. — Injuries to the person.
- § 533. — Injuries to property.
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**(C) COMPETENCY OF EXPERTS.**

- § 535. Necessity of qualification.
- § 536. Knowledge, experience, and skill in general.
- § 537. Bodily and mental condition.
- § 538. Due care and proper conduct in general.
- § 539. Machinery and mechanical devices and appliances.
- § 539½. Construction and operation of railroads.
- § 540. Conduct of business, custom, or usage.
- § 541. Laws of other states or countries.
- § 542. Physical facts.
- § 543. Value.
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- § 544. Cause and effect.
- § 545. Preliminary evidence as to competency.
- § 546. Determination of question of competency.

**(D) EXAMINATION OF EXPERTS.**

- § 547. Mode of examination in general.
- § 548. Questions and answers based on personal knowledge of expert.
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- § 551. Hypothetical questions and answers.
- § 552. — In general.
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- § 555. Facts forming basis of opinion.

**XII. Opinion Evidence—Continued.****(D) EXAMINATION OF EXPERTS—Continued.**

- § 556. References to authorities on subject.
- § 557. Experiments and results thereof.
- § 558. Cross-examination and re-examination.
- § 559. Corroboration.
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**(E) COMPARISON OF HANDWRITING.**

- § 561. Grounds for allowing comparison.
- § 562. Writings to be proved.
- § 563. Competency of expert.
- § 564. Standard of comparison.
- § 565. Mode of making comparison.
- § 566. Examination of expert.
- § 567. Cross-examination.

**(F) EFFECT OF OPINION EVIDENCE.**

- § 568. Opinions of witnesses in general.
- § 569. Testimony of experts.
- § 570. — In general.
- § 571. — Nature of subject.
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**XIII. Evidence at Former Trial or in Other Proceeding.**

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- § 576. Death or disability of witness.
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- § 577½. Nature of former proceeding.
- § 578. Opportunity for cross-examination.
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- § 586. Positive and negative evidence.
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- § 588. Credibility of witnesses in general.
- § 589. Testimony of party.
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- § 591. Conclusiveness of evidence on party introducing it.
- § 592. Evidence introduced by adverse party.
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- § 594. Uncontroverted evidence.
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**XIV. Weight and Sufficiency—Continued.**

- § 597. Sufficiency to support verdict or finding.
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- § 601. Particular facts or issues.

*Cross-References.*

- See "Affidavits"; "Depositions"; "Discovery"; "Witnesses."
- Absence of evidence, ground for continuance, see "Continuance," §§ 22-26; "Criminal Law," §§ 594-598.
- Absence of evidence, ground for new trial, see "New Trial," § 88.
- Absence of evidence, ground for opening or vacating judgment, see "Judgment," § 369.
- Additional proofs in appellate court, see "Appeal and Error," § 891.
- Admissibility under pleadings, see "Admiralty," § 70; "Equity," § 326; "Pleading," §§ 379-385.
- Adoption by federal courts of practice of state courts, see "Courts," § 348.
- Applicability and sufficiency as affecting verdict on several counts or issues, see "Trial," § 330.
- Applicability of instructions to evidence, see "Criminal Law," § 814; "Trial," § 252.
- Comments of counsel on evidence, see "Criminal Law," § 720; "Trial," § 121.
- Comments of counsel on failure to produce, see "Criminal Law," § 721½.
- Comments of judge on evidence or witnesses, see "Criminal Law," § 656; "Trial," § 29.
- Comments on facts or evidence, see "Criminal Law," § 755½.
- Competency of evidence to contradict witness, see "Witnesses," §§ 406, 414.
- Conformity of findings of court to evidence, see "Trial," § 396.
- Conformity of judgment to proofs, see "Judgment," §§ 255, 258.
- Discovery of evidence, see "Discovery," § 38.
- Effect of abolition of distinction between forms of action at common law, see "Action," § 32.
- Effect of order setting aside default in another state as evidence, see "Judgment," § 174.
- Effect of special findings of jury as evidence, see "Trial," § 365.
- Effect of stipulation as to evidence, see "Stipulations," § 18.
- Exceptions to rulings on evidence, see "Criminal Law," § 697; "Trial," §§ 100-105.
- Failure of court to find on issues not supported by evidence, see "Trial," § 397.
- Failure to disclose, as fraud authorizing vacation of judgment, see "Judgment," § 375.
- False swearing, see "Perjury."
- In admiralty, see "Admiralty," §§ 73-77; "Collision," §§ 122-125.
- Incorporating evidence in bill of exceptions, see "Exceptions, Bill of," §§ 12-17.
- In proceedings before grand jury, see "Grand Jury," § 33.
- Instructions as to rules of evidence, see "Criminal Law," §§ 778-789; "Trial," §§ 205-212, 234, 235, 237.
- Instructions excluding evidence from consideration, see "Criminal Law," § 783½.
- Instructions on evidence or witnesses as invasion of province of jury, see "Criminal Law," §§ 756-764; "Trial," §§ 185-189, 191-195.
- Laws affecting rules of evidence as depriving of property without due process of law, see "Constitutional Law," § 311.
- Laws affecting rules of evidence as impairing obligation of contracts, see "Constitutional Law," § 175.
- Laws affecting rules of evidence as impairing vested rights, see "Constitutional Law," § 109.
- Loss of evidence result of laches, see "Equity," § 73.
- Mandamus to compel judge to hear evidence, see "Mandamus," § 40.
- Manner of introducing documentary evidence, see "Criminal Law," § 663; "Trial," § 39.
- Motion to strike out evidence, see "Criminal Law," § 696; "Trial," §§ 89-97.
- Newly discovered evidence ground for continuance, see "Continuance," § 27; "Criminal Law," §§ 938-945.
- Newly discovered evidence ground for new trial, see "New Trial," §§ 99-108.
- Newly discovered evidence ground for opening or vacating judgment, see "Judgment," § 378.
- Newly discovered evidence ground of writ of error coram nobis, see "Judgment," § 334.
- Objections to evidence, see "Criminal Law," §§ 690-698, 1036; "Trial," §§ 74-76, 78, 79, 81-87, 378.
- Objections to evidence as not within issues, see "Pleading," § 427.
- Objections to evidence on ground of insufficiency of pleadings, see "Pleading," § 428.
- Objections to evidence on ground of variance, see "Pleading," § 430.
- Offer of proof, see "Criminal Law," § 670; "Trial," §§ 45-49.
- Pleading matters judicially noticed, see "Pleading," § 6.
- Pleading matters of evidence, see "Indictment and Information," § 65; "Pleading," § 11.

- Pleading matters of presumption, see "Indictment and Information," § 62; "Pleading," § 7.
- Power of Legislature over rules of evidence, see "Constitutional Law," § 26.
- Practice in federal courts, see "Courts," § 348.
- Presentation of evidence by counsel, see "Criminal Law," §§ 706, 707; "Trial," § 110.
- Printing of evidence as item of costs, see "Costs," § 190.
- Privileged communications in judicial proceedings, see "Libel and Slander," § 38.
- Questions of fact for jury, see "Criminal Law," §§ 734-749; "Trial," §§ 134-149.
- Rebuttal of evidence contradicting witness, see "Witnesses," § 407.
- Rebuttal of evidence impeaching character of witness, see "Witnesses," § 360.
- Rebuttal of evidence of inconsistent statements by witness, see "Witnesses," § 394.
- Rebuttal of evidence of interest or bias of witness, see "Witnesses," § 376.
- Rebuttal of statements of counsel in argument to jury, see "Criminal Law," § 727; "Trial," § 130.
- Reception at hearing before referee, see "Reference," §§ 63-67.
- Reception at hearing of motion, see "Motions," § 37.
- Reception at new trial, see "Appeal and Error," § 1214; "Criminal Law," §§ 661-689; "New Trial," § 174.
- Reception at trial, see "Equity," § 385; "Homicide," §§ 263-267; "Justices of the Peace," § 110; "Rape," § 56; "Trial," §§ 32-105, 377-380.
- Reception in arbitration proceedings, see "Arbitration and Award," § 34.
- Reference to take and report testimony, see "Reference," § 16.
- Report of evidence with decision or findings of referee, see "Reference," § 94.
- Report of referee as evidence, see "Reference," § 99.
- Right to special findings by jury as to evidentiary facts, see "Trial," § 350.
- Rulings on evidence ground for new trial, see "New Trial," § 35.
- State laws as rules of decision in federal courts, see "Courts," § 376.
- Statement and review of evidence by trial court, see "Criminal Law," §§ 756, 777½; "Trial," § 185.
- Statutes prescribing rules of evidence as encroachment on judiciary, see "Constitutional Law," § 55.
- Stipulations as to evidence, see "Stipulations," § 14.
- Suppression or falsification of evidence as contempt of court, see "Contempt," § 13.
- Surprise at evidence ground for new trial, see "New Trial," §§ 89, 90.
- Testimony as witness as ground of estoppel in pais, see "Estoppel," § 69.
- To sustain judgment, see "Judgment," § 19.
- Use of testimony taken on examination of bankrupt or others, see "Bankruptcy," § 243.
- Verdict or findings contrary to evidence, ground for new trial, see "Criminal Law," § 935; "New Trial," §§ 68-72.
- Waiver and correction of errors in rulings as to admissibility of evidence, see "Criminal Law," § 899; "Trial," §§ 411-414.
- As to particular facts or issues.*
- See "Abandonment," § 5; "Accord and Satisfaction," § 26; "Acknowledgment," §§ 59-62; "Adverse Possession," §§ 27, 33, 38, 57, 85, 95, 112-114; "Assignments," §§ 134-137; "Boundaries," § 33; "Champerly and Maintenance," § 5; "Common Law," §§ 16, 17; "Compromise and Settlement," § 23; "Conspiracy," § 19; "Contempt," § 60; "Customs and Usages," §§ 19, 20; "Damages," §§ 163-192; "Death," §§ 1-6; "Dedication," §§ 41-44; "Deeds," §§ 192-197, 199-204, 206-212; "Domicile," §§ 8-10; "Easements," § 36; "Estoppel," §§ 116-118; "Exchange of Property," § 8; "Fraud," § 50; "Fraudulent Conveyances," §§ 270-302; "Gifts," §§ 47-49, 80-82; "Guaranty," §§ 89-91; "Highways," §§ 17, 68; "Interest," § 67; "Lost Instruments," § 23; "Marriage," §§ 40, 42-50; "Money Lent," § 7; "Money Paid," § 9; "Money Received," § 18; "Monopolies," §§ 24, 30; "Negligence," §§ 120-135; "Notice," § 14; "Novation," § 12; "Nuisance," §§ 33, 49; "Partnership," §§ 44-56; "Payment," §§ 65-68, 70, 71, 73-75; "Pledges," § 16; "Release," §§ 55-57; "Seals," § 6; "Statutes," §§ 283-287, 289, 290; "Stipulations," § 21; "Tender," § 28; "Usury," §§ 113-117.
- Abandonment and forfeiture of mining claim, see "Mines and Minerals," § 38.
- Abandonment of invention, see "Patents," § 87.
- Abandonment, waiver, or forfeiture of homestead, see "Homestead," § 181.
- Acquisition and establishment of homestead, see "Homestead," § 57.
- Ademption of legacy, see "Wills," § 770.
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- Adoption of local option law, see "Intoxicating Liquors," § 39.
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- Adverse possession by tenant in common, see "Tenancy in Common," § 15.
- Agency, see "Brokers," § 8; "Husband and Wife," §§ 23¼, 25, 188; "Insurance," §§ 76, 92, 100, 110; "Principal and Agent," §§ 19-23.
- Agister's lien, see "Animals," § 26.
- Aiding construction of contract of insurance, see "Insurance," § 155.
- Alienage, see "Aliens," § 2.
- Alienation of affections of husband or wife, see "Husband and Wife," § 333.
- Alteration of written instrument, see "Alteration of Instruments," §§ 27-29; "Bills and Notes," § 507.
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- Appointment and authority of municipal officers or agents, see "Municipal Corporations," § 753.
- Appointment of executor or administrator, see "Executors and Administrators," § 28.
- Assets of estate for purpose of administration, see "Executors and Administrators," §§ 38-73.
- Assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 51.
- Assignment of lease, see "Landlord and Tenant," § 80½.
- Assumption of mortgage by grantee of property, see "Mortgages," § 280.
- Assumption of risk by servant injured, see "Master and Servant," §§ 273, 280.
- Authority of agent, see "Principal and Agent," §§ 119-123, 148.
- Authority of attorney, see "Attorney and Client," § 72.
- Authority of bank officers or agents, see "Banks and Banking," § 118.
- Authority of corporate officer or agent, see "Corporations," § 432.
- Authority of private detective, see "Detectives," § 4.
- Awards of arbitrators, see "Arbitration and Award," §§ 86, 88, 89.
- Bar of statute of frauds, see "Frauds, Statute of," § 158.
- Bar of statute of limitations, see "Limitation of Actions," §§ 195-197.
- Breach of contracts in general, see "Contracts," § 322.
- Breach of warranty of goods sold, see "Sales," §§ 439-441.
- Cancellation of policy, see "Insurance," § 235.
- Cause of action, on application for judgment by default, see "Judgment," § 126.
- Character and conduct of prosecutrix or defendant in bastardy proceedings, see "Bastards," §§ 59, 61.
- Character and conduct of witnesses, for purpose of impeachment, see "Witnesses," §§ 352, 359-361.
- Character of instrument as will or other disposition of property, see "Wills," § 93.
- Character of transaction as mortgage or other contract, see "Chattel Mortgages," §§ 37-39; "Mortgages," §§ 36-38.
- Citizenship, see "Citizens," § 10.
- Citizenship, residence or character of parties for purpose of jurisdiction of federal courts, see "Courts," § 323.
- Claims against bankrupt's estate, see "Bankruptcy," §§ 330-336, 340.
- Claims against insolvent corporations, see "Corporations," § 565.
- Classification of imports, see "Customs Duties," § 52.
- Community or separate debt, see "Husband and Wife," § 268.
- Community or separate property, see "Husband and Wife," §§ 262-264.
- Compensation for property taken for public use, see "Eminent Domain," §§ 199-205.
- Compensation of corporate officers and agents, see "Corporations," § 308.
- Competency of juror, see "Jury," §§ 120, 132.
- Competency of witness, see "Witnesses," §§ 78, 123, 183.
- Compromise or settlement of mortgage debt, see "Mortgages," § 319.
- Confidential nature of communications and privilege in respect thereto, see "Witnesses," § 222.
- Consent to assignment of lease, see "Landlord and Tenant," § 76.
- Consent to destruction of fence, see "Fences," § 28.
- Consideration for contracts in general, see "Contracts," §§ 88-90.
- Consideration for mortgage, see "Husband and Wife," § 171; "Mortgages," § 25.
- Consideration of bill or note, see "Bills and Notes," §§ 493, 503, 518.
- Construction of charitable gift, see "Charities," § 32.
- Construction of contracts, as to usury, see "Usury," § 72.
- Construction of contracts in general, see "Contracts," § 175.
- Construction of contracts of sale, see "Sales," § 87; "Vendor and Purchaser," § 80.
- Construction of deeds, see "Deeds," §§ 109, 118; "Taxation," § 775.
- Construction of leases, see "Landlord and Tenant," § 42.
- Construction of letters patent, see "Patents," §§ 159, 160.
- Construction of mortgages, see "Mortgages," § 109.
- Construction of statutes, see "Statutes," § 221.
- Construction of trusts, see "Trusts," § 119.
- Construction of wills, see "Wills," §§ 486-490.
- Continuance of life, see "Death," § 1.
- Contract to devise or bequeath, see "Wills," § 58.
- Contributory negligence in general, see "Negligence," §§ 122, 132, 135.
- Contributory negligence of owner of animals injured on or near railroad tracks, see "Railroads," §§ 441, 442, 443.
- Contributory negligence of owner of property injured by fire set by railroad company, see "Railroads," § 480.
- Contributory negligence of passenger, see "Carriers," §§ 344-346.
- Contributory negligence of person injured at railroad crossing, see "Railroads," §§ 346, 347, 348.
- Contributory negligence of person injured in crossing race track at agricultural fair, see "Agriculture," § 4.
- Contributory negligence of person injured on or near railroad tracks, see "Railroads," §§ 396, 397, 398.
- Contributory negligence of person injured on or near street railroad tracks, see "Street Railroads," §§ 112, 113, 114.
- Contributory negligence of servant injured, see "Master and Servant," §§ 274, 281.
- Conversion, see "Trove and Conversion," §§ 35-40.
- Corporate existence, see "Corporations," §§ 32, 633; "Municipal Corporations," § 20.
- Corporate membership, see "Corporations," § 171.
- Corporate powers, see "Corporations," § 389.
- Creation, existence and validity of constructive trusts, see "Trusts," §§ 107-110.

- Creation, existence and validity of express trust, see "Trusts," §§ 41-44.
- Criminal conversation, see "Husband and Wife," § 348.
- Damage caused by combinations, see "Monopolies," § 28.
- Damages in ejectment, see "Ejectment," § 135.
- Death of or injury to person insured, and cause thereof, see "Insurance," § 659.
- Default, on application for judgment by default, see "Judgment," § 125.
- Delay in transportation or delivery of goods, see "Carriers," § 104.
- Delivery and acceptance of goods sold, see "Sales," § 181.
- Delivery of bill or note, see "Bills and Notes," §§ 492, 502, 517.
- Delivery of contracts in general, see "Contracts," § 45.
- Delivery of goods to vessel, see "Shipping," § 105.
- Demand for payment of bill or note, see "Bills and Notes," §§ 498, 510, 526.
- Development of mine, see "Mines and Minerals," § 38.
- Discharge in bankruptcy, see "Bankruptcy," § 436.
- Discharge of servant, see "Master and Servant," § 40.
- Discovery of mineral in mining location, see "Mines and Minerals," § 38.
- Dissolution of corporation, see "Corporations," § 630.
- Divorce, see "Divorce," § 174.
- Domicile or residence of parties seeking divorce, see "Divorce," § 62.
- Duress in procuring execution of bill or note, see "Bills and Notes," §§ 505, 520.
- Ejection of passenger or intruder from train, see "Carriers," § 381.
- Election under will, see "Wills," § 792.
- Employment, see "Master and Servant," § 6.
- Entries and sales of and necessary rights in public lands, see "Public Lands," § 41.
- Estoppel or waiver as to conditions in insurance policy, see "Insurance," § 664.
- Execution and delivery of mortgage, see "Chattel Mortgages," § 68; "Mortgages," § 74.
- Execution, existence and genuineness of will, see "Wills," §§ 287-306.
- Execution of bill or note, see "Bills and Notes," §§ 492, 502, 517.
- Execution of contracts in general, see "Contracts," § 45.
- Existence and validity of contract of sale, see "Sales," § 52; "Vendor and Purchaser," § 44.
- Existence of school district, see "Schools and School Districts," § 27.
- Existence or location of streets, see "Municipal Corporations," § 654.
- Extent of authority of agent and notice thereof, see "Principal and Agent," § 148.
- Facts authorizing removal of cause from state to federal court, see "Removal of Causes," § 86.
- Fault as cause of collision, see "Collision," §§ 33, 34, 42, 48, 49, 55, 56, 65, 66, 73, 74, 85.
- Filing or recording mortgage, see "Chattel Mortgages," § 93.
- For damages for rape, see "Rape," § 66.
- For damages for removal, destruction of or injury to logs on which lien is claimed, see "Logs and Logging," § 31.
- For damages for wrongful enforcement of tax, see "Taxation," § 613.
- For deficiency on foreclosure of mortgage, see "Mortgages," § 561.
- Former adjudication, see "Judgment," §§ 951-957.
- Fraud in assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 161.
- Fraud in procuring execution of bill or note, see "Bills and Notes," §§ 505, 520.
- Fraud in procuring making of marriage settlement, see "Husband and Wife," § 34.
- Fraud in procuring subscriptions to corporate stocks, see "Corporations," § 80.
- Fraud or misrepresentation by insured, see "Insurance," § 655.
- Fraudulent diversion of bill or note, see "Bills and Notes," §§ 507, 522.
- Gambling transactions, see "Gaming," § 49.
- Gift by husband to wife or vice versa, see "Husband and Wife," §§ 49½, 49¾.
- Good faith of purchaser at execution sale, see "Execution," § 274.
- Good faith of purchaser of bill or note, and payment of value, see "Bills and Notes," §§ 497, 509, 525.
- Good faith of purchaser of goods, see "Sales," § 244.
- Good faith of purchaser of land, see "Trespass to Try Title," § 39; "Vendor and Purchaser," §§ 242-244.
- Grounds of attachment, see "Attachment," § 47.
- Identity of bill or note sued on, see "Bills and Notes," §§ 492, 502, 517.
- Identity of names, see "Names," § 18.
- Identity of property sued for, see "Trespass to Try Title," § 39.
- Illegitimacy, see "Bastards," §§ 3-6.
- Impeachment or contradiction of record, see "Appeal and Error," § 668.
- Improvements or taxes, see "Ejectment," § 147.
- Incompetency of fellow servant, see "Master and Servant," §§ 271, 279.
- Inconsistent statements by witnesses, for purpose of impeachment, see "Witnesses," §§ 390-396.
- Incorporation of national bank, see "Banks and Banking," § 236.
- Increase of risk within provisions of insurance policy, see "Insurance," § 657.
- Indebtedness to decedent's estate, see "Executors and Administrators," § 52.
- Infancy, see "Infants," § 99.
- Infringement of copyright, see "Copyrights," § 83.
- Infringement of patent, see "Patents," §§ 274, 312.
- Insanity, see "Insane Persons," § 2.
- Insolvency, see "Banks and Banking," § 73; "Building and Loan Associations," § 42; "Corporations," § 538.
- Insolvency or other act of bankruptcy, see "Bankruptcy," § 91.

- Intent of married woman to charge separate estate, see "Husband and Wife," § 164.
- Interest and bias of witnesses, for purpose of impeachment, see "Witnesses," §§ 374, 376, 377.
- Interest or title of insured, see "Insurance," § 653.
- Interferences in patent office, see "Patents," § 106.
- Intimacy and illicit intercourse of prosecutrix and defendant in bastardy proceedings, see "Bastards," § 62.
- Items of costs, see "Costs," § 207.
- Judgment as estoppel or defense, see "Judgment," §§ 951-957.
- Judgment as evidence of indebtedness in actions by or against persons not parties or privies, see "Judgment," § 711.
- Judgment as evidence of its own existence, in actions by or against persons not parties or privies, see "Judgment," § 709.
- Judgment as evidence of title, or link in chain of title, in actions by or against persons not parties or privies, see "Judgment," § 712.
- Jurisdictional facts, see "Courts," §§ 219, 224, 323, 330; "Judgment," § 124.
- Knowledge of agent, see "Principal and Agent," § 182.
- Knowledge of principal as to act of agent, see "Principal and Agent," § 166.
- Legality of bill or note, see "Bills and Notes," §§ 506, 521.
- Legality of object or consideration of contracts, see "Contracts," § 141.
- Legitimacy of pauper, see "Paupers," § 52.
- License in respect to real property, see "Licenses," §§ 49, 64.
- Limitation of liability of carrier in respect to goods, see "Carriers," §§ 163, 165.
- Location of railroad, see "Railroads," § 53.
- Loss of or injury to goods in course of transportation, see "Carriers," §§ 132-134.
- Loss or damage to property insured, and cause thereof, see "Insurance," § 658.
- Loss under insurance policy, see "Insurance," §§ 533-562, 789.
- Marks on logs, see "Logs and Logging," § 9.
- Marriage in actions by or against husband or wife, see "Husband and Wife," § 233.
- Marriage in actions for divorce, see "Divorce," § 113.
- Married woman's separate property, see "Husband and Wife," §§ 131-133.
- Matters not apparent of record on appeal or writ of error, see "Appeal and Error," § 715; "Criminal Law," § 1128.
- Membership in association, see "Associations," § 7.
- Merger of contracts, see "Contracts," § 247.
- Mesne profits, see "Ejectment," § 135.
- Mistake, fraud or undue influence in execution of will, see "Wills," §§ 163-166.
- Mistake in execution of bill or note, see "Bills and Notes," §§ 505, 520.
- Modification of contracts, see "Contracts," § 247.
- Municipal ordinances or by-laws, see "Municipal Corporations," § 122.
- Names of persons, see "Names," § 18.
- Naturalization, see "Aliens," § 69.
- Nature and cause of injury to servant, see "Master and Servant," § 269.
- Navigability of lake or stream, see "Navigable Waters," § 1.
- Negligence causing injuries from fires set by railroad company, see "Railroads," §§ 480-482.
- Negligence causing injuries to animals on or near railroad tracks, see "Railroads," §§ 441-443.
- Negligence causing injuries to passenger, see "Carriers," §§ 316-318.
- Negligence causing injuries to persons at railroad crossings, see "Railroads," §§ 346-348.
- Negligence causing injuries to persons on or near railroad tracks, see "Railroads," §§ 396-398.
- Negligence causing injuries to persons on or near street railroad tracks, see "Street Railroads," §§ 112-114.
- Negligence causing injuries to travelers on highway, see "Highways," §§ 209-211.
- Negligence causing injuries to travelers on street, see "Municipal Corporations," §§ 817-819.
- Negligence causing injuries to travelers on toll road, see "Turnpikes and Toll Roads," § 49.
- Negligence causing injury to person crossing race track at agricultural fair, see "Agriculture," § 4.
- Negligence causing injury to wharf, see "Wharves," § 22.
- Negligence in blasting, see "Explosives," § 12.
- Negligence in operation of ferry, see "Ferries," § 33.
- Negligence in operation of railroad in general, see "Railroads," § 251.
- Negligence in respect to explosives, see "Explosives," §§ 7-10.
- Negligence in respect to production and use of steam, see "Steam," § 6.
- Negligence in use of highway, see "Highways," § 184.
- Negligence of fellow servant, see "Master and Servant," §§ 272, 279.
- Negligence of innkeeper, see "Innkeepers," § 11.
- Negligence of master causing injury to servant, see "Master and Servant," §§ 270, 278.
- Negligence of physician or surgeon, see "Physicians and Surgeons," § 18.
- Negligence of telegraph or telephone company in construction or maintenance of lines, see "Telegraphs and Telephones," § 20.
- Negligence of warehousemen, see "Warehousemen," § 34.
- Negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.
- Negligence or misconduct of broker, see "Brokers," § 38.
- New promise after discharge in bankruptcy, see "Bankruptcy," § 436.
- Notice and proof of loss under insurance policy, see "Insurance," § 662.

- Notice of nonpayment or of protest of bill or note, see "Bills and Notes," §§ 498, 510, 526.
- Notice of sale of land for taxes, see "Taxation," § 662.
- Notice of time for payment of insurance premium or assessment, see "Insurance," § 355.
- Notice to mortgagor of assignment of mortgage, see "Mortgages," § 238.
- Notice to redeem from tax sale, see "Taxation," § 707.
- Offer and acceptance of contracts, see "Contracts," § 28.
- Originality and priority of invention, see "Patents," § 91.
- Ownership and operation of railroads, see "Railroads," §§ 270-272.
- Ownership of animals, see "Animals," §§ 3, 10.
- Ownership of crops, see "Crops," § 2.
- Ownership of lost goods, see "Finding Lost Goods," § 3.
- Ownership of or interest in property intermixed, see "Confusion of Goods," § 13.
- Ownership of property claimed as assets of decedent's estate, see "Executors and Administrators," § 59.
- Ownership of vehicle causing injury on highway, see "Highways," § 184.
- Ownership or possession of mining location, see "Mines and Minerals," § 38.
- Parties to contracts, see "Contracts," § 28.
- Patentable invention, see "Patents," §§ 32-36.
- Patentable novelty, see "Patents," § 45.
- Patentable utility, see "Patents," § 49.
- Pauperism, see "Paupers," § 1.
- Payment for corporate stock, see "Corporations," § 88.
- Payment of bill or note, see "Bills and Notes," §§ 499, 511, 527.
- Payment of debt secured by mortgage, see "Mortgages," § 319.
- Payment of judgment, see "Judgment," § 877.
- Payment of legacy or distributive share, see "Executors and Administrators," § 305.
- Payment of taxes, see "Levees," § 26; "Taxation," § 529.
- Performance of contracts in general, see "Contracts," § 322.
- Performance or breach of warranty or condition in insurance policy, see "Insurance," § 654.
- Persons entitled to proceeds of insurance policy, see "Insurance," § 663.
- Pledge of stock, see "Corporations," § 123.
- Possession of land, see "Trespass to Try Title," § 39.
- Preferences in assignment for creditors, see "Assignments for Benefit of Creditors," § 133.
- Prejudice or local influence to justify removal of cause, see "Removal of Causes," § 63.
- Presentation of claim against decedent's estate, see "Executors and Administrators," § 228.
- Presentment of bill or note for payment, see "Bills and Notes," §§ 498, 510, 526.
- Prior knowledge or use of invention, see "Patents," §§ 58-62.
- Prior public use or sale of invention, see "Patents," § 81.
- Promise to marry, and breach thereof, see "Breach of Marriage Promise," §§ 20-23.
- Protest of bill or note, see "Bills and Notes," §§ 498, 510, 526.
- Proximate cause of injury to traveler on toll road, see "Turnpikes and Toll Roads," § 49.
- Public necessity for railroad, see "Railroads," § 7.
- Purpose of levy of town taxes, see "Towns," § 56.
- Ratification of acts of agent, see "Principal and Agent," § 173.
- Ratification of agency of husband for wife, see "Husband and Wife," § 25.
- Reasonableness of charges for transportation, see "Carriers," § 12.
- Reasonableness of license tax on telegraph or telephone companies, see "Licenses," § 7.
- Recognition by landlord of tenant holding over, see "Landlord and Tenant," § 90.
- Reduction to possession by husband of wife's property, see "Husband and Wife," § 11.
- Registration of title to land, see "Records," § 9.
- Relation of carrier and passenger, see "Carriers," § 246.
- Relation of guest and innkeeper, see "Innkeepers," § 8.
- Relation of landlord and tenant, see "Landlord and Tenant," § 18.
- Relation of master and servant, see "Master and Servant," §§ 268, 277.
- Release of mortgage, see "Mortgages," § 319.
- Removing or secreting records, see "Records," § 21.
- Renewal of lease, see "Landlord and Tenant," § 88.
- Rents, see "Ejectment," § 135.
- Requisites and validity of guaranty, see "Guaranty," § 25.
- Rescission of marriage settlement, see "Husband and Wife," § 33.
- Rescission of sale by buyer, see "Sales," § 130.
- Resemblance of child to defendant in bastardy proceedings, see "Bastards," § 63.
- Reservations in assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 100.
- Res judicata, see "Judgment," §§ 951-957.
- Revocation of license in respect to real property, see "Licenses," § 58.
- Revocation of will, see "Wills," § 290.
- Right to take property for public use, see "Eminent Domain," § 196.
- Rules of court, see "Courts," § 84.
- Search for property as basis for arrest of defaulting taxpayer, see "Taxation," § 602.
- Service of notice of proceedings to alter highway, see "Highways," § 72.
- Service of process, see "Process," §§ 145-149.
- Service or posting of notice of proceedings to establish highway, see "Highways," § 30.

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Sexual intercourse, see "Adultery," § 13;

"Bastards," §§ 59-63; "Divorce," § 129;

"Husband and Wife," § 348; "Fornication," §§ 7-9.

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Testamentary capacity, see "Wills," §§ 52-55.

Title to land after loss or destruction of record, see "Records," § 18.

Title to land on which fences have been removed or destroyed, see "Fences," § 28.

Title to property in general, see "Property," § 9.

Title to property sued for, see "Trespass to Try Title," §§ 38-41.

Title to vessel, see "Shipping," § 19.

Torts in general, see "Torts," § 27.

Township indebtedness, see "Towns," § 46.

Transfer and ownership of bill or note, see "Bills and Notes," §§ 496, 508, 523, 524.

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Transfer of shares of corporate stock, see "Corporations," § 139.

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Usury in transactions of building and loan associations, see "Building and Loan Associations," § 33.

Validity of assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 51.

Validity of contracts in general, see "Contracts," § 99.

Validity of mortgage, see "Chattel Mortgages," § 79; "Mortgages," § 86.

Valuation of property insured, see "Insurance," § 660.

Value of attorney's services, see "Attorney and Client," § 166.

Value of property taken for public use, see "Eminent Domain," §§ 202, 297.

Violation of injunction, see "Injunction," § 230.

Violation of Sunday laws, see "Sunday," §§ 23, 27.

Waiver of condition in sale, see "Sales," § 477.

Waiver of lien on logs, lumber, mills, or mill products, see "Logs and Logging," § 32.

Waiver of right to trial by jury, see "Jury," § 28.

Waiver or abandonment of homestead, see "Homestead," § 181.

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See "Adjoining Landowners," §§ 4, 9; "Associations," § 20; "Attorney and Client," §§ 126, 129, 166; "Banks and Banking," §§ 55, 82, 143, 154, 175, 227, 306; "Beneficial Associations," § 20; "Brokers," §§ 37, 38, 84-86, 106; "Building and Loan Associations," § 41; "Carriers," §§ 20, 45,

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Assignees for benefit of creditors, see "Assignments for Benefit of Creditors," §§ 278, 351, 396.

Assignees in general, see "Assignments," §§ 134-137.

Assignees or trustees in insolvency, see "Insolvency," § 99.

Bankers and bank officers, see "Banks and Banking," §§ 55, 58, 82.

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Between parties to joint adventure, see "Joint Adventures," § 5.

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Boards of health and health officers, see "Health," § 19.

Claimants under tax titles, see "Taxation," § 810.

County officers, see "Counties," § 75.

Creditors of corporations, see "Corporations," § 548.

Devises and legatees, see "Wills," § 847.

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Election officers, see "Elections," § 58.

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Gas companies, see "Gas," §§ 11, 13, 14, 14½, 20, 22.

Guarantors, see "Guaranty," §§ 89-91.  
 Heirs and distributees, see "Descent and Distribution," §§ 71, 90, 91, 147; "Husband and Wife," § 274.  
 Indemnitors, see "Indemnity," § 15; "Mechanics' Liens," § 317; "Sheriffs and Constables," §§ 138, 151.  
 Insurance companies, see "Insurance," §§ 188, 197, 646, 648-665, 817.  
 License officers, see "Marriage," § 25.  
 Officers and agents of corporations, see "Corporations," § 361.  
 Owner of property taken for public use, see "Eminent Domain," §§ 294-300.  
 Parties to bailment, see "Bailment," § 31.  
 Parties to mortgages, see "Chattel Mortgages," §§ 157, 172, 173, 174, 176, 177, 178, 229, 278, 306; "Mortgages," §§ 186, 312, 369, 379, 460, 461, 463, 464, 505, 529, 553, 617.  
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 Postmasters, see "Post Office," § 7.  
 Receivers of corporations, see "Corporations," § 560.  
 Seller in conditional sale, see "Sales," §§ 479, 480.  
 Stockholders, see "Banks and Banking," §§ 49, 250; "Corporations," §§ 212, 269.  
 Sureties on guardians' bonds, see "Guardian and Ward," § 182.  
 Sureties on liquor dealer's bond, see "Intoxicating Liquors," § 88.  
 Tax collectors, see "Taxation," §§ 567, 570.  
 Tax payers, see "Municipal Corporations," § 1000.  
 Trustees in bankruptcy, see "Bankruptcy," § 303.  
 Trustees in general, see "Trusts," §§ 262, 323, 325, 372, 387.  
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 Wharfingers, see "Wharves," § 20.

*In particular civil actions or proceedings.*

See "Assault and Battery," §§ 26-35; "Assumpsit, Action of," § 25; "Bankruptcy," §§ 91, 136, 225, 340, 414; "Cancellation of Instruments," §§ 45-47; "Creditors' Suit," §§ 44-46; "Detinue," § 18; "Dismissal and Nonsuit," § 71; "Divorce," §§ 109-137, 167, 198, 214, 271, 276; "Ejectment," §§ 86, 88-91, 93-96, 162; "Entry, Writ of," § 21; "Extradition," § 14; "False Imprisonment," §§ 22-31; "Forcible Entry and Detainer," § 29; "Fraud," § 50; "Garnishment," §§ 160-164; "Habeas Corpus," § 85; "Injunction," §§ 125-128; "Interpleader," § 29; "Libel and Slander," §§ 101-112; "Malicious Prosecution," §§ 56, 58-64; "Mandamus," § 168; "Money Lent," § 7; "Money Paid," § 9; "Money Received," § 18; "Ne Exeat," § 6; "Negligence," §§ 120-135; "Partition," § 63; "Possessory Warrant," § 4; "Prohibition," § 27; "Quieting Title," § 44; "Quo Warranto," § 55; "Real Actions," §§ 3, 8; "Reformation of Instruments," §§ 43-45; "Removal of Causes," § 87; "Replevin," §§ 70-72; "Scire Facias," § 11; "Sequestration," § 16; "Specific Performance," §§ 119-121; "Trespass," §§ 44-46; "Trespass to Try Title," §§ 38-41; "Trove and Conversion,"

§§ 35-40; "Use and Occupation," § 9; "Work and Labor," §§ 26-28.  
 Abolition of grade crossing, see "Railroads," § 99.  
 Accounting between partners, see "Partnership," §§ 336-338.  
 Accounting by assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 396.  
 Accounting by executor or administrator, see "Executors and Administrators," §§ 503, 506.  
 Accounting by guardian, see "Guardian and Ward," §§ 154, 157.  
 Accounting by trustee, see "Trusts," §§ 323, 325.  
 After opening default judgment, see "Judgment," § 176.  
 Against agent for negligence or wrongful acts, see "Principal and Agent," § 79.  
 Against carrier as warehouseman, see "Carriers," § 146.  
 Against carrier for breach of contract, see "Carriers," § 69.  
 Against carrier for refusal to deliver goods, see "Carriers," § 94.  
 Against carrier for refusal to receive goods, see "Carriers," § 45.  
 Against carriers for penalties, see "Carriers," § 20.  
 Against guarantors, see "Guaranty," §§ 89-91.  
 Against personal representative for accounting, see "Executors and Administrators," §§ 473, 474.  
 Against sureties, see "Principal and Surety," §§ 159-161.  
 Allowance of claims against decedent's estate, see "Executors and Administrators," § 221.  
 Alteration of municipal boundaries, see "Municipal Corporations," § 33.  
 Appointment of administrator, see "Executors and Administrators," § 20.  
 Appointment of guardian, see "Guardian and Ward," § 13.  
 Appointment of receiver, see "Receivers," § 38.  
 Arrest for nonpayment of taxes, see "Taxation," § 602.  
 Attachment proceedings to collect rent, see "Landlord and Tenant," § 229.  
 Bastardy proceedings, see "Bastards," §§ 54-65.  
 Before referee in bankruptcy, see "Bankruptcy," § 225.  
 Between co-sureties, see "Principal and Surety," § 200.  
 Between mortgagees for damages, see "Chattel Mortgages," § 178.  
 Between parties to bailment, see "Bailment," § 31.  
 Between parties to mortgage for damages, see "Chattel Mortgages," § 176.  
 Bill of review, see "Equity," § 463.  
 By carrier to recover freight charges, see "Carriers," § 196.  
 By grantee of purchaser at foreclosure sale for possession, see "Mortgages," § 553.  
 By heirs of community property to recover interests therein, see "Husband and Wife," § 274.

- By landlord for unlawful detainer, see "Landlord and Tenant," § 291.
- By landlord under lease on shares, see "Landlord and Tenant," § 331.
- By married woman to become sole trader, see "Husband and Wife," § 95.
- By mortgagee against purchaser or transferee, see "Chattel Mortgages," § 229.
- By owner of property taken for public use, see "Eminent Domain," §§ 294-300.
- By party to mortgage against third person to recover damages, see "Chattel Mortgages," § 177.
- By pilot for fees, see "Pilots," § 12.
- By pledgee to enforce right of action pledged, see "Pledges," § 58.
- By taxpayers for relief against municipal acts, see "Municipal Corporations," § 1000.
- By tenant against landlord for failure to deliver possession, see "Landlord and Tenant," § 129.
- By United States to recover timber or the value of timber cut from public lands, see "Public Lands," § 13.
- Certiorari to review tax assessment, see "Taxation," § 496.
- Challenge of voters, see "Elections," § 223.
- Claims against estate of bankrupt, see "Bankruptcy," § 340.
- Claims against estate of decedent, see "Executors and Administrators," § 252.
- Claim to attached property, see "Attachment," § 308.
- Claim to property garnished, see "Garnishment," § 218.
- Claim to property taken on execution, see "Execution," § 194.
- Claim under French Spoliation Act, see "United States," § 101.
- Compelling surrender of property by bankrupt to trustee, see "Bankruptcy," § 186.
- Condemnation proceedings, see "Eminent Domain," §§ 196, 199-205.
- Contempt proceedings, see "Contempt," § 60; "Injunction," § 230.
- Contests of right to purchase state lands, see "Public Lands," §§ 172, 173.
- Crossing of one railroad by another, see "Railroads," § 91.
- Deportation of Chinese, see "Aliens," § 32.
- Disbarment, see "Attorney and Client," § 53.
- Discharge of bankrupt, see "Bankruptcy," § 414.
- Distress, see "Landlord and Tenant," § 270.
- Distribution of decedent's estate, see "Executors and Administrators," § 314.
- Election contests, see "Elections," §§ 153, 154, 291-295.
- Enforcement of landlord's lien, see "Landlord and Tenant," § 262.
- Enforcement of liability of bank officers, see "Banks and Banking," § 55.
- Enforcement of taxes, see "Municipal Corporations," § 978.
- Establishment of heirship, see "Descent and Distribution," § 71.
- Establishment of title to land after loss or destruction of record, see "Records," § 18.
- Establishment of railroad crossing, see "Railroads," § 97.
- Flowage of lands, see "Waters and Water Courses," § 179.
- For accounting, see "Account," § 18.
- For accounting by broker, see "Brokers," § 37.
- For alienation of affections of husband or wife, see "Husband and Wife," § 333.
- For allotment of widow's allowance, see "Executors and Administrators," § 194.
- For appointment of viewer for corporation, see "Corporations," § 557.
- For bounties, see "Bounties," § 8.
- For breach of contract for carriage of passengers, see "Carriers," § 276; "Shipping," § 165.
- For breach of contract for sale of good will, see "Good Will," § 7.
- For breach of contract in general, see "Contracts," §§ 348-350.
- For breach of contract of sale, see "Logs and Logging," § 3; "Sales," §§ 381-383, 415-417; "Vendor and Purchaser," §§ 329, 350.
- For breach of contract to drive, float, or raft logs, see "Logs and Logging," § 15.
- For breach of contract to saw or manufacture logs, see "Logs and Logging," § 21.
- For breach of covenant in general, see "Covenants," §§ 118-122.
- For breach of covenant in indentures or other contract of apprenticeship, see "Apprentices," § 19.
- For breach of logging contract, see "Logs and Logging," § 8.
- For breach of marriage promise, see "Breach of Marriage Promise," §§ 20-23.
- For breach of warranty of goods sold, see "Sales," §§ 439-441.
- For cancellation of marriage settlement, see "Husband and Wife," § 34.
- For causing death, see "Death," §§ 58-77.
- For change of venue, see "Venue," § 68.
- For compensation as municipal employee, see "Municipal Corporations," § 220.
- For compensation for driving intermingled or obstructing logs, see "Logs and Logging," § 17.
- For compensation of attorney, see "Attorney and Client," § 166.
- For compensation of broker, see "Brokers," §§ 84-86.
- For compensation of court stenographer, see "Courts," § 57.
- For compensation of factor, see "Factors," § 46.
- For compensation of innkeeper, see "Innkeepers," § 12.
- For compensation of physician or surgeon, see "Physicians and Surgeons," § 24.
- For compensation of teacher, see "Schools and School Districts," § 145.
- For compensation of witness, see "Witnesses," § 34.
- For conspiracy, see "Conspiracy," § 19.
- For continuance, see "Continuance," § 47.
- For contribution in general, see "Contribution," § 9.
- For conversion of logs or lumber, see "Logs and Logging," § 35.
- For counsel fees and expenses of wife in divorce suit, see "Divorce," § 198.

For criminal conversation, see "Husband and Wife," § 848.  
 For damage caused by combination, see "Monopolies," § 28.  
 For damage for obstructing mail, see "Post Office," § 53.  
 For damages arising from municipal improvement, see "Municipal Corporations," § 404.  
 For delay in transportation or delivery of goods, see "Carriers," §§ 104, 185.  
 For deposits, see "Banks and Banking," § 154.  
 For discrimination by carrier, see "Carriers," § 201.  
 For dissolution of partnership, see "Partnership," § 328.  
 For diversion of water, see "Waters and Water Courses," § 87.  
 For dower, see "Dower," § 79.  
 For ejectment of passenger or intruder from train, see "Carriers," § 381.  
 For encroachments on adjoining lands, see "Adjoining Landowners," § 9.  
 For enticing away or harboring apprentice, see "Apprentices," § 21.  
 For equitable relief against judgment, see "Judgment," § 461.  
 For establishment and protection of easements, see "Easements," § 61.  
 For excess of freight charges paid, see "Carriers," § 202.  
 For failure or refusal to supply gas to private consumers, see "Gas," § 18.  
 For failure to repair leased premises, see "Landlord and Tenant," § 154.  
 For infringement of copyright, see "Copyrights," § 83.  
 For infringement of patent, see "Patents," §§ 274, 312.  
 For infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 93.  
 For injunction, see "Injunction," §§ 125-128.  
 For injuries arising from accidents to trains, see "Railroads," § 297.  
 For injuries arising from condition and use of municipal buildings and other property, see "Municipal Corporations," § 857.  
 For injuries at railroad crossings, see "Railroads," §§ 346-348.  
 For injuries by or to animals, see "Animals," §§ 74, 85, 100.  
 For injuries by servants, see "Master and Servant," § 330.  
 For injuries caused by electricity, see "Electricity," § 19.  
 For injuries from construction of railroad, see "Railroads," § 114.  
 For injuries from construction of water-works, see "Waters and Water Courses," § 195.  
 For injuries from construction or maintenance of telegraph or telephone lines, see "Telegraphs and Telephones," § 20.  
 For injuries from defects in bridges, see "Bridges," § 46.  
 For injuries from defects in fences, see "Fences," § 24.  
 For injuries from defects in sewers and drains in cities, see "Municipal Corporations," § 845.

For injuries from defects or obstructions in highways, see "Highways," §§ 209-211.  
 For injuries from defects or obstructions in streets, see "Municipal Corporations," §§ 817-819.  
 For injuries from defects or obstructions in toll roads, see "Turnpikes and Toll Roads," § 49.  
 For injuries from escape or explosion of gas, see "Gas," § 20.  
 For injuries from explosions, see "Explosives," §§ 7-10.  
 For injuries from fires caused by operation of railroads, see "Railroads," §§ 480-482.  
 For injuries from negligence of agricultural society, see "Agriculture," § 4.  
 For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see "Telegraphs and Telephones," § 66.  
 For injuries from negligent use of highway, see "Highways," § 184.  
 For injuries from negligent use of street, see "Municipal Corporations," § 706.  
 For injuries from negligent use of weapons, see "Weapons," § 18.  
 For injuries from nuisances, see "Nuisance," § 49.  
 For injuries from sale of drugs or poisons, see "Druggists," § 10; "Poisons," § 6.  
 For injuries from sale of liquor, see "Intoxicating Liquors," §§ 308-310.  
 For injuries incident to construction or operation of gas works, see "Gas," § 14½.  
 For injuries incident to driving or rafting logs, see "Logs and Logging," § 19.  
 For injuries incident to supply or use of water, see "Waters and Water Courses," § 263.  
 For injuries to animals on or near railroad tracks, see "Railroads," §§ 441-443.  
 For injuries to bridge, see "Bridges," § 27.  
 For injuries to buildings by removal of lateral support, see "Adjoining Landowners," § 4.  
 For injuries to easements, see "Easements," § 69.  
 For injuries to guests at hotel, see "Innkeepers," § 10.  
 For injuries to licensees and trespassers on railroad property, see "Railroads," § 282.  
 For injuries to or destruction of logs or rafts, see "Logs and Logging," § 19.  
 For injuries to passengers, see "Carriers," §§ 316-318, 344-346, 416; "Ferries," § 33.  
 For injuries to persons attending theaters or other places of amusement, see "Theaters and Shows," § 6.  
 For injuries to persons hiring horses from liverymen, see "Livery Stable Keepers," § 11.  
 For injuries to persons on or near railroad tracks, see "Railroads," §§ 396-398.  
 For injuries to persons on or near street railroad tracks, see "Street Railroads," §§ 112-114.  
 For injuries to riparian lands by floatage of rafts and logs, see "Navigable Waters," § 39.  
 For injuries to servants, see "Master and Servant," §§ 265, 267-274, 276-281.



- For injuries to vessel at wharf, see "Wharves," § 20.
- For injuries to wharf, see "Wharves," § 22.
- For injury incident to supply of water, see "Waters and Water Courses," § 209.
- For interest, see "Interest," § 67.
- For interference with party wall, see "Party Walls," § 10.
- For interference with relation of master and servant, see "Master and Servant," § 340.
- For interference with surface waters, see "Waters and Water Courses," § 126.
- For interference with waters of wells or springs, see "Waters and Water Courses," § 107.
- For judgment against real property for taxes, see "Taxation," § 644.
- For judgment by default, see "Judgment," §§ 124-126.
- For leave to sue or defend in forma pauperis, see "Costs," § 132.
- For loss of or injuries to hired horses or vehicles, see "Livery Stable Keepers," § 12.
- For loss of or injuries to horses or vehicles in care of liveryman, see "Livery Stable Keepers," § 7.
- For loss of or injuries to logs, see "Logs and Logging," § 20.
- For loss of or injury to goods in course of transportation, see "Carriers," §§ 132-134, 163-165, 185.
- For loss of or injury to goods stored, see "Warehousemen," § 34.
- For loss of or injury to passenger's baggage, see "Carriers," §§ 408, 417.
- For loss of or injury to property of guest, see "Innkeepers," § 11.
- For loss of services of child, see "Parent and Child," § 7.
- For marshaling assets, see "Marshaling Assets and Securities," § 11.
- For misdelivery or nondelivery of goods stored, see "Warehousemen," § 34.
- For money loaned to school district, see "Schools and School Districts," § 121.
- For necessities furnished child, see "Parent and Child," § 3.
- For negligence of attorney, see "Attorney and Client," § 129.
- For negligence or default of bank in making collections, see "Banks and Banking," § 175.
- For negligence or malpractice of physician or surgeon, see "Physicians and Surgeons," § 18.
- For negligence or misconduct of broker, see "Brokers," § 38.
- For negligence or misconduct of sheriff or constable, see "Sheriffs and Constables," § 138.
- For negligent or wrongful act of factor, see "Factors," § 43.
- For new trial, see "New Trial," §§ 140, 142-145, 147, 148, 150, 151.
- For obstruction of highway, see "Highways," § 160.
- For obstruction of navigation, see "Navigable Waters," § 26.
- For official fees, salary, or compensation, see "Counties," § 75; "Sheriffs and Constables," § 74.
- For penalties, see "Civil Rights," § 14; "Druggists," § 11; "Elections," § 323; "Fish," § 14; "Food," § 16; "Gas," § 22; "Highways," § 161; "Intoxicating Liquors," § 188; "Licenses," § 41; "Logs and Logging," § 36; "Marriage," § 25; "Mortgages," § 312; "Municipal Corporations," § 633; "Penalties," § 33; "Telegraphs and Telephones," § 78.
- For personal injuries to child, see "Parent and Child," § 11.
- For pollution of stream, see "Waters and Water Courses," § 77.
- For possession of decedent's realty, see "Executors and Administrators," § 130.
- For possession of leased premises, see "Landlord and Tenant," § 285.
- For possession of mineral lands, see "Mines and Minerals," § 50.
- For possession of mortgaged property, see "Chattel Mortgages," §§ 172, 173, 174.
- For premiums, see "Insurance," § 188.
- For price of land sold, see "Vendor and Purchaser," § 315.
- For price of liquor sold, see "Intoxicating Liquors," § 329.
- For price of logs or timber sold, see "Logs and Logging," §§ 3, 34.
- For price or value of goods sold, see "Sales," §§ 357-359.
- For proceeds of goods consigned to factor, see "Factors," § 42.
- For protection of rights in respect to fixtures, see "Fixtures," § 35.
- For refusal of admission to theater, see "Theaters and Shows," § 4.
- For refusal to pay check, see "Banks and Banking," § 143.
- For relief against municipal assessment, see "Municipal Corporations," § 513.
- For rent, see "Landlord and Tenant," § 231.
- For rewards, see "Rewards," § 15.
- For royalties under mining lease, see "Mines and Minerals," § 70.
- For salvage, see "Salvage," § 48.
- For seduction, see "Seduction," § 17.
- For separate maintenance of wife, see "Husband and Wife," § 297.
- For services or wages of child, see "Parent and Child," § 6.
- For subrogation, see "Subrogation," § 41.
- For summary judgment, see "Judgment," § 185.
- For supplies furnished to, or expenditures incurred on behalf of paupers, see "Paupers," § 52.
- For temporary alimony, see "Divorce," § 214.
- For tort in general, see "Torts," § 27.
- For torts of child, see "Parent and Child," § 13.
- For trespass or conversion affecting mining rights, see "Mines and Minerals," § 51.
- For unfair competition in trade, see "Trade-Marks and Trade-Names," § 93.
- For unlawful detainer brought by landlord, see "Landlord and Tenant," § 291.
- For unpaid taxes, see "Taxation," § 593.
- For use of private roads, see "Private Roads," § 11.
- For wages, see "Master and Servant," § 80.
- For waste, see "Waste," § 20.
- For water rent, see "Waters and Water Courses," § 203.
- For writ of ne exeat, see "Ne Exeat," § 6.

- For wrongful attachment, see "Attachment," § 374.
- For wrongful discharge of servant, see "Master and Servant," § 40.
- For wrongful distress, see "Landlord and Tenant," § 274.
- For wrongful execution, see "Execution," § 471.
- For wrongful foreclosure by exercise of power of sale in mortgage, see "Mortgages," § 379.
- For wrongful receiverships, see "Receivers," § 220.
- In admiralty, see "Admiralty," §§ 73-77; "Collision," §§ 122-125.
- In equity, see "Equity," §§ 336-348, 404.
- In justices' courts, see "Justices of the Peace," § 104.
- In proceedings before interstate commerce commission, see "Commerce," § 87.
- In United States Court of Claims, see "Courts," § 464.
- Motion to dismiss appeal or writ of error, see "Appeal and Error," § 799.
- On account, see "Account, Action on," §§ 7, 22.
- On account stated, see "Account Stated," § 19.
- On administration bond, see "Executors and Administrators," § 537.
- On assigned claims, see "Assignments," §§ 134-137.
- On award, see "Arbitration and Award," § 85.
- On bail bonds, see "Bail," §§ 34, 90.
- On bills or notes, see "Bills and Notes," §§ 491-499, 501-514, 516-527.
- On bond for support of wife, in proceedings for abandonment, see "Husband and Wife," § 319.
- On bond in proceedings to vacate judgment, see "Judgment," § 402.
- On bond of contractor for public improvements, see "Municipal Corporations," § 348.
- On bonds and undertakings on appeal or writ of error, see "Appeal and Error," § 1246.
- On bonds and undertakings to secure costs, see "Costs," § 145.
- On bonds for payment of license taxes, see "Licenses," § 26.
- On bonds given on appeal from justice courts, see "Justices of the Peace," § 191.
- On bonds in general, see "Bonds," §§ 130-132.
- On bonds of depositaries, see "Depositaries," § 14.
- On bonds of indemnity to sheriffs and constables, see "Sheriffs and Constables," § 151.
- On bonds of public officers, see "Clerks of Courts," § 75; "Counties," § 101; "Municipal Corporations," § 173; "Officers," § 142; "Post Office," § 7; "Sheriffs and Constables," § 169; "Taxation," § 570.
- On bonds or undertakings in attachment proceedings, see "Attachment," § 350.
- On bonds or undertakings in proceedings for injunction, see "Injunction," § 251.
- On bonds or undertakings in replevin, see "Replevin," § 134.
- On bonds to indemnify against mechanics' liens, see "Mechanics' Liens," § 317.
- On composition agreement, see "Compositions with Creditors," § 25.
- On contract of suretyship, see "Principal and Surety," §§ 159-161.
- On contract or transaction entered into on Sunday, see "Sunday," § 23.
- On contract relating to water rights, see "Waters and Water Courses," § 158½.
- On county warrants, see "Counties," § 170.
- On debts of intestate, see "Descent and Distribution," § 147.
- On exceptions to report of referee, see "Reference," § 100.
- On gambling contracts, see "Gaming," § 49.
- On guaranty, see "Guaranty," §§ 89-91.
- On guardians' bonds, see "Guardian and Ward," § 182.
- On indebtedness secured by mortgage, see "Mortgages," § 218.
- On insurance policies, see "Insurance," §§ 646, 648-665, 817.
- On judgment, see "Divorce," § 271; "Judgment," §§ 918-920, 942-944.
- On lost instrument, see "Lost Instruments," § 23.
- On liquor dealer's bond, see "Intoxicating Liquors," § 88.
- On motion to vacate judgment by confession, see "Judgment," § 68.
- On municipal bonds, see "Municipal Corporations," § 955.
- On municipal bonds, see "Municipal Corporations," § 955.
- On municipal improvement contracts, see "Municipal Corporations," § 374.
- On school district bonds or warrants, see "Schools and School Districts," §§ 95, 97.
- On separation agreements, see "Husband and Wife," § 281.
- On subscriptions for corporate stock, see "Corporations," § 90.
- On traverse of grounds of attachment, see "Attachment," § 257.
- On trial de novo in appellate court in highway proceedings, see "Highways," § 59.
- On trustees' bonds, see "Trusts," § 387.
- Petitory actions, see "Real Actions," § 8.
- Prize proceedings, see "War," § 28.
- Probate proceedings and actions relating to wills or probate, see "Wills," §§ 287-306.
- Registration of title to land, see "Records," § 9.
- Relating to community or separate property of husband or wife, see "Husband and Wife," § 270.
- Relating to usury, see "Usury," §§ 113-117.
- Remand of cause removed from state to federal court, see "Removal of Causes," § 107.
- Removal of executors and administrators, see "Executors and Administrators," § 35.
- Removal of firemen, see "Municipal Corporations," § 198.
- Removal of municipal employees, see "Municipal Corporations," § 218.
- Removal of policemen, see "Municipal Corporations," § 185.
- Removal of trustee, see "Trusts," § 167.
- Revocation of license, see "Intoxicating Liquors," § 108.

- Scire facias to revive judgment, see "Judgment," § 870.
- Set-off of judgments, see "Judgment," § 883.
- Subscriptions in general, see "Subscriptions," § 21.
- Summary proceedings against officers, see "Sheriffs and Constables," § 125.
- Summary proceedings by client against attorney, see "Attorney and Client," § 126.
- Summary proceedings by landlord to recover possession of demised premises, see "Landlord and Tenant," § 308.
- Supplying or restoring records or instruments lost or destroyed, see "Records," § 17.
- To abate or restrain nuisance, see "Intoxicating Liquors," § 275; "Nuisance," § 33.
- To amend or correct judgment, see "Judgment," §§ 315, 324.
- To annul marriage, see "Marriage," § 60.
- To compel assessment or payment of tax on omitted property, see "Taxation," § 362½.
- To compel issuance of corporate stock, see "Corporations," § 98.
- To compel listing of property for taxation, see "Taxation," § 336.
- To compel satisfaction of judgment, see "Judgment," § 894.
- To confirm or revise assessment for public improvements, see "Municipal Corporations," § 502.
- To confirm or try tax title, see "Taxation," § 810.
- To construe wills, see "Wills," § 703.
- To determine adverse claim to mining location, see "Mines and Minerals," § 38.
- To determine as to location and mode of construction of telegraph or telephone line, see "Telegraphs and Telephones," § 10.
- To determine contests of nominations of candidates for office, see "Elections," § 153.
- To determine custody of children, see "Parent and Child," § 2.
- To determine priority between mortgages and other liens, see "Mortgages," § 186.
- To determine rights to mortgaged property, see "Chattel Mortgages," § 157.
- To determine riparian rights, see "Waters and Water Courses," § 49.
- To determine title of and right to purchase state school land, see "Public Lands," § 173.
- To determine water rights, see "Waters and Water Courses," §§ 33, 152.
- To enforce assessment for public improvements, see "Municipal Corporations," §§ 553, 568.
- To enforce assessments by mutual insurance companies, see "Insurance," § 197.
- To enforce civil liability on insolvency of bank, see "Banks and Banking," § 82.
- To enforce contract specifying charges for gas, see "Gas," § 14.
- To enforce dissolution of corporation or forfeiture of franchise, see "Corporations," § 613.
- To enforce drainage assessment, see "Drains," § 90.
- To enforce liabilities on change of county boundaries, see "Counties," § 16.
- To enforce liability of officers and agents of corporations, see "Banks and Banking," § 58; "Corporations," § 361.
- To enforce liability of stockholders for corporate debts and acts, see "Banks and Banking," §§ 49, 250; "Corporations," § 269.
- To enforce license fees or taxes, see "Licenses," § 32; "Telegraphs and Telephones," § 30.
- To enforce marriage settlement, see "Husband and Wife," § 35.
- To enforce right of exemption, see "Exemptions," § 148; "Homestead," § 214.
- To enforce testamentary charge, see "Wills," § 826.
- To establish and enforce trust, see "Trusts," § 372.
- To establish boundaries, see "Boundaries," §§ 33, 35-37.
- To establish lost instruments, see "Lost Instruments," § 8.
- To foreclose or enforce liens or mortgages, see "Agriculture," § 15; "Animals," § 26; "Building and Loan Associations," § 39; "Chattel Mortgages," § 278; "Corporations," § 482; "Fences," § 15; "Logs and Logging," § 33; "Maritime Liens," § 65; "Mechanics' Liens," §§ 279-281; "Mines and Minerals," § 117; "Mortgages," §§ 460, 461, 463, 464; "Railroads," § 189; "Taxation," §§ 708, 827; "Vendor and Purchaser," §§ 281, 299.
- To limit shipowner's liability, see "Shipping," § 209.
- To open or vacate judgment, see "Judgment," §§ 162, 392.
- To open or vacate settlement of decedent's estate, see "Executors and Administrators," §§ 509, 516.
- To procure license, see "Intoxicating Liquors," § 70.
- To quash venire of jurors, see "Jury," § 120.
- To recover advances or expenses by factor, see "Factors," § 45.
- To recover exchanged personal property, see "Exchange of Property," § 13.
- To recover fine paid, see "Fines," § 19.
- To recover goods delivered by seller or proceeds thereof, see "Sales," § 324.
- To recover land conveyed to railroad company for right of way, see "Railroads," § 82.
- To recover license tax from gas company, see "Gas," § 11.
- To recover payments, see "Payment," § 89.
- To recover pledged goods from pawnbroker, see "Pawnbrokers," § 9.
- To recover possession of property taken on execution, see "Execution," § 186.
- To recover price paid for goods, see "Sales," § 397.
- To recover price paid for land, see "Vendor and Purchaser," § 341.
- To recover royalties, see "Patents," § 219.
- To recover taxes paid, see "Taxation," § 543.
- To redeem from mortgage sale, see "Mortgages," § 617.
- To redeem from tax sale, see "Taxation," § 722.
- To rescind sale, see "Sales," §§ 110, 130.

To restrain collection of municipal assessment, see "Municipal Corporations," § 538.  
 To restrain collection of tax, see "Taxation," § 611.  
 To restrain diversion of water, see "Waters and Water Courses," § 87.  
 To restrain execution, see "Execution," § 172.  
 To restrain making of municipal improvements, see "Municipal Corporations," § 323.  
 To restrain obstruction of highway, see "Highways," § 159.  
 To restrain pollution of water, see "Waters and Water Courses," §§ 77, 196.  
 To review tax assessments, see "Taxation," § 485.  
 To revoke certificate or license of physician to practice, see "Physicians and Surgeons," § 11.  
 To set aside administration sale, see "Executors and Administrators," § 380.  
 To set aside assessment for taxation, see "Taxation," § 500.  
 To set aside assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 351.  
 To set aside conveyance fraudulent as to wife's right of alimony, see "Divorce," § 276.  
 To set aside decree of adoption, see "Adoption," § 16.  
 To set aside execution sales, see "Execution," § 256.  
 To set aside fraudulent transfer, see "Fraudulent Conveyances," §§ 270-302.  
 To set aside judicial sale, see "Judicial Sales," § 43.  
 To set aside justice's judgment, see "Justices of the Peace," § 128.  
 To set aside sale on foreclosure of mortgage, see "Mortgages," § 529.  
 To set aside satisfaction of mortgage, see "Mortgages," § 316.  
 To subject trust property to claim against beneficiary, see "Trusts," § 151.  
 To try title to office, see "Officers," § 83.  
 To vacate appraisal of property on mortgage foreclosure, see "Mortgages," § 505.  
 To vacate attachment, see "Attachment," § 249.  
 To vacate sale under mortgage or deed of trust, see "Mortgages," § 369.  
 Trial de novo on appeal, see "Appeal and Error," § 898; "Justices of the Peace," § 175.  
 Under anti-trusts laws, see "Monopolies," § 24.  
 Vacation of decree in divorce suit, see "Divorce," § 167.

*In criminal prosecutions.*

See "Abduction," §§ 8-13; "Abortion," §§ 8-11; "Adulteration," § 12; "Adultery," §§ 10-14; "Affray," § 5; "Arson," §§ 27-37; "Assault and Battery," §§ 82-92; "Bigamy," §§ 7-11; "Breach of the Peace," §§ 7, 8; "Bribery," §§ 9-11; "Burglary," §§ 29, 32-39, 41, 43; "Compounding Felony," § 6; "Conspiracy," §§ 44½, 47; "Contempt," § 80; "Criminal Law," §§ 304-572;

"Disorderly Conduct," § 9; "Disorderly House," §§ 15-17; "Disturbance of Public Assemblage," §§ 9-11; "Embezzlement," §§ 36, 38-44; "Embracery," § 5; "Extortion," § 15; "False Pretenses," §§ 41-49; "Fires," § 5; "Forgery," §§ 35, 37-44; "Fornication," §§ 8, 9; "Gaming," §§ 96-98; "Homicide," §§ 143-257; "Incest," §§ 13-15; "Kidnapping," § 5; "Larceny," §§ 41-66; "Lewdness," §§ 9, 10; "Libel and Slander," §§ 154-156; "Malicious Mischief," §§ 7, 8; "Nuisance," § 92; "Obscenity," §§ 15-17; "Obstructing Justice," §§ 14-16; "Perjury," §§ 31-34; "Poisons," §§ 5, 9; "Prize Fighting," § 4; "Prostitution," § 4; "Rape," §§ 36-54; "Receiving Stolen Goods," § 8; "Rescue," § 4; "Riot," § 6; "Robbery," §§ 22-24; "Seduction," §§ 39-46; "Sodomy," § 6; "Threats," § 7; "Trespass," § 88; "Unlawful Assembly," § 3; "Vagrancy," § 3; "Weapons," § 17.

Abandonment of wife by husband, see "Husband and Wife," § 313.

Abandonment or nonsupport of children, see "Parent and Child," § 17.

Absence of evidence ground for continuance, see "Criminal Law," §§ 594-598.

Applicability of instructions to evidence, see "Criminal Law," § 814.

Application for change of venue, see "Criminal Law," § 134.

Application for continuance, see "Criminal Law," § 608.

Application for new trial, see "Criminal Law," §§ 956-958.

Assignment of errors on appeal, see "Criminal Law," § 1129.

Bastardy proceedings, see "Bastards," §§ 54-65.

Comments of counsel on evidence or failure to produce it, see "Criminal Law," §§ 720-721½.

Comments of judge on evidence or witnesses, see "Criminal Law," § 656.

Comments on facts or evidence, see "Criminal Law," § 755½.

Evidence of matters not apparent of record on appeal, see "Criminal Law," § 1128.

Exceptions to evidence, see "Criminal Law," § 697.

Extradition proceedings, see "Extradition," § 14.

Fraudulent change of name, see "Names," § 20.

Illegal sales by auctioneer, see "Auctions and Auctioneers," § 13.

Instructions as to rules of evidence, see "Criminal Law," §§ 778-789.

Instructions excluding evidence from consideration, see "Criminal Law," § 783½.

Instructions on evidence or witnesses as invasion of province of jury, see "Criminal Law," §§ 756-764.

Larceny by warehouseman, see "Warehousemen," § 36.

Maintaining lotteries, see "Lotteries," § 29.

Manner of introducing documentary evidence, see "Criminal Law," § 663.

Motion to dismiss indictment, see "Indictment and Information," § 144.

Motion to quash indictment, see "Indictment and Information," § 140.

Motion to quash warrant, see "Criminal Law," § 219.  
 Motion to strike out evidence, see "Criminal Law," § 696.  
 Newly discovered evidence ground for continuance, see "Criminal Law," §§ 938-945.  
 Objections to evidence, see "Criminal Law," §§ 690, 698, 1036.  
 Obstruction of highway, see "Highways," § 164.  
 Offenses of bank officers or agents, see "Banks and Banking," §§ 62, 85, 257.  
 Offer of proof, see "Criminal Law," § 670.  
 On preliminary examination, see "Criminal Law," § 238.  
 On trial de novo on appeal, see "Criminal Law," § 1139.  
 Pleading matters of evidence, see "Indictment and Information," § 65.  
 Pleading matters of presumption, see "Indictment and Information," § 62.  
 Practicing medicine without authority, see "Physicians and Surgeons," § 6.  
 Presentation of evidence by counsel, see "Criminal Law," §§ 706, 707.  
 Presumptions on appeal or error, see "Criminal Law," § 1144.  
 Proceedings before grand jury, see "Grand Jury," § 33.  
 Proceedings to remove accused to other district for trial, see "Criminal Law," § 242.  
 Procuring illegal marriage, see "Marriage," § 53.  
 Questions of fact for jury, see "Criminal Law," §§ 734-749.  
 Rebuttal of statements of counsel in argument to jury, see "Criminal Law," § 727.  
 Reception at trial, see "Criminal Law," §§ 661-689; "Homicide," §§ 263-267; "Rape," § 56.  
 Record for purpose of review, see "Criminal Law," §§ 1087, 1088, 1090, 1091, 1114, 1119, 1120, 1121, 1124, 1128.  
 Removal or transfer of mortgaged property by mortgagor, see "Chattel Mortgages," § 233.  
 Removing or secreting records, see "Records," § 21.  
 Return and filing of evidence taken before grand jury, see "Indictment and Information," § 12.  
 Review of questions of fact, see "Criminal Law," § 1159.  
 Review of rulings dependent on motion for new trial, see "Criminal Law," §§ 1063, 1064.  
 Review of rulings dependent on objections or exceptions in lower court, see "Criminal Law," §§ 1036, 1054; "Homicide," § 325.  
 Review of rulings dependent on prejudicial nature of error, see "Criminal Law," §§ 1168-1170½.  
 Review of rulings dependent on presentation of evidence in record, see "Criminal Law," §§ 1120, 1121.  
 Review of sufficiency of evidence, see "Criminal Law," §§ 1121, 1158-1160.  
 Sale of property subject to agricultural lien, see "Agriculture," § 15½.  
 Statement and review of evidence by trial court, see "Criminal Law," §§ 756, 777½.

Sufficiency to sustain indictment or information, see "Indictment and Information," §§ 10, 41.  
 Verdict or findings contrary to evidence ground for new trial, see "Criminal Law," § 935.  
 Violation of Sunday laws, see "Sunday," §§ 23, 27.  
 Violations of election laws, see "Elections," § 329.  
 Violations of forest laws, see "Woods and Forests," § 12.  
 Violations of health regulations, see "Health," § 41.  
 Violations of license laws in general, see "Licenses," § 42.  
 Violations of liquor laws, see "Intoxicating Liquors," §§ 224-236.  
 Violations of municipal ordinances, see "Municipal Corporations," § 640.  
 Violations of postal laws, see "Post Office," § 49.  
 Violations of regulations relating to articles of food or drink, see "Food," § 21.  
 Violations of regulations relating to hawkers and peddlers, see "Hawkers and Peddlers," § 7.  
 Waiver and correction of errors in rulings as to admissibility of evidence, see "Criminal Law," § 899.

*Review and procedure thereon in appellate courts.*

See "Review," § 23.  
 Assignment of errors to rulings, see "Criminal Law," § 1129.  
 Consideration of matters not necessary to decision or review, see "Appeal and Error," § 843.  
 Effect of omission from record on appeal, see "Appeal and Error," §§ 635, 671.  
 Estoppel to allege error, see "Appeal and Error," § 882.  
 Grounds for sustaining decision not considered below, see "Appeal and Error," § 256.  
 Incorporation of evidence into case or statement on appeal, see "Appeal and Error," § 560.  
 Incorporation of evidence into record, see "Appeal and Error," § 515.  
 Matters considered in determining questions, see "Appeal and Error," § 837.  
 Necessity of assignment of errors, see "Appeal and Error," § 719.  
 Necessity of including evidence in abstract of record or appeal, see "Appeal and Error," § 581.  
 Necessity of setting out evidence in brief, see "Appeal and Error," § 757.  
 Presentation of evidence by bill of exceptions, case, or statement, see "Appeal and Error," § 548.  
 Presumptions on appeal or writ of error, see "Appeal and Error," § 926; "Criminal Law," § 1144.  
 Record for purpose of review, see "Appeal and Error," §§ 522-524; "Criminal Law," §§ 1087, 1088, 1090, 1091, 1114, 1119, 1120, 1121, 1124, 1128.  
 Review dependent on reasons for decision, see "Appeal and Error," § 854.

Review dependent on whether questions are of law or of fact, see "Appeal and Error," § 842.

Review of orders relating to evidence, see "Appeal and Error," § 70.

Review of questions of fact, see "Criminal Law," § 1159.

Review of rulings dependent on motion for new trial in lower court, see "Appeal and Error," § 289; "Criminal Law," §§ 1063, 1064.

Review of rulings dependent on objections or exceptions in lower court, see "Appeal and Error," §§ 203-206, 260, 268, 273, 274; "Criminal Law," §§ 1036, 1054; "Homicide," § 325.

Review of rulings dependent on prejudicial nature of error, see "Appeal and Error,"

§§ 1047, 1048, 1050-1054, 1056-1059; "Criminal Law," §§ 1168-1170½.

Review of rulings dependent on presentation of evidence in record, see "Appeal and Error," §§ 690-692; "Criminal Law," §§ 1120, 1121.

Review of rulings dependent on specification in assignment of errors, see "Appeal and Error," § 728.

Review of rulings involving discretion of court, see "Appeal and Error," § 970.

Review of sufficiency of evidence, see "Appeal and Error," §§ 209-212, 694-697, 987-1024, 1094, 1095; "Criminal Law," §§ 1121, 1158-1160.

Review on writ of error coram nobis, see "Judgment," § 334.

Right of appellee or respondent to allege error, see "Appeal and Error," § 878.

## I. JUDICIAL NOTICE.

### Cross-References.

By appellate court of facts noticed below, see "Appeal and Error," § 837.

In criminal prosecutions, see "Criminal Law," §§ 304, 1128.

Pleading matters judicially noticed, see "Pleading," § 6.

### § 1. Nature and scope in general.

### §§ 2-4. Grounds.

### § 5. Matters of common knowledge in general.

#### Annotation.

Right of court to decide question as to quickest means of stopping train as a matter of common knowledge.—14 L. R. A. (N. S.) 262, note.

### § 6. Course and laws of nature.

(a) The law respects the regular course of nature, as well in regard to the revolution of the seasons as in relation to vegetables and animals.—*Patterson v. McCausland*, 3 Bland 69.

### § 7. Qualities and properties of matter.

#### Annotation.

Judicial notice or inference as to spirituous, vinous, distilled, malt, fermented, or intoxicating quality of liquor, from its name.—48 L. R. A. (N. S.) 302, note.

Judicial notice of intoxicating character of mixed drink.—19 L. R. A. (N. S.) 848, note.

Judicial notice as to intoxicating character of beverages.—20 L. R. A. 648, note.

### §§ 8, 9. (See Analysis.)

### § 10. Geographical facts.

(a) In the absence of evidence of unusual delay, it may be assumed that it did not take several months for a shipment to go from Baltimore to Nashville.—*American*

*Syrup & Preserving Co. v. Roberts*, 112 Md. 18, 76 Atl. 589.

(b) Courts may notice the location of two important cities of the United States, the distance between them, and the approximate time required to transport railroad freight between them.—*Philadelphia, B. & W. R. Co. v. Diffendal*, 109 Md. 494, 72 Atl. 193, 458.

### §§ 11, 12. (See Analysis.)

### § 13. Phenomena of animal and vegetable life.

(a) The court cannot judicially say that the concentric layers in the trunk of a tree mark each a year's growth of the tree, and thus indicate its age by the number of concentric layers; though, if the fact were proved that the number of layers in a tree marks the number of years of the age of the tree, and that trees increase by the annual accession of one such layer, then the age of other trees similarly situated might be proved in the same way.—*Patterson v. McCausland*, 3 Bland 69.

### §§ 14, 15. (See Analysis.)

### § 16. Language, words and phrases, and abbreviations.

(a) The court will not take judicial notice of the meaning of printers' marks at the foot of an advertisement.—*Johnson v. Robertson*, 31 Md. 476.

(b) The court does not know judicially what class of persons are meant by "Black Republicans," "supporters of the Helper book," and so cannot say that a provision that none such shall be employed, etc., necessarily vitiates the whole statute.—*City of Baltimore v. State*, 15 Md. 376.

**§ 17. Time, days, and dates.****Annotation.**

Judicial notice of holidays.—19 L. R. A. 316, note.

(a) While courts take judicial notice of the computation of time, as the coincidence of days of the week with days of the month, the trial court was not expected to know that the date of the note sued upon fell on Sunday, when there was nothing directing his mind to that fact.—*Line v. Line*, 119 Md. 403, 86 Atl. 1032.

(b) The court will take judicial notice of the computation of time, and upon what day of the week a certain day of the month falls.—*Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415.

**§ 18. Weights, measures, and values.**

(a) The court will take judicial notice of the fact that the cost of living is now in excess of what it used to be.—*McCaddin v. McCaddin*, 116 Md. 567, 82 Atl. 554.

**§ 19. Matters of art and skill.****§ 20. Management and conduct of occupations.****Cross-References.**

See ante, § 10.

Evidence in action therefor admissible by reason of admission of similar evidence of adverse party, see post, § 155.

Language, words and phrases, and abbreviations relating thereto, see ante, § 16.

**Annotation.**

Judicial notice of banking customs.—21 L. R. A. 446, note.

(a) The court will take cognizance that electric cars do not run perfectly smoothly and that there are certain irregular movements to which they are subject.—*Dawson v. Maryland Electric Ry.*, 119 Md. 373, 86 Atl. 1041.

(b) In the absence of evidence of actual delay, it is common knowledge that a letter, written during business hours in Baltimore on any day except Saturday, would be delivered in New York in the early morning delivery of the next day, and if written on Saturday afternoon would be delivered on Monday morning.—*Ætna Indemnity Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

**§ 21. Customs and usages.****Cross-Reference.**

Customs of assessors, see post, § 48.

(a) By commercial usage, Sundays and great festivals, such as Christmas, are dies non in law, and courts will judicially take notice of the commercial usage to observe them, without proof on the subject.—*Sasser v. Farmers' Bank*, 4 Md. 409. [Cited and annotated in 19 L. R. A. 317, on effect of holiday as to matters other than relating to negotiable paper.]

(b) The court cannot take judicial notice of local customs or usages.—*Merchants Mut. Ins. Co. v. Wilson*, 2 Md. 217.

(c) Courts of justice are required to take judicial notice of usages of universal prevalence, which are so established as to have become a part of the existing law; but a particular usage has only a limited application, and its existence must be proved.—*Columbia Bank v. Fitzhugh*, 1 H. & G. 239. [Cited and annotated in 21 L. R. A. 442, 445, on banking customs.]

**§ 22. Corporations and associations and members thereof.****Cross-References.**

See ante, §§ 10, 20.

Corporate existence as matter judicially noticed obviating necessity of pleading it, see "Pleading," § 6.

**§ 23. Matters relating to government and its administration in general.**

(a) It is common knowledge that in all cities and large towns the post office is open for general delivery at certain hours on Sundays, and that there is one delivery by carriers on holidays.—*Ætna Indemnity Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

**§ 24. Nature and constitution of government.****§ 25. Political divisions and bodies.****Cross-References.**

See ante, §§ 10, 12; post, § 31.

**§ 26. Foreign governments.****Cross-Reference.**

Notice of civil war in foreign country disclosed by official records, see post, § 48.

## § 27. Laws of the state.

### Cross-References.

Boundary lines fixed and declared by public statutes, see ante, § 10.

Laws of other states, see post, § 35.

Pleading statutes, see "Statutes," §§ 279, 280.

## § 28.— In general.

(a) Upon a bill concerning the interests of the state, and professedly for their protection, the court will take judicial notice of the laws of the state, even though they contradict the allegations of the pleader.—*State v. Jarrett*, 17 Md. 309.

## § 29.— Public statutes.

### Cross-References.

Charters of public and private corporations, see post, § 31.

In general, see ante, § 28.

Mortality tables embodied in statutes, see ante, § 12.

(a) Act 1904, c. 56, empowering the Western Maryland Railroad Company to construct bridges across the Chesapeake & Ohio Canal, in which the state is financially interested, in pursuance of plans approved by the Board of Public Works, and authorizing a condemnation of property of the canal company, and requiring a plat of said railroad to be filed with the Secretary of State, is so far a public act that the court should take judicial notice of it.—*Chesapeake & O. Canal Co. v. Western Maryland R. Co.*, 99 Md. 570, 58 Atl. 34.

(b) Judicial notice cannot be taken of the result of an election to determine whether liquor should be sold in a town under act 1894, c. 484, providing for a resubmission of the question to the people thereof, and making all sales unlawful if the election should result against the sale of liquors.—*Whitman v. State*, 80 Md. 410, 31 Atl. 325.

(c) Act Cong. 1870, c. 59, regulating the rate of interest in the District of Columbia, is of such a public nature that the courts of Maryland could take judicial notice of it wherever the federal courts would do so.—*Eastwood v. Kennedy*, 44 Md. 563. [Cited and annotated in 48 L. R. A. 637, as to what statute of limitations will govern action in another state or country; in 46 L. R. A. (N. S.) 688, on law governing limitation of action where cause of action created by statute of another state.]

(d) The court will notice a law passed to enable a particular public officer to qualify.—*State v. Jarrett*, 17 Md. 309. [Cited and annotated in 50 L. R. A. (N. S.) 381, on death, or failure to qualify, of person elected.]

(e) An act operating as a grant of the public domain, and affecting the rights of navigation and fishery, by allowing improvements to be made out into navigable waters, will be judicially noticed by the courts as a public law.—*Hammond v. Inloes*, 4 Md. 138. [Cited and annotated in 34 L. R. A. 331, on conclusiveness of prior decisions on subsequent appeals.]

## § 30.— Private statutes.

### Cross-Reference.

Pleading, see "Statutes," § 280.

## § 31.— Charters of public and private corporations.

### Cross-References.

Existence and powers of chartered corporations, see ante, §§ 22, 25.

General incorporation laws, see ante, § 29.

Laws of other states, see post, § 35.

(a) The court will take judicial notice of a statute granting a charter to a company, and permitting it to become "sole surety" on all official and like bonds.—*Miller v. Matthews*, 87 Md. 464, 40 Atl. 176. [Cited and annotated in 48 L. R. A. 589, on powers and privileges of surety and trust companies.]

(b) Where a bank was incorporated by the Legislature of the state, the act of incorporation is a public act, of which the courts will take judicial notice in actions by or against the bank.—*Agnew v. Bank of Gettysburg*, 2 H. & G. 478. [Cited and annotated in 32 L. R. A. (N. S.) 449, on abatement of action by or against corporation by dissolution or expiration of charter.]

(c) Where a charter incorporating a bank reserves for the use and benefit of the state certain shares of the capital stock, to be subscribed for in such manner as the Legislature may direct, and also provides that any director, etc., holding any shares therein, who shall commit any fraud, etc., shall be liable to prosecution by indictment in the name of the state, it is a public law, and must be judicially taken notice of.—*Towson v. Havre de Grace Bank*, 6 H. & J. 47.



**§ 32.—Municipal ordinances.**

(a) Courts cannot take judicial notice of the repeal of a city ordinance.—*Field v. Malster*, 88 Md. 691, 41 Atl. 1087.

(b) Municipal ordinances are not subjects of judicial notice.—*Central Sav. Bank v. City of Baltimore*, 71 Md. 515, 20 Atl. 288; *Shanfelter v. Same*, 80 Md. 483, 31 Atl. 439.

**§ 33.—Legislative proceedings and journals.****Annotation.**

Judicial notice of existence and contents of legislative journals.—40 L. R. A. (N. S.) 38, note.

**§ 34. Laws of United States.****§ 35. Laws of other states.****Cross-References.**

Expert testimony, see post, § 517.

Laws of the state, see ante, §§ 28-33.

Presumptions as to laws of other states, see post, § 80.

(a) The courts of a state will not take judicial notice of the laws of a sister state at variance with the common law.—*Schaun v. Brandt*, 116 Md. 560, 82 Atl. 551. [Cited and annotated in 44 L. R. A. (N. S.) 156, 158, on right of corporation to purchase own shares.]

(b) The courts of Maryland do not take judicial notice of the laws of another state, and the same must be proved as any other fact, and in the manner prescribed by Code 1904, art. 35, § 53.—*Mandru v. Ashby*, 108 Md. 693, 71 Atl. 312. (See Code 1911, art. 35, § 53.)

(c) The courts will not take judicial notice of the laws of other states, but they must be proved in the same manner as other facts.—*Baptiste v. De Volunbrun*, 5 H. & J. 86; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752. [Cited and annotated in 16 L. R. A. (N. S.) 102, on presumptions flowing from marriage ceremony; in 36 L. R. A. (N. S.) 534, on admissibility of declarations of relatives upon issue of relationship or heirship.]

**§ 36. Laws and customs of Indians.****§ 37. Laws of foreign countries.****Cross-References.**

Expert testimony, see post, § 517.

Pleading, see "Statutes," § 281.

**Annotation.**

Judicial cognizance of foreign law.—67 L. R. A. 33, note.

**§§ 38, 39. (See Analysis.)****§ 40. Jurisdiction and powers of courts.****Cross-Reference.**

See ante, §§ 10, 35.

**§ 41. Existence, organization, and terms of courts.****§ 42. Rules and procedure of courts.**

(a) Appellate courts do not take judicial notice of the rules of the court below.—*Cherry v. Baker*, 17 Md. 75; *Scott v. Scott*, Id. 78.

(b) The Court of Appeals is bound to know judicially the rules of the Court of Chancery.—*Contee v. Pratt*, 9 Md. 67; *Oliver v. Palmer*, 11 G. & J. 426.

**§ 43. Judicial proceedings and records.**

(a) A defendant in divorce who pleads a previous adjudication between the parties must prove it, even though it be in the same court, and a decree for defendant based on such former judgment without evidence thereof is erroneous.—*Matthews v. Matthews*, 112 Md. 582, 77 Atl. 249.

(b) Where the facts in previous cases before the Court of Appeals show a certain street to have been dedicated, the court will take notice of that fact in a subsequent case involving the same question.—*Story v. Ulman*, 88 Md. 244, 41 Atl. 120. [Cited and annotated in 11 L. R. A. (N. S.) 617, on judicial notice of court's own records in other actions.]

(c) Proceedings in one case, that are referred to by the bill in another case, are not before the court in the latter case, where they are not offered in evidence, as the court cannot take judicial notice thereof.—*Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074. [Cited and annotated in 11 L. R. A. (N. S.) 616, on judicial notice of court's own records in other actions.]

**§ 44. Offices and official position and authority.**

(a) The Court of Appeals will take judicial notice of the fact that a judge of a lower court of record died on a particular date.—*Gross v. Wood*, 117 Md. 362, 83 Atl. 337, 341, Ann. Cas. 1914A, 30; *Wood v. Rosenheim*, Id.

**§§ 45-47. (See Analysis.)**

### § 48. Official proceedings and acts.

#### Cross-References.

See ante, § 43.

Public surveys, see ante, § 43.

(a) It is not the duty of courts to take judicial notice of the execution of a public statute. The various modes in which public statutes are carried into effect by the executive officers of government are mere facts, and must be proved as facts.—*Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 G. & J. 1.

### § 49. Official signatures and seals.

(a) The Orphans' Court of Washington County, in the District of Columbia, being created under a public statute of the United States, any judicial tribunal of Maryland, acting under the authority of the act of 1813, may judicially recognize the seal of said court, without requiring any proof of its genuineness or identity, other than that afforded by the inspection thereof.—*Mangun v. Webster*, 7 Gill 78.

(b) The seal of a state court proves itself, but the seal of a court of a foreign country authenticating the signature of the chief secretary of the court to an exemplification of a judgment of the court annulling a will must be proved.—*De Sobry v. De Laistre*, 2 H. & J. 191, 3 Am. Dec. 555. [Cited and annotated in 25 L. R. A. 450, 451, 460, on oral proof of foreign laws.]

### § 50. Public institutions.

### § 51. Mode of ascertaining facts required to be noticed.

#### Cross-Reference.

See ante, §§ 12, 29, 48.

(a) The judicial notice of facts, fulfills the object for which evidence is designed and stands in the place of evidence; and, where the trial court is called upon to take judicial notice of a fact, it may inform itself by reference to documents or books of reference.—*Line v. Line*, 119 Md. 403, 86 Atl. 1032.

(b) On an issue as to the time when two statutes took effect, the court may resort to any testimony which in its nature is capable of conveying a satisfactory answer to the question.—*Strauss v. Heiss*, 48 Md. 292. [Cited and annotated in 23 L. R. A. 345, on conclusiveness of enrolled bill.]

(c) Whenever a question arises in a court of law as to the existence of a statute, or as to the time when it took effect, or as to its precise terms, the judges who are called upon to decide such question have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required.—*Legg v. City of Annapolis*, 42 Md. 203. [Cited and annotated in 23 L. R. A. 345, 40 L. R. A. (N. S.) 36, on conclusiveness of enrolled bill.]

(d) Upon the trial of the issue of nul tiel record, a file of papers and proceedings, which had originated on the equity side of the county court, but which were subsequently removed to the Court of Chancery, under act 1831, c. 309, were offered by the plaintiff in support of his replication, averring them to be proceedings of the county court; it not appearing that any action had been had upon them by the chancellor, or that they had been recorded in either court. *Held*, that it was competent for the court before whom they were so produced, by inspection, to ascertain and determine if they were the genuine original papers and proceedings of that court, stated and referred to in the replication.—*Boteler v. State*, 8 G. & J. 359.

### § 52. Effect of judicial notice.

#### Cross-Reference.

Necessity of pleading facts judicially noticed, see "Pleading," § 6.

## II. PRESUMPTIONS.

#### Cross-References.

As to possession of primary evidence, see post, § 179.

Arising from failure of court to find on particular questions, see "Trial," § 397.

Arising from failure to plead compliance with statute of frauds, see "Frauds, Statute of," § 148.

From facts found by jury, see "Trial," § 356.

In aid of pleadings, see "Pleading," § 343.

In criminal prosecutions, see "Criminal Law," §§ 306-325.

In favor of general verdict, see "Trial," §§ 343, 359.

Instructions as to, see "Trial," § 205.

Pleading matters of presumptions, see "Pleading," § 7.

As to particular facts or issues.

See "Accord and Satisfaction," § 26; "Acknowledgment," § 59; "Adoption," § 7; "Adverse Possession," §§ 85, 104, 112; "Boundaries," § 33; "Common Law," § 16; "Damages," § 163; "Death," § 2; "Dedication," §§ 41, 42; "Deeds," §§ 192-197; "Domicile," § 8; "Easements," § 36; "Estoppel," § 116; "Fraud," § 50; "Fraudulent Conveyances," § 271; "Garnishment," § 162; "Gifts," §§ 47, 80; "Guaranty," § 89; "Licenses," § 49; "Marriage," § 40; "Money Received," § 18; "Negligence," § 121; "Notice," § 14; "Novation," § 12; "Partnership," §§ 44-56; "Party Walls," § 4; "Payment," §§ 65-68; "Pledges," § 16; "Principal and Surety," § 159; "Release," § 55; "Trespass," § 44; "Trusts," §§ 41, 86; "Usury," §§ 113, 142.

Abandonment of action, see "Action," § 70.

Abandonment of business after purchase of good will, see "Good Will," § 6.

Acceptance of assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 44.

Acceptance of dedication, see "Dedication," § 42.

Acceptance of mortgage, see "Mortgages," § 74.

Adoption of local option laws, see "Intoxicating Liquors," § 39.

Advancements, see "Descent and Distribution," § 115.

Affection of husband for wife, see "Husband and Wife," § 333.

Agency, see "Husband and Wife," §§ 19, 23½, 25, 138; "Principal and Agent," § 19.

Allowance of claims against estate, see "Executors and Administrators," § 221.

Alteration of written instrument, see "Alteration of Instruments," § 27.

Appointment of election officers, see "Elections," § 51.

Assent of executors to legacy, see "Executors and Administrators," § 291.

Assumption of mortgage by grantee of property, see "Mortgages," § 280.

Assumption of risk by servant injured, see "Master and Servant," § 265.

Authority of agent, see "Principal and Agent," § 119.

Authority of attorney to appear, see "Attorney and Client," § 70; "Judgment," § 352.

Authority of broker, see "Brokers," § 8.

Authority of corporate officer or agent, see "Corporations," § 432.

Award of arbitrators, see "Arbitration and Award," § 66.

Bar of statute of limitations, see "Limitation of Actions," § 195.

Breach of warranty of goods sold, see "Sales," § 439.

Cause of loss of or injury to cargo, see "Shipping," § 132.

Character of transaction as mortgage or other contract, see "Mortgages," § 36.

Communication of disease from animals, see "Animals," § 33.

Community or separate debt, see "Husband and Wife," § 268.

Community or separate property, see "Husband and Wife," § 262.

Compensation for property taken for public use, see "Eminent Domain," § 200.

Compensation of corporate officers, see "Corporations," § 308.

Competency of witness, see "Witnesses," §§ 35, 223.

Concurrence of judges in opinion of court, see "Courts," § 102.

Confirmation of administrator's sale, see "Executors and Administrators," § 375.

Consent to construction of railroad in street, see "Railroads," § 75.

Consideration for contracts in general, see "Contracts," § 88.

Consideration for issuance of county bonds, see "Counties," § 183.

Consideration for mortgage, see "Mortgages," § 25.

Consideration of bill or note, see "Bills and Notes," § 493.

Constitutionality of statutes, see "Constitutional Law," § 48.

Construction of contract, see "Contracts," § 175.

Continuance of domicile necessary to give jurisdiction of suit for divorce, see "Divorce," § 109.

Continuance of habitual intoxication, see "Divorce," § 109.

Continuance of intent to desert, see "Divorce," § 109.

Continuance of pauper's settlement, see "Paupers," § 22.

Contributory negligence in general, see "Negligence," § 122.

Contributory negligence of owner of animals injured on or near railroad tracks, see "Railroads," § 441.

Contributory negligence of owner of property injured by fire set by railroad company, see "Railroads," § 480.

Contributory negligence of passenger, see "Carriers," § 344.

Contributory negligence of person injured at railroad crossing, see "Railroads," § 346.

Contributory negligence of person injured on or near railroad tracks, see "Railroads," § 396.

Contributory negligence of person injured on or near street railroad tracks, see "Street Railroads," § 112.

Contributory negligence of servant injured, see "Master and Servant," § 265.

Conversion, see "Trove and Conversion," § 35.

Correctness and regularity of survey, see "Boundaries," § 54.

Correctness of entry of judgment sought to be amended nunc pro tunc, see "Judgment," § 326.

Custody of jury wheel, see "Jury," § 65.

Damage from injury, see "Damages," § 4.

Delivery and acceptance of goods, see "Sales," § 181.

Delivery of bill or note, see "Bills and Notes," § 492.

Delivery of deed on Sunday, see "Sunday," § 23.

Demand for payment of bill or note, see "Bills and Notes," § 498.

- Dissolution of prior marriage, see "Divorce," § 109.  
 Divorce, see "Divorce," § 174.  
 Election returns or certificates, see "Elections," § 292.  
 Enactment of statutes, see "Statutes," § 283.  
 Evidence to rebut presumption of payment of judgment from lapse of time, see "Judgment," § 876.  
 Execution, existence and genuineness of will, see "Wills," § 289.  
 Execution of bill or note, see "Bills and Notes," § 492.  
 Execution of proper deed to purchaser at foreclosure sale, see "Mortgages," § 554.  
 Exemption from taxation, see "Taxation," § 203.  
 Existence and terms of renewal contract of employment, see "Master and Servant," § 9.  
 Existence and validity of contracts of sale, see "Vendor and Purchaser," § 44.  
 Existence and validity of ordinances, see "Municipal Corporations," § 122; "Street Railroads," § 67.  
 Existence and width of highways, see "Highways," §§ 17, 68.  
 Facts supporting order of confirmation of administrator's sale, see "Executors and Administrators," § 375.  
 Fault as cause of collision, see "Collision," §§ 33, 48, 55, 65, 73.  
 Filing bond of assignee for benefit of creditors, see "Assignments for Benefit of Creditors," § 208.  
 Gambling contracts, see "Gaming," § 49.  
 Gift by husband to wife and vice versa, see "Husband and Wife," §§ 49½, 49¾.  
 Good faith of purchaser of bill or note, and payment of value, see "Bills and Notes," § 497.  
 Good faith of purchaser of land, see "Trespass to Try Title," § 38; "Vendor and Purchaser," § 242.  
 Grant of right of way to railroad company, see "Railroads," § 66.  
 Identity of bill or note sued on, see "Bills and Notes," § 492.  
 Identity of names, see "Names," § 18.  
 Identity of names and persons, see "Names," § 14.  
 Infringement of copyright, see "Copyrights," § 83.  
 Injury from defamation, see "Libel and Slander," § 33.  
 Intent of married woman to charge separate estate, see "Husband and Wife," § 164.  
 Issuance and validity of patent of public lands, see "Public Lands," § 114.  
 Jurisdiction of courts, see "Courts," §§ 35, 36; "Criminal Law," § 104; "Judgment," §§ 495, 496; "Justices of the Peace," § 59; "Lis Pendens," §§ 5, 24.  
 Knowledge of custom, see "Customs and Usages," § 12.  
 Knowledge of extent of authority of municipal officers, see "Municipal Corporations," § 230.  
 Land included within municipality, see "Municipal Corporations," § 23.  
 Legality of contract, see "Contracts," § 141.  
 Legality of meeting of directors, see "Corporations," § 298.  
 Legality of tax levy, see "Highways," § 128.  
 Legitimacy of child, see "Bastards," § 8.  
 Liability of connecting carriers, see "Carriers," § 185.  
 Liability of estate for services rendered by persons standing in family relation to decedent, see "Executors and Administrators," § 221.  
 Limitation of liability of carrier in respect to goods, see "Carriers," § 163.  
 Loss of or injury to goods in course of transportation, see "Carriers," § 132.  
 Malice in institution of prosecution, see "Malicious Prosecution," § 32.  
 Married woman's separate property, see "Husband and Wife," § 131.  
 Mistake, fraud and undue influence, in execution of will, see "Wills," § 163.  
 Naturalization, see "Aliens," § 69.  
 Negligence causing injuries from fires set by railroad company, see "Railroads," § 480.  
 Negligence causing injuries to animals on or near railroad tracks, see "Railroads," § 441.  
 Negligence causing injuries to passenger, see "Carriers," § 316.  
 Negligence causing injuries to persons at railroad crossings, see "Railroads," § 346.  
 Negligence causing injuries to persons on or near railroad tracks, see "Railroads," § 396.  
 Negligence causing injuries to persons on or near street railroad tracks, see "Street Railroads," § 112.  
 Negligence causing injuries to travelers on highway, see "Highways," § 209.  
 Negligence causing injuries to travelers on street, see "Municipal Corporations," § 817.  
 Negligence in operation of railroad in general, see "Railroads," § 251.  
 Negligence in production and use of electricity, see "Electricity," § 19.  
 Negligence in use of highway, see "Highways," § 184.  
 Negligence of fellow servant, see "Master and Servant," § 265.  
 Negligence of master causing injuries to servant, see "Master and Servant," § 265.  
 Negligence of physician or surgeon, see "Physicians and Surgeons," § 18.  
 Negligence of warehouseman, see "Warehousemen," § 34.  
 Negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.  
 Notice of limitations of power of city council to contract, see "Municipal Corporations," § 228.  
 Notice of meeting of committee of city council, see "Municipal Corporations," § 230.  
 Notice of nonpayment or of protest of bill or note, see "Bills and Notes," § 498.

Originality and priority of invention, see "Patents," § 91.  
 Ownership and operation of railroads, see "Railroads," § 270.  
 Patentable invention, see "Patents," § 32.  
 Payment of bill or note, see "Bills and Notes," § 499.  
 Payment of debt secured by mortgage, see "Mortgages," § 319.  
 Payment of legacy charged on land, see "Wills," § 826.  
 Payment of legacy or distributive share, see "Executors and Administrators," § 305.  
 Payment of taxes, see "Taxation," § 529.  
 Performance or breach of contract, see "Contracts," § 322.  
 Place of execution of mortgage, see "Mortgages," § 74.  
 Possession of land, see "Trespass to Try Title," § 38.  
 Presentment of bill or note for payment, see "Bills and Notes," § 498.  
 Prior knowledge or use of invention, see "Patents," § 58.  
 Probate of will, see "Wills," § 418.  
 Promise to marry, and breach thereof, see "Breach of Marriage Promise," § 20.  
 Protest of bill or note, see "Bills and Notes," § 498.  
 Qualification of women to vote at school election, see "Elections," § 65.  
 Qualifications of jurors, see "Jury," § 38.  
 Qualifications of voter, see "Elections," § 70.  
 Reasonableness of carrier's rates, see "Carriers," § 12.  
 Reasonableness of license tax, see "Licenses," § 7.  
 Reasonableness of license tax on telegraph or telephone companies, see "Telegraphs and Telephones," § 7.  
 Reduction to possession by husband of wife's property, see "Husband and Wife," § 11.  
 Regularity of appointment of executor or administrator, see "Executors and Administrators," § 29.  
 Regularity of preliminary proceedings for making of municipal improvements, see "Municipal Corporations," § 325.  
 Relation of landlord and tenant, see "Landlord and Tenant," § 18.  
 Relation of master and servant, see "Master and Servant," § 265.  
 Release of mortgage, see "Mortgages," § 319.  
 Renunciation of community, see "Husband and Wife," § 248.  
 Revocation of will, see "Wills," § 290.  
 Right to possession of land, see "Trespass to Try Title," § 38.  
 Service of process, see "Process," § 145.  
 Services rendered, see "Work and Labor," § 26.  
 Settlement of pauper, see "Paupers," § 22.  
 Signing of court records by judge, see "Courts," § 113.  
 Sufficiency of master's rules, see "Master and Servant," § 142.  
 Survivorship, see "Death," § 5.  
 Testamentary capacity, see "Wills," § 52.

Title to property sued for, see "Trespass to Try Title," § 38.  
 Transfer and ownership of bill or note, see "Bills and Notes," § 496.  
 Truth of recitals in minutes of county board, see "Counties," § 53.  
 Validity of act imposing license taxes, see "Licenses," § 7.  
 Validity of administrator's deed, see "Executors and Administrators," § 397.  
 Validity of administrator's sale, see "Executors and Administrators," § 384.  
 Validity of assessment for public improvements, see "Municipal Corporations," §§ 484, 485.  
 Validity of assessment rolls or books, see "Taxation," § 442.  
 Validity of contracts, in general, see "Contracts," § 99.  
 Validity of enactment of statutes, see "Statutes," § 61.  
 Validity of execution sale, see "Execution," § 259.  
 Validity of mortgage, see "Mortgages," § 86.  
 Validity of municipal contract, see "Municipal Corporations," § 244.  
 Validity of tax sale, see "Taxation," § 693.  
 Validity of writ of execution, see "Execution," § 104.  
 Waiver of right to trial by jury, see "Jury," § 28.  
 Waiver or abandonment of homestead, see "Homestead," § 181.  
 Want of probable cause for prosecution, see "Malicious Prosecution," §§ 23, 24.  
 What law governs, see "Contracts," § 2.

*In particular civil actions or proceedings.*

See "Assault and Battery," § 26; "Cancellation of Instruments," § 45; "Contempt," § 60; "Creditors' Suit," § 44; "Divorce," §§ 109, 174; "Ejectment," § 86; "Entry, Writ of," § 21; "False Imprisonment," § 22; "Forcible Entry and Detainer," § 29; "Fraud," § 50; "Libel and Slander," § 101; "Malicious Prosecution," § 56; "Negligence," §§ 121, 122; "Partition," § 63; "Prohibition," § 27; "Quieting Title," § 44; "Reformation of Instruments," § 43; "Replevin," § 70; "Specific Performance," § 119; "Trespass," § 44; "Trespass to Try Title," § 38; "Trover and Conversion," § 35; "Work and Labor," § 26.  
 Accounting by executor or administrator, see "Executors and Administrators," § 506.  
 Against agent for accounting, see "Principal and Agent," § 78.  
 Against carriers of live stock, see "Carriers," § 228.  
 Against guarantors, see "Guaranty," § 89.  
 Against heirs and distributees, see "Descent and Distribution," § 147.  
 Against landlord for injuries from negligence, see "Landlord and Tenant," § 169.  
 Against master for injuries by servant, see "Master and Servant," § 330.  
 Against railroad company for penalty, see "Railroads," § 254.

- Against sureties, see "Principal and Surety," § 159.
- Appeal from justice court, see "Justices of the Peace," § 183.
- Bastardy proceedings, see "Bastards," § 54.
- By agent to recover compensation, see "Principal and Agent," § 89.
- By landlord for unlawful detainer, see "Landlord and Tenant," § 291.
- By or against banks, see "Banks and Banking," § 227.
- By or against corporations in general, see "Corporations," § 519.
- By or against foreign corporations, see "Corporations," § 673.
- By or against husband or wife, see "Husband and Wife," § 232.
- By owner of property taken for public use, see "Eminent Domain," § 295.
- Condemnation proceedings, see "Eminent Domain," § 200.
- Contempt proceedings, see "Injunction," § 230.
- Deportation under Chinese exclusion act, see "Aliens," § 32.
- Election contests, see "Elections," §§ 291, 292.
- For alienation of affections, see "Husband and Wife," § 333.
- For breach of contract of carriage, see "Carriers," § 276.
- For breach of contract of sale, see "Sales," §§ 381, 415.
- For breach of contracts in general, see "Contracts," § 348.
- For breach of covenant, see "Covenants," § 118.
- For breach of marriage promise, see "Breach of Marriage Promise," § 20.
- For breach of warranty of goods sold, see "Sales," § 439.
- For causing death, see "Death," § 58.
- For compensation of broker, see "Brokers," § 84.
- For compensation of factor, see "Factors," § 46.
- For compensation of physician or surgeon, see "Physicians and Surgeons," § 24.
- For criminal conversation, see "Husband and Wife," § 348.
- For deposits, see "Banks and Banking," § 154.
- For dower, see "Dower," § 79.
- For equitable relief against judgment, see "Judgment," § 461.
- For flowage of lands, see "Waters and Water Courses," § 179.
- For infringement of patents, see "Patents," § 312.
- For injunction, see "Injunction," § 126.
- For injuries arising from accidents to trains, see "Railroads," § 297.
- For injuries at railroad crossings, see "Railroads," § 346.
- For injuries by animals, see "Animals," § 74.
- For injuries from defects or obstructions in highways, see "Highways," § 209.
- For injuries from defects or obstructions in streets, see "Municipal Corporations," § 817.
- For injuries from fires caused by operation of railroads, see "Railroads," § 480.
- For injuries from negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.
- For injuries from negligent use of highway, see "Highways," § 184.
- For injuries from negligent use of street, see "Municipal Corporations," § 706.
- For injuries from sale of liquor, see "Intoxicating Liquors," § 308.
- For injuries incident to construction or operation of gas works, see "Gas," § 14½.
- For injuries to persons on or near railroad tracks, see "Railroads," § 441.
- For injuries to licensees and trespassers on railroad property, see "Railroads," § 282.
- For injuries to passenger, see "Carriers," §§ 316, 344.
- For injuries to persons on or near railroad tracks, see "Railroads," § 396.
- For injuries to persons on or near street railroad tracks, see "Street Railroads," § 112.
- For injuries to servants, see "Master and Servant," § 265.
- For injuries to vessels at wharf, see "Wharves," § 20.
- For loss of or injury to animals in hands of agister, see "Animals," § 23.
- For loss of or injury to cargo, see "Shipping," § 132.
- For loss of or injury to goods stored, see "Warehousemen," § 34.
- For loss of or injury to tow, see "Towage," § 15.
- For loss of services of child, see "Parent and Child," § 7.
- For maritime torts, see "Shipping," § 86.
- For misdelivery or nondelivery of goods stored, see "Warehousemen," § 34.
- For negligence or malpractice of physician or surgeon, see "Physicians and Surgeons," § 18.
- For nuisance, see "Nuisance," § 49.
- For personal injuries to passengers, see "Shipping," § 166.
- For price of land sold, see "Vendor and Purchaser," § 315.
- For price or value of goods sold, see "Sales," § 357.
- For use of private road, see "Private Roads," § 11.
- For wages, see "Master and Servant," § 80.
- For wrongful discharge of servant, see "Master and Servant," § 40.
- For wrongful ejection of passengers and intruders, see "Carriers," § 381.
- In equity, see "Equity," § 346.
- On assigned claims, see "Assignments," § 134.
- On bills or notes, see "Bills and Notes," §§ 491-499.
- On bonds in general, see "Bonds," § 130.
- On bonds of depositaries, see "Depositaries," § 14.
- On contract of suretyship, see "Principal and Surety," § 159.
- On county bonds, see "Counties," § 188.
- On county warrants, see "Counties," § 170.

- On gambling contracts, see "Gaming," § 49.  
 On guaranty, see "Guaranty," § 89.  
 On injunction bond, see "Injunction," § 251.  
 On insurance policies, see "Insurance," §§ 646, 817.  
 On judgment, see "Judgment," §§ 918, 942.  
 On official bonds, see "Sheriffs and Constables," § 169.  
 On replevin bond, see "Replevin," § 134.  
 On trustees' bonds, see "Trusts," § 387.  
 Probate proceedings and actions relating to wills or probate, see "Wills," §§ 288-290.  
 Relating to bankrupt's property, see "Bankruptcy," § 303.  
 Relating to usury, see "Usury," §§ 113, 142.  
 Remand of cause removed, see "Removal of Causes," § 107.  
 Revision of tax assessments, see "Taxation," § 485.  
 Selecting and summoning jurors, see "Jury," §§ 61-64.  
 To confirm or try tax title, see "Taxation," § 810.  
 To determine adverse claim to mining location, see "Mines and Minerals," § 38.  
 To determine and protect water rights, see "Waters and Water Courses," § 152.  
 To determine priorities between mortgages and other liens, see "Mortgages," § 186.  
 To dismiss appeal, see "Appeal and Error," § 801.  
 To enforce assessment, see "Municipal Corporations," § 568.  
 To enforce liability of stockholders for corporate debts and acts, see "Corporations," § 269.  
 To enforce mechanic's lien, see "Mechanics' Liens," § 279.  
 To enforce vendor's heir, see "Vendor and Purchaser," § 281.  
 To establish and enforce trust, see "Trusts," § 372.  
 To establish boundaries, see "Boundaries," § 33.  
 To establish heirship, see "Descent and Distribution," § 71.  
 To establish lost instruments, see "Lost Instruments," § 8.  
 To foreclose mortgage, see "Mortgages," § 460.  
 To open or vacate judgment, see "Judgment," § 392.  
 To recover interest, see "Interest," § 67.  
 To recover possession of property taken under execution, see "Execution," § 186.  
 To recover price of land paid, see "Vendor and Purchaser," § 341.  
 To recover property sold, see "Sales," § 324.  
 To recover rent, see "Landlord and Tenant," § 231.  
 To set aside fraudulent transfer, see "Fraudulent Conveyances," § 271.
- § 53. Nature and scope in general.  
 § 54. Grounds.  
 § 55. Identity of persons and things.

### Cross-Reference.

Identity of names and identity of persons and names, see "Names," §§ 14, 18.

### Annotation.

Identity of name as evidence of identity of person in criminal cases.—4 L. R. A. (N. S.) 539, note.  
 Presumption as to identity of person from identity of name.—17 L. R. A. 824, note.

### § 56. Personal status and condition in general.

#### Annotation.

Presumption as to validity of former marriage in prosecution for bigamy.—9 L. R. A. (N. S.) 1036, note.

### § 57. Nature and condition of property or other subject-matter.

#### Annotation.

Inference as to spirituous, vinous, distilled, malt, fermented, or intoxicating quality of liquor, from its name.—48 L. R. A. (N. S.) 302, note.

### § 58. Health and physical condition.

#### Annotation.

Judicial notice of the court's own records in other actions.—11 L. R. A. (N. S.) 616; 29 L. R. A. (N. S.) 905, notes.  
 Right to take judicial notice of decree in proceeding to punish violation of same as contempt.—24 L. R. A. (N. S.) 404, note.

### § 59. Love of life and avoidance of danger.

#### Cross-References.

Rebuttal of presumption, see post, § 89.  
 Contributory negligence, see "Death," §§ 58, 76; "Negligence," § 122.

### § 60. Innocence.

#### Cross-References.

Genuineness of writings, see post, § 70.  
 Of voter, see "Elections," § 291.  
 Presumption as to fraud, see "Fraud," § 50.

#### Annotation.

Presumption of innocence in civil action.—33 L. R. A. (N. S.) 841, note.  
 Presumption of innocence in habeas corpus proceeding.—22 L. R. A. 678, note.

(a) The presumption of innocence is a presumption of law, which remains good until disproved.—*Bowman v. Little*, 101 Md. 273, 61 Atl. 1084. [Cited and annotated in 51 L. R. A. (N. S.) 183, on applicability of disqualification statute to testimony of alleged spouse to establish marriage in order to share in decedent's property; in 16 L. R. A. (N. S.) 103, on presumptions flowing from marriage ceremony.]

(b) A husband had a deposit in a bank in his own name, and changed it to the joint account of his wife, so that either could draw it out on indorsing the certificate. Subsequently, during the husband's life, the wife indorsed the certificates to another bank for collection, and took a certificate stating that the deposit was received of such husband and wife, payable to them or their order. *Held*, that the deposit in the latter bank must be presumed to have been rightfully made, in preference to the presumption that plaintiff deliberately made the deposit in that form to defraud her husband, since, where an act on one hypothesis is consistent with innocence and on another is wrongful, the former must be adopted.—*Brewer v. Bowersox*, 92 Md. 567, 48 Atl. 1060.

### § 61. Character.

#### Annotation.

Presumption as to good character of defendant in criminal case.—46 L. R. A. (N. S.) 342, note.

Presumption and burden of proof as to chastity where it is an ingredient of the offense or a condition of conviction.—43 L. R. A. (N. S.) 476, note.

Presumption as to character of independent contractor.—65 L. R. A. 459, note.

Presumption as to good character of accused.—20 L. R. A. 609, note.

### § 62. Mental capacity in general.

#### Cross-Reference.

Similar facts and transactions, see post, § 132.

(a) The maxim "once insane, always insane," is not universally applicable.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated in 17 L. R. A. 497, on burden of proving testamentary capacity; in 35 L. R. A. 120, on presumption of continuance of insanity; in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 37 L. R. A. 263, on what are insane delusions; in 38 L. R. A. 721, 722, 727, 732, 738, on nonexpert opinions as to sanity or insanity; in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close; in 27 L. R. A. (N. S.) 77, on what is testamentary capacity.] *Stewart v. Redditt*, 3 Md. 67. [Cited and annotated in 19 L. R. A. 752, on declarations as part of *res gestæ*; in 35 L. R. A. 120, on presumption of continuance of insanity; in 38 L. R.

A. 721, 737, 739, on nonexpert opinions as to sanity or insanity.]

### § 63. Sanity.

#### Cross-References.

Continuance of insanity, see post, § 67.

Mental capacity in general, see ante, § 62.

Rebuttal of presumption, see post, § 89.

Similar facts and transactions, see post, § 132.

#### Annotation.

Presumption and burden of proof as to sanity of witness.—46 L. R. A. (N. S.) 1030, note.

Presumption and burden of proof as to sanity in criminal cases.—44 L. R. A. (N. S.) 119, note.

Presumption and burden of proof as to sanity.—36 L. R. A. 721, note.

(a) Every person is presumed to be sane until the contrary appears.—*Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422. [Cited and annotated in 16 L. R. A. 678, on effect of belief in spiritualism, witchcraft, etc., on capacity to make will or deed; in 17 L. R. A. 494, on burden of proving testamentary capacity; in 36 L. R. A. 724, on presumption and burden of proof as to sanity; in 37 L. R. A. 270, on what are insane delusions; in 15 L. R. A. (N. S.) 674, on testamentary capacity of one believing in spiritualism.]

(b) The legal presumption of insanity does not arise from an act of suicide.—*Knickerbocker Life Insurance Co. v. Peters*, 42 Md. 414. [Cited and annotated in 17 L. R. A. 90, on effect of provision avoiding policy for suicide, "sane or insane;" in 35 L. R. A. 259, 261, 264, on effect of insanity on suicide condition in policy; in 36 L. R. A. 741, on presumption and burden of proof as to insanity.]

### § 64. Intent.

#### Annotation.

Presumption and burden of proof in action on insurance policy exempting insurer or limiting its liability in case of injury intentionally inflicted by another.—48 L. R. A. (N. S.) 524, note.

Intent of one purchasing goods with the knowledge that he cannot pay for them.—44 L. R. A. (N. S.) 21, note.

Inference of fraudulent intent from grantee's oral promise to grantor to hold in trust.—39 L. R. A. (N. S.) 911, note.

Presumption as to testator's intent to adeem general legacy by gift.—38 L. R. A. (N. S.) 589, note.

Presumed intention of parties to contract with carrier.—18 L. R. A. (N. S.) 880, note.



Presumption of intent to revive revoked will.—37 L. R. A. 577, note.

Presumption of general intent from recording deed or delivering for record.—54 L. R. A. 885, note.

Presumption of creditor's participation in debtor's fraudulent intent in making transfer.—31 L. R. A. 646; 32 L. R. A. 71, notes.

(a) When one instrument has by law a conclusive, and another a prima facie, character, a party using either is presumed to intend it according to its legal effect.—*Jones v. Ricketts*, 7 Md. 108.

### § 65. Knowledge of law.

#### Cross-References.

See "Taxation," § 838; "Trade-Marks and Trade-Names," § 43.

Liability for misrepresentation as to matters of law, see "Fraud," § 10.

Violation of law ground for removal of county commissioner, see "Counties," § 45.

(a) Parties to a contract are assumed to know the liabilities legally flowing from their obligation, and the jury is not at liberty to infer, from evidence, their ignorance of such liabilities.—*Gist v. Drakely*, 2 Gill 330, 41 Am. Dec. 426. [Cited and annotated in 28 L. R. A. (N. S.) 796, 797, on relief from mistake of law as to effect of instrument.]

### § 66. Knowledge of fact.

### § 67. Continuance of fact or condition.

#### Cross-References.

Similar facts and transactions, see post, § 132.

Life, see "Death," § 1.

Pauper's settlement, see "Paupers," § 22.

Title to property, see "Property," § 9.

#### Annotation.

Presumption of continuance of insanity.—35 L. R. A. 117, note.

(a) The maxim "once insane, always insane," is not universally applicable.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated, see supra, § 62.] *Stewart v. Redditt*, 3 Md. 67. [Cited and annotated, see supra, § 62.]

### § 68. Consequences of acts or states of fact.

#### Cross-References.

Equitable title following legal title, see "Property," § 9.

Presumption of possession arising from legal title, see "Property," § 10.

### § 69. Regularity of course of business or conduct of affairs.

#### Cross-References.

See "Nuisance," § 33.

Compliance with conditions of trust in conducting sale of property, see "Trusts," § 200.

Regularity of foreign assignment for creditors, see "Assignments for Benefit of Creditors," § 199.

### § 70. Making, validity, and genuineness of writings.

#### Cross-References.

Evidence raising presumption of receipt of letter justifying admission of copy in evidence, see post, § 181.

Rebuttal of presumptions, see post, § 89.

Presumption of payment from remittance by mail, see "Payment," § 65.

### § 71. Mailing, and delivery of mail matter.

#### Cross-Reference.

See post, § 89.

#### Annotation.

Presumption as to receipt of communication sent through mail.—49 L. R. A. (N. S.) 458, note.

(a) Proof of the mailing of original letters raises the presumption of their receipt by the addressee.—*Goodman v. Saperstein*, 115 Md. 678, 81 Atl. 695. [Cited and annotated in 49 L. R. A. (N. S.) 459, on presumption as to receipt of communication sent through mail.]

(b) The presumption that a person to whom a letter has been addressed received it arises on proof that the letter has been mailed.—*George F. Sloan & Bro. v. Grollman*, 113 Md. 192, 77 Atl. 577. [Cited and annotated in 49 L. R. A. (N. S.) 459, on presumption as to receipt of communication sent through mail.]

(c) An attorney wrote to his client, a partnership, for authority to do a particular act, and received, in due course of mail, a letter purporting to be signed in the firm name. A witness testified that the letter was signed by an employee who had charge of the business with which the letter dealt. Held, that the letter was presumptively the letter of the firm.—*American Bonding Co. v. Ensey*, 105 Md. 211, 65 Atl. 921; *Same v. Chand-lee*, Id.

(d) On an issue as to whether the assignee of the claimant of a fund received notice of its attachment by garnishment proceedings, it appeared that the garnishees placed a letter containing the notice in an envelope, with their firm name, and written directions to return if not delivered within five days, which letter was placed among their mail for that day, together with a letter to defendant in garnishment, which letter was duly received and answered. In rebuttal the book-keeper of such assignee testified that, if such letter had ever been received, he would have seen it, and its attorney testified that, if any notice of attachment had come to it, he would have received such notice, and answered it. Its secretary and treasurer was not examined, though it appeared that he had conducted the correspondence with regard to such matter. *Held*, that the claimant's assignee must be deemed to have received such notice.—*Lawrence Bank v. Raney & Berger Iron Co.*, 77 Md. 321, 26 Atl. 119. [Cited and annotated in 49 L. R. A. (N. S.) 460, 461, 463, 465, 467, 470, on presumption as to receipt of communication sent through mail.]

(e) Evidence that a letter was duly posted raises the presumption that it was received.—*Yoe v. Benjamin C. Howard Masonic Mut. Ben. Ass'n*, 63 Md. 86. [Cited and annotated in 49 L. R. A. (N. S.) 459, on presumption as to receipt of communication sent through mail.]

## § 72. Sending and delivery of telegrams and other messages.

## § 73. Corporate acts and records.

## § 74. Evidence withheld or falsified.

### Cross-References.

Excuse for failure to testify or to call witness, see post, § 153.

Rebuttal of presumption, see post, § 89.  
Proceedings before land department, see "Public Lands," § 106.

Refusal of witness to answer questions on ground of privilege, see "Witnesses," § 309.

Suppression or falsification of evidence as contempt of court, see "Contempt," § 13.

## § 75.—In general.

### Annotation.

Presumption where a party fails to produce evidence after demand or notice by the party entitled to the production thereof.—34 L. R. A. 581, note.

(a) Where defendant testified that he issued a deposit book to plaintiff in which all items of the account between them shown by his ledger were entered, and plaintiff neither produced such book nor denied that it was in her custody, the evidence sufficiently showed all payments for plaintiff shown by defendant's ledger.—*Wilmer v. Placide*, 119 Md. 49, 86 Atl. 43.

(b) No presumption arises against a party from the nonproduction of evidence to rebut what has not been testified to for the adverse party.—*Ætna Indemnity Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

(c) Where a paper is in the hands of one of the parties to a suit, and he declines to produce it on notice, the refusal to produce does not authorize any inference against the party refusing. The nonproduction has no other legal effect than to allow the opposite party to prove the contents.—*Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 Am. Dec. 30. [Cited and annotated in 34 L. R. A. 582, on presumption against spoliator of evidence.]

(d) Where plaintiff, suing to enforce an award alleged to be in certain terms, introduces certain letters of defendant agreeing to the submission, but fails to introduce other letters of defendant in his hands relative to the reference, no presumption arises that the latter letters, if produced, would show the terms of the reference to be other than those alleged.—*Walsh v. Gilmor*, 3 H. & J. 383, 6 Am. Dec. 503.

## § 76.—Failure of party to testify or giving evasive answers.

(a) Where a defendant relies on a certain contract in an unsworn answer, and, though put on the stand by the opposite party, does not attempt to support the allegations of his answer by his testimony, a strong presumption is raised to the effect that no such contract existed.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

## § 77.—Failure to call witness.

### Cross-References.

Operation and effect of presumption, see post, § 87.

Instructions as to failure to call witness, see "Trial," § 211.

(a) In an action against a street railway company for personal injuries, where a witness testified that he had been plaintiff's physician for 31 years, and was examined fully as to her injuries, plaintiff's failure to call another physician, who saw her after the accident, though summoned and in court, was not ground for a presumption against plaintiff, since it was not necessary to offer corroborative testimony.—*United Rys. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379. [Cited and annotated in 15 L. R. A. (N. S.) 666, on refusal of order for physical examination as abuse of discretion; in 23 L. R. A. (N. S.) 465, on power to compel physical examination; in 42 L. R. A. (N. S.) 941, on statements some time after accident as *res gestae*.]

### § 78.—Suppression or spoliation of evidence.

#### Cross-References.

See ante, § 75.

Keeping adverse witness from testifying as amounting to an admission, see post, § 219.

Operation and effect of presumption, see post, § 87.

In bastardy proceedings, see "Bastards," § 61.

(a) The destruction of a contract by a person claiming under it, after he knows that there is to be a difficulty about it, is strong presumptive evidence that its terms were unfavorable to his claim.—*Love v. Dilley*, 64 Md. 238, 1 Atl. 59, 4 Atl. 290; *Same v. Same*, 64 Md. 610, 6 Atl. 168.

(b) Every inference will be indulged against a party who destroys papers material to the case. Every presumption will be adopted against a litigant who suppresses evidence that would illustrate his case. "*Omnia praesumuntur contra spoliatores*."—*Love v. Dilley*, 64 Md. 238, 1 Atl. 59, 4 Atl. 290; *Same v. Same*, 64 Md. 610, 6 Atl. 168.

### § 79.—Fabrication of evidence.

### § 80. Laws of other states.

#### Cross-References.

Continuance of law shown to exist, see ante, § 67.

Expert testimony, see post, § 517.

Failure to plead in action against devisee, see "Wills," § 847.

Laws of Indian Territory, see "Indians," § 39.

#### Annotation.

Presumption as to law of other state or country.—21 L. R. A. 471; 67 L. R. A. 33, notes.

(a) In the absence of proof to the contrary, the court presumes that the common law prevailing in a sister state is the same as the law of the forum, but there is no similar presumption as to statutes.—*Schaun v. Brandt*, 116 Md. 560, 82 Atl. 551.

(b) In general, in the absence of evidence to the contrary, it will be presumed that the common law exists and is in force in another state.—*National Bank of Bristol v. Baltimore & O. R. Co.*, 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. [Cited and annotated in 67 L. R. A. 48, on how case determined when proper foreign law not proved.]

(c) It will not be presumed that a sister state has enacted a statute similar to one in Maryland, where such statute radically changes the common law.—*Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *Second Nat. Bank v. Same*, Id. [Cited and annotated in 67 L. R. A. 48, on how case determined when proper foreign law not proved; in 39 L. R. A. (N. S.) 890, on effect of surrender of pledge upon rights of pledgee.]

(d) In the absence of proof to the contrary, it will be presumed that the common law prevails in Pennsylvania; but no presumption obtains respecting the positive statute law of such state.—*State v. Pittsburgh & C. R. Co.*, 45 Md. 41. [Cited and annotated in 21 L. R. A. 471, on presumption as to law of other states; in 56 L. R. A. 194, on conflict of laws as to action for death or bodily injury; in 67 L. R. A. 48, 60, on how case determined when proper foreign law not proved.]

### § 81. Laws of foreign countries.

#### Cross-References.

Expert testimony, see post, § 517.

Action by Indian, see "Indians," § 27.

#### Annotation.

Presumption as to law of foreign country.—34 L. R. A. (N. S.) 261; 38 L. R. A. (N. S.) 40, notes.

(a) The law of a foreign country governing the disposition of property under a power will be presumed, in the absence of proof to the contrary, to be the same as the law of

this country.—*De Gallard, De Bearn v. Winans*, 111 Md. 434, 74 Atl. 626. [Cited and annotated in 34 L. R. A. (N. S.) 268, on determination of case properly governed by unproved foreign law.]

(b) In the absence of an allegation that the law of the place of payment of a draft payable in a foreign country differs from the local law, it will be presumed to be the same as regards the method of payment and matters incidental thereto.—*Hammond, Snyder & Co. v. American Express Co.*, 107 Md. 295, 68 Atl. 496. [Cited and annotated in 19 L. R. A. (N. S.) 673, on conflict of laws as to negotiable paper; in 34 L. R. A. (N. S.) 271, on determination of case properly governed by unproved foreign law.]

(c) In the absence of proof of a foreign law, it will be presumed to be the same as the domestic law.—*Fouke v. Fleming*, 13 Md. 392. [Cited and annotated in 23 L. R. A. 341, on conclusiveness of enrolled bill.]

## § 82. Judicial proceedings.

### Cross-References.

In criminal prosecutions, see "Criminal Law," § 321.

Presumptions as to appointment of trustee in bankruptcy, see "Bankruptcy," § 198.

(a) Where the Circuit Court had jurisdiction to determine issues submitted to it by the Orphans' Court as to the validity of a will, its findings are presumed to be regular in every respect.—*Houston v. Wilcox*, 121 Md. 91, 88 Atl. 32.

(b) A motion to dismiss an appeal upon the ground, that the bills of exceptions were not prepared and submitted to the court below, during the term at which they were taken, in conformity with one of the rules of the lower court, will be overruled, there being nothing in the record to show that they were not submitted at the same term at which the cause was tried.—*Allen v. Sow-erby*, 37 Md. 410.

## § 83. Official proceedings and acts.

### Cross-References.

See ante, § 69.

Rebuttal of presumption, see post, § 89.

Acts of quarantine officers in excluding diseased animals from state, see "Animals," § 30.

Performance of duty by judge in preparing and filing statement of facts, see "Appeal and Error," § 564.

Presumption as to tax levy or assessment, see "Municipal Corporations," §§ 956, 973; "Taxation," §§ 319, 442.

Presumption of validity of special assessments, see "Municipal Corporations," § 484.

Refundment of taxes, see "Taxation," § 535.

(a) Where a telephone company submitted schedules of telephone rates to the Public Service Commission, with the request that they be adopted as the lawful rates, it will be presumed that the commission did its duty and made an investigation before the adoption of the rates.—*Gregg v. Laird*, 121 Md. 1, 87 Atl. 1111.

(b) It is presumed that public officers, in the discharge of their duties, properly performed them.—*Union Trust Co. v. State*, 116 Md. 368, 81 Atl. 873.

(c) It is not to be assumed that a public officer will act in an unlawful or oppressive manner.—*Schultz v. State*, 112 Md. 211, 76 Atl. 592.

(d) The court will presume that an ordinance, requiring a city to keep a map showing street lines, gas mains, etc., has been observed, and the city is chargeable with knowledge of the location of a gas main in a street.—*Manuel v. City of Cumberland*, 111 Md. 196, 73 Atl. 705.

(e) Although the presumption is that persons acting under a city charter and ordinances will conform to the limitations, when a case is stated on oath, apparently showing contrary proceedings, the court should interfere.—*Diffenderffer v. Hillen*, 1 Bland 189, note.

## § 84. Particular facts.

### Cross-References.

In criminal prosecutions, see "Criminal Law," § 323.

Presumption as to purpose of conveyance to railroad company, see "Railroads," § 67.

(a) The law presumes that a representation is true, and the presumption must be overcome by positive evidence of falsity, or by suspicious circumstances so strong as to warrant a reasonable mind to believe that there was falsity.—*Etna Indemnity Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

**§§ 85-87. Operation and effect.***Cross-References.*

See ante, §§ 71, 83.

In criminal prosecutions, see "Criminal Law," § 324.

(a) The defendants in an action of ejectment relied upon an outstanding title derived under a seizure and sale by the sheriff of the right, title, and interest of the party under whom the plaintiff claimed, and offered in proof various facts and circumstances as presumptive evidence that the seizure and sale by the sheriff were valid. *Held*, that the presumption arising from the facts and circumstances so given in evidence was not a presumption of law conclusive upon the plaintiff, and therefore irrebuttable, but a presumption of fact, to be found by the jury.—*Kershner v. Kershner*, 36 Md. 309.

(b) Slight presumptions, although sufficient to excite suspicion or produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either amount to proof or shift the burden of proof.—*Corner v. Pendleton*, 8 Md. 337. [Cited and annotated in 52 L. R. A. 720, on what provable by books of account.]

**§ 88. Conflicting presumptions of fact.****§ 89. Rebuttal of presumption of fact.***Cross-References.*

See ante, §§ 55, 71, 82, 84, 87.

Rebuttal of presumption of payment of judgment from lapse of time, see "Judgment," § 876.

(a) The presumption that a person to whom a letter has been addressed and mailed received it is not conclusive.—*George F. Sloan & Bro. v. Grollman*, 113 Md. 192, 77 Atl. 577. [Cited and annotated in 49 L. R. A. (N. S.) 459, on presumption as to receipt of communication sent through mail.]

**III. BURDEN OF PROOF.***Cross-References.*

Effect on failure of court to find particular questions, see "Trial," § 397.

In criminal prosecutions, see "Criminal Law," §§ 327-336.

Instructions as to burden of proof, see "Trial," §§ 205, 234.

Practice in federal courts, see "Courts," § 348.

Review as dependent on presentation of question in lower court, see "Appeal and Error," § 203.

*As to particular facts or issues.*

See ante, §§ 56, 63, 64, 67, 71.

See "Acknowledgment," § 59; "Adverse Possession," §§ 85, 112; "Boundaries," § 33; "Damages," § 163; "Deeds," §§ 192-197; "Estoppel," § 116; "Fraud," § 50; "Fraudulent Conveyances," § 271; "Garnishment," § 162; "Gifts," §§ 47, 80; "Guaranty," § 89; "Marriage," § 40; "Money Received," § 18; "Negligence," § 121; "Novation," § 12; "Partnership," § 44; "Payment," §§ 65-68; "Pledges," § 16; "Principal and Surety," § 159; "Release," § 55; "Trespass," § 44; "Usury," §§ 113, 142.

Abandonment of water right, see "Waters and Water Courses," § 152.

Adultery, see "Divorce," § 109.

Advancements, see "Descent and Distribution," § 115.

Agency, see "Mines and Minerals," § 117; "Husband and Wife," § 138; "Principal and Agent," § 19.

Allowance of claims against estate, see "Executors and Administrators," § 221.

Alteration of written instrument, see "Alteration of Instruments," § 27.

Assumption of risk by servant injured, see "Master and Servant," § 265.

As to creation, existence and termination of easements, see "Easements," § 36.

Authority of agent in general, see "Principal and Agent," § 119.

Authority of broker, see "Brokers," § 8.

Authority of corporate officer or agent, see "Corporations," § 432.

Authority to indorse check, see "Banks and Banking," § 140.

Bar of statute of limitations, see "Limitation of Actions," § 195.

Breach of warranty of goods sold, see "Sales," § 439.

Cause of action, on application for judgment by default, see "Judgment," § 126.

Cause of loss of or injury to cargo, see "Shipping," § 132.

Champerty, see "Champerty and Maintenance," § 5.

Character of transaction as mortgage or other contract, see "Mortgages," § 36.

Claims against bankrupt's estate, see "Bankruptcy," § 340.

Collusive joinder of parties to prevent removal of cause, see "Removal of Causes," § 107.

Community or separate property, see "Husband and Wife," § 262.

Compensation for property taken for public use, see "Eminent Domain," § 200.

Condonation of offense, ground for divorce, see "Divorce," § 109.

Consideration for contract in general, see "Contracts," § 88.

Consideration of bill or note, see "Bills and Notes," § 493.

Construction of contract, see "Sales," § 87.

Contributory negligence in general, see "Negligence," § 122.

Contributory negligence of owner of animals injured on or near railroad tracks, see "Railroads," § 441.

Contributory negligence of owner of property injured by fire set by railroad companies, see "Railroads," § 480.  
 Contributory negligence of passenger, see "Carriers," § 344.  
 Contributory negligence of person injured at railroad crossing, see "Railroads," § 346.  
 Contributory negligence of person injured by collision in highway, see "Highways," § 184.  
 Contributory negligence of person injured on or near railroad tracks, see "Railroads," § 396.  
 Contributory negligence of person injured on or near street railroad tracks, see "Street Railroads," § 112.  
 Contributory negligence of servant injured, see "Master and Servant," § 265.  
 Conversion, see "Trove and Conversion," § 35.  
 Creation, existence and validity of constructive trusts, see "Trusts," § 107.  
 Creation, existence and validity of express trusts, see "Trusts," § 41.  
 Creation, existence and validity of resulting trusts, see "Trusts," § 86.  
 Damages from breach of agreement to pay mortgage by grantee of property, see "Mortgages," § 292.  
 Dedication of literary manuscript to the public, see "Literary Property," § 9.  
 Defect in title on sale under foreclosure of mortgage, see "Mortgages," § 537.  
 Delivery and acceptance of goods, see "Sales," § 181.  
 Delivery of bill or note, see "Bills and Notes," § 492.  
 Delivery of note and mortgage, see "Mortgages," § 74.  
 Demand for payment of bill or note, see "Bills and Notes," § 498.  
 Denial of preference, see "Bankruptcy," § 165.  
 Desertion, see "Divorce," § 109.  
 Discharge in bankruptcy, see "Bankruptcy," § 436.  
 Duty of employer to give clearance papers to discharged employee, see "Master and Servant," § 33.  
 Employment of broker, see "Brokers," § 84.  
 Execution, existence and genuineness of will, see "Wills," § 289.  
 Execution of bill or note, see "Bills and Notes," § 492.  
 Exemption from taxation, see "Taxation," §§ 203, 251.  
 Exemptions of bankrupt, see "Bankruptcy," § 400.  
 Existence and validity of contract of sale, see "Vendor and Purchaser," § 44.  
 Existence of claims as ground for sale of real estate of decedent, see "Executors and Administrators," § 340.  
 Existence of custom, see "Customs and Usages," § 19.  
 Existence of highway, see "Highways," §§ 17, 68.  
 Existence of monopoly, see "Monopolies," § 28.  
 Existence of nuisance, see "Nuisances," § 84.

Facts authorizing removal of cause, see "Removal of Causes," § 86.  
 Fault as cause of collision, see "Collision," §§ 33, 48, 55, 65, 73, 84.  
 Forfeiture of charter of railroad company, see "Railroads," § 32.  
 Fraud in arbitration proceedings, see "Arbitration and Award," § 76.  
 Fraud of administrator in procuring adjudication of insolvency, see "Executors and Administrators," § 410.  
 Freedom from undue influence in contract or transaction between husband and wife, see "Husband and Wife," § 36.  
 Gambling contracts, see "Gaming," § 49.  
 Gift by husband to wife and vice versa, see "Husband and Wife," §§ 49½, 49¾.  
 Good faith of purchaser of bill or note, and payment of value, see "Bills and Notes," § 497.  
 Good faith of purchaser of land, see "Trespass to Try Title," § 38; "Vendor and Purchaser," § 242.  
 Grant by state of public lands, see "Public Lands," § 176.  
 Grounds of attachment, see "Attachment," § 47.  
 Identity of bill or note sued on, see "Bills and Notes," § 492.  
 Illegality of tax levy, see "Highways," § 128.  
 Incorporation of telephone company, see "Telegraphs and Telephones," § 10.  
 Indebtedness of executor to estate, see "Executors and Administrators," § 88.  
 Injuries by communication of disease from infected animals, see "Animals," § 33.  
 Intent of married woman to charge separate estate, see "Husband and Wife," § 164.  
 Invalidity of judgment note executed by married woman, see "Husband and Wife," § 232.  
 Invalidity of proceedings for making of public improvements, see "Municipal Corporations," § 325.  
 Invalidity of transfer of private switch by railroad company, see "Railroads," § 216.  
 Jurisdiction of municipal officers to receive bid for public improvement, see "Municipal Corporations," § 335.  
 Lack of affection of husband for wife, see "Husband and Wife," § 333.  
 Legality of contract, see "Contracts," § 141.  
 Legitimacy of child, see "Bastards," § 4.  
 Liability for deficiency on foreclosure of mortgage, see "Mortgages," § 559.  
 Liability of connecting carriers, see "Carriers," § 185.  
 Liability of purchaser of railroad at foreclosure sale for debts incurred by receiver, see "Railroads," § 194.  
 Limitation of liability of carrier in respect to goods, see "Carriers," § 163.  
 Loss of or injury to goods, in course of transportation, see "Carriers," § 132.  
 Married woman's separate property, see "Husband and Wife," § 131.  
 Mistake, fraud and undue influence, in execution of will, see "Wills," § 163.

- Modification of contract, see "Contracts," § 247.
- Naturalization, see "Aliens," § 69.
- Navigability of lake or stream, see "Navigable Waters," § 1.
- Negligence causing injuries from fires set by railroad company, see "Railroads," § 480.
- Negligence causing injuries to animals on or near railroad tracks, see "Railroads," § 441.
- Negligence causing injuries to passenger, see "Carriers," § 316.
- Negligence causing injuries to persons at railroad crossings, see "Railroads," § 346.
- Negligence causing injuries to persons on or near railroad tracks, see "Railroads," § 396.
- Negligence causing injuries to persons on or near street railroad tracks, see "Street Railroads," § 112.
- Negligence causing injuries to travelers in highway, see "Highways," § 209.
- Negligence causing injuries to travelers on street, see "Municipal Corporations," § 817.
- Negligence in issuance of marriage license, see "Marriage," § 25.
- Negligence in operation of railroad in general, see "Railroads," § 251.
- Negligence in production and use of electricity, see "Electricity," § 19.
- Negligence in shooting oil well, see "Mines and Minerals," § 109.
- Negligence in use of highway, see "Highways," § 184.
- Negligence of fellow servant, see "Master and Servant," § 265.
- Negligence of master causing injuries to servant, see "Master and Servant," § 265.
- Negligence of physician or surgeon, see "Physicians and Surgeons," § 18.
- Negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.
- Nonconsent of owner of trees to cutting thereof, see "Logs and Logging," § 36.
- Nondelivery of deed delivered in escrow, see "Escrows," § 9.
- Nonexistence of prejudice or local influence justifying removal of cause, see "Removal of Causes," § 107.
- Nonpayment of miner's claim for services, see "Mines and Minerals," § 117.
- Notice of nonpayment or of protest of bill or note, see "Bills and Notes," § 498.
- Originality and priority of invention, see "Patents," § 91.
- Ownership and operation of railroads, see "Railroads," § 270.
- Ownership of goods intermixed, see "Confusion of Goods," § 13.
- Ownership of vessel, see "Shipping," § 19.
- Patentable invention, see "Patents," § 32.
- Payment of bill or note, see "Bills and Notes," § 499.
- Payment of debt secured by mortgage, see "Mortgages," § 319.
- Payment of judgment, see "Judgment," § 876.
- Performance of conditions prerequisite to sale under power in trust deed, see "Mortgages," § 372.
- Performance of contract by broker, see "Brokers," § 84.
- Performance or breach of contract in general, see "Contracts," § 322.
- Possession of land, see "Trespass to Try Title," § 38.
- Presentment of bill or note for payment, see "Bills and Notes," § 498.
- Prior knowledge or use of invention, see "Patents," § 58.
- Privileged character of communications, see "Witnesses," § 222.
- Promise to marry, and breach thereof, see "Breach of Marriage Promise," § 20.
- Propriety of extension of time for making election under will, see "Wills," § 790.
- Protest of bill or note, see "Bills and Notes," § 498.
- Proximate cause of injury to servant, see "Master and Servant," § 265.
- Ratification of agent's act, see "Principal and Agent," § 173.
- Reasonableness of carrier's rates, see "Carriers," § 12.
- Reasonableness of license tax, see "Gas," § 10.
- Regularity of proceedings for establishment of county boundaries, see "Counties," § 8.
- Relation of master and servant, see "Master and Servant," § 265.
- Reputation of dental college by applicant for examination for admission to practice dentistry, see "Physicians and Surgeons," § 3.
- Revocation of license in respect of real property, see "Licenses," § 58.
- Revocation of will, see "Wills," § 290.
- Right to reference, see "Reference," § 27.
- Right to take or cut timber from public lands, see "Public Lands," §§ 93, 131.
- Service of process, see "Process," § 145.
- Services rendered, see "Work and Labor," § 26.
- Settlement of pauper, see "Paupers," § 22.
- Signatures to mortgage, see "Mortgages," § 74.
- Solvency of bankrupt claiming homestead, see "Bankruptcy," § 396.
- Testamentary capacity, see "Wills," § 52.
- Testamentary character of deed, see "Wills," § 93.
- Title to property sued for, see "Trespass to Try Title," § 38.
- Transfer and ownership of bill or note, see "Bills and Notes," § 496.
- Transfer of mortgage and bona fides thereof, see "Mortgages," § 270.
- Truth of charges against city marshal, see "Municipal Corporations," § 183.
- Valid contract, see "Frauds, Statute of," § 158.
- Validity of contract, see "Contracts," § 99.
- Validity of contract with board of education, see "Schools and School Districts," § 121.
- Validity of mortgage, see "Mortgages," § 86.

Validity of ordinances, see "Municipal Corporations," § 122.  
 Waiver of condition in lease as to return of premises in good condition, see "Landlord and Tenant," § 160.  
 Waiver of service of papers on appeal, see "Appeal and Error," § 633.  
 Waiver or abandonment of homestead, see "Homestead," § 181.  
 Waiver or release of lien on logs, lumber, mills, or mill products, see "Logs and Logging," § 32.  
 Want of jurisdiction, see "Courts," § 35.  
 Withdrawal of members of associations, see "Associations," § 9.

*In particular civil actions or proceedings.*

See "Assault and Battery," § 26; "Assumpsit, Action of," § 25; "Cancellation of Instruments," § 45; "Carriers," § 408; "Contempt," § 60; "Creditors' Suit," § 44; "Divorce," § 109; "Ejectment," § 86; "Entry, Writ of," § 21; "False Imprisonment," § 22; "Forcible Entry and Detainer," § 29; "Fraud," § 50; "Libel and Slander," § 101; "Malicious Prosecution," §§ 56, 60; "Negligence," §§ 121, 122; "Quieting Title," § 44; "Reformation of Instruments," § 43; "Replevin," § 70; "Specific Performance," § 119; "Trespass," § 44; "Trespass to Try Title," § 38; "Trover and Conversion," § 35; "Work and Labor," § 26.  
 Proof of negative, see ante, § 92.  
 Accounting of executor or administrator, see "Executors and Administrators," § 506.  
 Against agent for accounting, see "Principal and Agent," § 78.  
 Against carrier as warehouseman, see "Carriers," § 146.  
 Against carriers for delay in shipment of goods, see "Carriers," § 104.  
 Against carriers for refusal to deliver goods, see "Carriers," § 94.  
 Against carriers of live stock, see "Carriers," § 228.  
 Against guarantors, see "Guaranty," § 89.  
 Against heirs and distributees, see "Descent and Distribution," § 147.  
 Against landlord for injuries from negligence, see "Landlord and Tenant," § 169.  
 Against master for injuries by servant, see "Master and Servant," § 330.  
 Against railroad company for penalty, see "Railroads," § 254.  
 Against sureties, see "Principal and Surety," § 159.  
 Appeal from official survey, see "Boundaries," § 54.  
 Application for rehearing in appellate court, see "Appeal and Error," § 833.  
 Application of purchaser at foreclosure sale to be relieved on ground of defects in title, see "Mortgages," § 537.  
 Bastardy proceedings, see "Bastards," § 54.

Burden of proving fraud in inducing client to enter into contract of employment, see "Attorney and Client," § 72.  
 By agent to recover compensation, see "Principal and Agent," § 89.  
 By alien, see "Aliens," § 16.  
 By or against banks, see "Banks and Banking," § 227.  
 By or against corporations in general, see "Corporations," § 519.  
 By or against foreign corporations, see "Corporations," § 673.  
 By or against husband or wife, see "Husband and Wife," § 232.  
 By or against principal or agent, see "Principal and Agent," § 190.  
 By owner of property taken for public use, see "Eminent Domain," § 295.  
 Challenge to jurors, see "Jury," § 120.  
 Condemnation proceedings, see "Eminent Domain," § 200.  
 Contempt proceedings, see "Injunction," § 230.  
 Contest of right to purchase state lands, see "Public Lands," § 172.  
 Deportation under Chinese exclusion act, see "Aliens," § 32.  
 Determination of conflicting claims to state lands, see "Public Lands," § 175.  
 Discharge of bankrupt, see "Bankruptcy," § 414.  
 Election contests, see "Elections," §§ 291, 292.  
 For accounting by broker, see "Brokers," § 37.  
 For alienation of affections of husband or wife, see "Husband and Wife," § 383.  
 For allotment of widow's allowance, see "Executors and Administrators," § 194.  
 For breach of contract of carriage, see "Carriers," § 276.  
 For breach of contract of sale, see "Logs and Logging," § 3; "Sales," §§ 381, 415.  
 For breach of contracts in general, see "Contracts," § 348.  
 For breach of covenant, see "Covenants," § 118.  
 For breach of marriage promise, see "Breach of Marriage Promise," § 20.  
 For breach of warranty of goods sold, see "Sales," § 439.  
 For causing death, see "Death," § 58.  
 For collision, see "Collision," §§ 84, 123.  
 For compensation of broker, see "Brokers," § 84.  
 For compensation of physician or surgeon, see "Physicians and Surgeons," § 24.  
 For conversion of logs or lumber, see "Logs and Logging," § 35.  
 For deficiency on foreclosure, see "Mortgages," § 375.  
 For deposits, see "Banks and Banking," § 154.  
 For dower, see "Dower," § 79.  
 For equitable relief against judgment, see "Judgment," § 461.  
 For flowage of lands, see "Waters and Water Courses," § 179.  
 For infringement of copyright, see "Copyrights," § 83.  
 For infringement of patents, see "Patents," § 312.



- For injunction, see "Injunction," § 126.  
 For injuries arising from accidents to trains, see "Railroads," § 297.  
 For injuries at railroad crossings, see "Railroads," § 346.  
 For injuries by animals, see "Animals," § 74.  
 For injuries from defects in bridges, see "Bridges," § 46.  
 For injuries from defects or obstructions in highways, see "Highways," § 209.  
 For injuries from defects or obstructions in streets, see "Municipal Corporations," § 817.  
 For injuries from escape or explosion of gas, see "Gas," § 20.  
 For injuries from fires caused by operation of railroads, see "Railroads," § 480.  
 For injuries from negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.  
 For injuries from negligent use of highway, see "Highways," § 184.  
 For injuries from negligent use of street, see "Municipal Corporations," § 706.  
 For injuries from negligent use of weapons, see "Weapons," § 18.  
 For injuries from sale of liquor, see "Intoxicating Liquors," § 308.  
 For injuries from sale of poisons, see "Poisons," § 6.  
 For injuries incident to supply of water, see "Waters and Water Courses," § 209.  
 For injuries to animals on or near railroad tracks, see "Railroads," § 441.  
 For injuries to hired horse, see "Animals," § 27.  
 For injuries to licensees and trespassers on railroad property, see "Railroads," § 282.  
 For injuries to passenger, see "Carriers," §§ 316, 344.  
 For injuries to persons on or near railroad tracks, see "Railroads," § 396.  
 For injuries to persons on or near street railroad tracks, see "Street Railroads," § 112.  
 For injuries to servants, see "Master and Servant," § 265.  
 For interference with surface waters, see "Waters and Water Courses," § 126.  
 For judgment by default, see "Judgment," § 126.  
 For loss of or injury to animals in hands of agister, see "Animals," § 23.  
 For loss of or injury to cargo, see "Shipping," § 132.  
 For loss of or injury to goods stored, see "Warehousemen," § 34.  
 For loss of or injury to property of guest, see "Innkeepers," § 11.  
 For loss of or injury to tow, see "Towage," § 15.  
 For maritime torts, see "Shipping," § 86.  
 For misdelivery or nondelivery of goods stored, see "Warehousemen," § 34.  
 For necessities furnished child, see "Parent and Child," § 3.  
 For negligence or malpractice of physician or surgeons, see "Physicians and Surgeons," § 18.  
 For negligence or misconduct of broker, see "Brokers," § 38.  
 For negligence or misconduct of clerk of court, see "Clerks of Courts," § 72.  
 For negligent or wrongful act of factor, see "Factors," § 43.  
 For nuisance, see "Nuisance," § 49.  
 For penalties for cutting trees without consent of owner, see "Logs and Logging," § 36.  
 For penalties for illegal issuance of marriage license, see "Marriage," § 25.  
 For penalties for refusal or failure to transmit or deliver telegrams, see "Telegraphs and Telephones," § 78.  
 For penalties for trespassing on Indian lands, see "Indians," § 37.  
 For penalties for violations of regulations relating to druggists, see "Druggists," § 11.  
 For penalties in general, see "Penalties," § 33.  
 For personal injuries to passengers, see "Shipping," § 166.  
 For price of land sold, see "Vendor and Purchaser," § 315.  
 For price or value of goods sold, see "Sales," § 357.  
 For proceeds of goods consigned to factor, see "Factors," § 42.  
 For separate maintenance, see "Husband and Wife," § 297.  
 For services or wages of child, see "Parent and Child," § 6.  
 For subrogation, see "Subrogation," § 41.  
 For surplus on mortgage foreclosure sale, see "Mortgages," § 568.  
 For wages, see "Master and Servant," § 80.  
 For writ of ne exeat, see "Ne Exeat," § 6.  
 For wrongful discharge of servant, see "Master and Servant," § 40.  
 For wrongful ejection of passengers and intruders, see "Carriers," § 381.  
 For wrongful sequestration, see "Sequestration," § 21.  
 In actions for compensation of broker, see "Brokers," § 35.  
 In criminal prosecutions, see "Criminal Law," §§ 337-368.  
 In equity, see "Equity," § 346.  
 In scire facias, see "Scire Facias," § 11.  
 On assigned claims, see "Assignments," § 134.  
 On bills or notes, see "Bills and Notes," §§ 491-499.  
 On bonds in general, see "Bonds," § 130.  
 On contract of school board, see "Schools and School Districts," § 121.  
 On contract of suretyship, see "Principal and Surety," § 159.  
 On county bonds, see "Counties," § 188.  
 On county warrants, see "Counties," § 170.  
 On gambling contracts, see "Gaming," § 49.  
 On guaranty, see "Guaranty," § 89.  
 On insurance policies, see "Insurance," §§ 646, 817.

On judgment, see "Judgment," §§ 918, 942.  
 On official bonds, see "Sheriffs and Constables," § 169.  
 On replevin bond, see "Replevin," § 184.  
 On school district bonds, see "Schools and School Districts," § 97.  
 On school district warrants, see "Schools and School Districts," § 95.  
 On trustees' bonds, see "Trusts," § 387.  
 Probate proceedings, and actions relating to wills or probate, see "Wills," §§ 288-290.  
 Relating to bankrupt's property, see "Bankruptcy," § 303.  
 Relating to usury, see "Usury," §§ 113, 142.  
 Remand of cause removed, see "Removal of Causes," § 107.  
 Removal of election officers, see "Elections," § 101.  
 Revision of tax assessments, see "Taxation," § 485.  
 Summary proceedings to recover leased premises, see "Landlord and Tenant," § 308.  
 To confirm or try tax title, see "Taxation," § 810.  
 To determine adverse claim to mining location, see "Mines and Minerals," § 38.  
 To determine and protect water rights, see "Waters and Water Courses," § 152.  
 To determine custody of children, see "Parent and Child," § 2.  
 To determine location and mode of construction of telegraph or telephone line, see "Telegraphs and Telephones," § 10.  
 To determine priorities between mortgages and other liens, see "Mortgages," § 186.  
 To dismiss appeal, see "Appeal and Error," § 801.  
 To enforce drainage assessment, see "Drains," § 89.  
 To enforce liability of stockholders for corporate debts and acts, see "Corporations," § 269.  
 To enforce license taxes, see "Telegraphs and Telephones," § 30.  
 To enforce lien on logs, lumber, mills, or mill products, see "Logs and Logging," § 33.  
 To enforce mechanic's lien, see "Mechanics' Liens," § 279.  
 To enforce municipal assessment, see "Municipal Corporations," § 568.  
 To enforce testamentary charge, see "Wills," § 826.  
 To enforce vendor's lien, see "Vendor and Purchaser," § 281.  
 To establish and enforce trust, see "Trusts," § 372.  
 To establish and protect easements, see "Easements," § 61.  
 To establish boundaries, see "Boundaries," § 33.  
 To establish heirship, see "Descent and Distribution," § 71.  
 To establish lost instrument, see "Lost Instruments," § 8.  
 To foreclose agricultural lien, see "Agriculture," § 15.

To foreclose mortgage, see "Mortgages," § 460.  
 To open or vacate judgment, see "Judgment," § 392.  
 To procure personal judgment on foreclosure of mortgage, see "Mortgages," § 559.  
 To recover compensation as municipal employee, see "Municipal Corporations," § 220.  
 To recover interest, see "Interest," § 67.  
 To recover license tax from gas company, see "Gas," § 10.  
 To recover money loaned to school district, see "Schools and School Districts," § 121.  
 To recover money paid broker on contract of sales of land, see "Brokers," § 106.  
 To recover possession of mortgaged premises, see "Mortgages," § 213.  
 To recover possession of property sold on foreclosure, see "Mortgages," § 372.  
 To recover price of land paid, see "Vendor and Purchaser," § 341.  
 To recover property sold, see "Sales," § 324.  
 To recover property taken on execution, see "Execution," § 186.  
 To recover rent, see "Canals," § 28; "Landlord and Tenant," § 231.  
 To redeem from mortgage foreclosure, see "Mortgages," § 617.  
 To restrain diversion of water, see "Waters and Water Courses," § 87.  
 To restrain execution, see "Execution," § 172.  
 To set apart widow's allowance, see "Executors and Administrators," § 193.  
 To set aside conveyance fraudulent as to wife's right to alimony, see "Divorce," § 276.  
 To set aside execution sales, see "Execution," § 256.  
 To set aside fraudulent conveyances, see "Fraudulent Conveyances," § 271.  
 To set aside sale under trust deed, see "Mortgages," § 369.

## § 90. Nature and scope in general.

(a) The burden of proof may sometimes be shifted by the form of the pleadings.—*Burgess v. Lloyd*, 7 Md. 178.

(b) A defendant may, by the manner of his pleading, relieve the plaintiff from showing more than a prima facie case.—*Burgess v. Lloyd*, 7 Md. 178.

## § 91. Party asserting or denying existence of facts.

(a) In an action on an open account and a note, less admitted credits, defendant is entitled to an instruction that the burden of proof is on plaintiff to establish that both are owing by defendant.—*Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888.

§§ 92, 93. (See Analysis.)

### § 94. Extent of burden in general.

(a) Where the party holding the affirmative shows a state of facts raising a presumption in his favor, or otherwise makes out a prima facie case, the burden of proof is cast on the opposite party.—*Owens v. Collinson*, 3 G. & J. 25; *Rosenthal v. Maryland Brick Co.*, 61 Md. 590.

(b) Where a person stood in a fiduciary relation to a corporation, by being a director thereof, the burden is on one seeking to recover on a contract made by such director with the corporation to show the fairness of the transaction.—*Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598.

§§ 95-98. (See Analysis.)

## IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

### Cross-Reference.

Of newly discovered evidence as affecting right to new trial, see "New Trial," § 103.

### (A) FACTS IN ISSUE AND RELEVANT TO ISSUES.

### § 99. Relevancy in general.

#### Cross-Reference.

See "Assault and Battery," § 27.

#### Annotation.

Admissibility of finding of coroner to show cause of death.—68 L. R. A. 285; 45 L. R. A. (N. S.) 404, notes.

(a) An ex parte affidavit as to a loss on a mill, made by the miller, the insured's servant, at the instigation of an insurance company not the defendant, is res inter alios acta, and not admissible against the insured.—*Atlantic Ins. Co. v. Carlin*, 58 Md. 336. [Cited and annotated in 20 L. R. A. 283, on insurance agent as agent of assured.]

(b) The issue before the jury was whether work was done for and materials furnished to the defendants by plaintiff under a contract between them for the construction of an embankment for the defendants, who occupied a pier on grounds belonging to the Canton Co. The defendants offered in evidence a lease between them and the Canton Co., made after the embankment was begun, for the purpose of showing that it was the

company's duty to construct the embankment. Held, that this lease was inadmissible in evidence against the plaintiff.—*Baker v. Gunther*, 53 Md. 373.

(c) In an action by a bricklayer to recover for laying a specified number of bricks, evidence offered by the defendant that he had only paid the brickmaker for a smaller number is irrelevant.—*Donohue v. Shedrick*, 46 Md. 226.

(d) A witness who was a measurer of mechanical work cannot be asked whether the entries of measurements and valuations in his abstract book correspond with the entries thereof in the bill of particulars, when it appears that the results of the calculations were not transferred from the abstract book to the bill, but from the latter to the former. In such a case the agreement between the two would be no proof of the accuracy of either, and especially not of the bill of particulars.—*Green v. Caulk*, 16 Md. 556.

(e) A. sued B., the administrator of C., on two notes given by the intestate. In defense B. offered evidence of an agreement between A. and C. for the forbearance of the sale of land on an execution, in favor of A. against D., who had married the daughter of C.; that the notes were given as the consideration of the promise to forbear to sell for a specified time; that the amount, when paid, was to be indorsed on the judgment; and that there was a failure of consideration. Plaintiff then proved an agreement between himself and the widow of D., making a disposition of the money payable on these notes. Held, that the last agreement was res inter alios, and not admissible in evidence.—*Basford v. Parran*, 8 Md. 360.

(f) Matters irrelevant to the issue cannot be received in evidence.—*Maslin v. Thomas*, 8 Gill 18; *Dorsey v. Whipp*, Id. 457.

(g) Where a party is not bound to produce a promissory note, he is under no obligation to account for its nonproduction; and evidence offered to account for such nonproduction is useless and inadmissible.—*Wyman v. Rae*, 11 G. & J. 416, 37 Am. Dec. 70.

(h) Proceedings of the commissioners of bankruptcy are inadmissible in a collateral action to prove the act of bankruptcy, being

res inter alios acta, and not evidence according to the principles of common law, and not made evidence by the laws of the United States.—*Wood v. Grundy*, 3 H. & J. 13; *Barney v. Patterson*, 6 H. & J. 182.

### § 100. Circumstantial evidence of facts in issue.

#### Cross-Reference.

Injury to insured, see "Insurance," § 659.

### § 101. What law governs.

#### Cross-Reference.

See post, § 318.

### § 102. Identity of persons and things.

#### Cross-References.

Demonstrative evidence, see post, § 189.  
Hearsay evidence, see post, § 317.  
Opinion evidence, see post, §§ 474, 475.  
Presumptions, see ante, § 55.  
Record of baptism, see post, § 351.  
Self-serving declarations, see post, § 271.

### § 103. Personal status and condition.

#### Cross-References.

Judicial notice, see ante, § 15.  
Presumptions, see ante, § 56.

### § 104. Personal relations.

#### Cross-Reference.

See "Nuisance," § 33.

#### Annotation.

Evidence of divorce in action for alienation of affections or criminal conversation.—46 L. R. A. (N. S.) 1085, note.

(a) Where evidence had been offered to prove a partnership between the defendant and his son, and that the business had been carried on in one place in the name of the son and in another in the father's name, evidence by the plaintiff to explain why the goods for the price of which the action was brought were charged to the father, and not to the son, and the circumstances attending the delivery of such goods, was admissible.—*Smith v. Cooke*, 31 Md. 174, 100 Am. Dec. 58.

(b) In an action by the indorser of a promissory note against the maker, the defense being that the note was given for accommodation, defendant having produced as a witness the party to whom the note was given, who testified that it was for accommodation, and it was delivered by him to the plaintiff to be discounted, it was irrelevant to show that the defendant's witness

had been acting in the capacity of broker for the plaintiff by proving that certain papers, offered in evidence by the defendant and explained by the said witness, were made out in the form of broker's statements, the persons offering papers for discount, since such fact was independent and not pertinent to the issue.—*Hardesty v. Harris*, 19 Md. 317.

(c) Upon the question whether A. and B. were both members of a vestry at a certain time, an instrument in writing, reciting the doings of a meeting at which A. and others were present, but not reciting that B. was present, to which instrument an agreement was appended, signed by A., B., and others binding them to exonerate certain persons from any responsibility in relation to such doings of the vestry, was held not to be evidence per se that B. was then a member of the vestry.—*Chapman v. Davis*, 4 Gill 166.

### § 105. Nature and condition of property or other subject-matter.

#### Cross-Reference.

In criminal prosecutions, see "Criminal Law," § 340.

(a) In a trial at law of an issue from the Orphans' Court whether a paper writing conceded to have been admitted to probate by the Orphans' Court was the complete and final will of deceased, and "intended by him to operate as such without any addition or alteration," the order admitting the will to probate is inadmissible in evidence, though the caveators had submitted the original will for the jury's inspection, since what the jury were to determine was whether the paper was the complete and final will of decedent, intended by him to operate as such in its present shape, without alteration, and on such issue evidence that the paper had been admitted to probate was irrelevant.—*Mason v. Poulson*, 40 Md. 355.

(b) In an action against the defendant for not employing the plaintiff's boat to carry coal on a canal, as agreed, evidence offered by the defendant that in consequence of the deepening of the canal, the boat could carry more freight in each load than previously, was held to be irrelevant.—*Borden Min. Co. v. Barry*, 17 Md. 419.

## § 106. Character or reputation.

### Cross-References.

See "Adverse Possession," §§ 33, 113; "Assault and Battery," § 29; "Breach of Marriage Promise," § 22; "Dedication," § 43; "False Imprisonment," § 25; "Libel and Slander," § 110; "Malicious Prosecution," §§ 58, 59; "Negligence," § 132; "Seduction," § 17; "Wills," § 53.

Competency of testimony, see post, § 152.

Evidence of character to show intent, see post, § 108.

Hearsay evidence, see post, § 322.

Negative testimony, see post, § 147.

Pecuniary condition, see post, §§ 107, 322.

Remoteness of evidence, see post, § 145.

Character of defendant or prosecutrix in bastardy proceedings, see "Bastards," §§ 59, 61.

In action for libel, see "Libel and Slander," § 110.

Materiality of evidence as to property, see "Evidence," § 142.

Mitigation of damages for libel or slander, see "Libel and Slander," § 61.

Moral character of employees of carrier, see "Carriers," § 94.

Of beneficiary of person wrongfully killed, see "Death," § 60.

Of conductor wrongfully ejecting passenger, see "Carriers," § 381.

Of incompetent servant, see "Master and Servant," § 271.

Of passenger wrongfully ejected, see "Carriers," § 381.

Of person wrongfully killed, see "Death," § 68.

Of servant, see "Master and Servant," §§ 274, 330.

Reputation as to location of boundaries, see "Boundaries," § 35.

Reputation for morality as evidence in suits for divorce, see "Divorce," § 116.

Reputation of animals for viciousness, see "Animals," § 74.

To show extent of damages, see "Damages," §§ 169, 180.

To show marriage, see "Divorce," § 116.

Wrongful discharge of servant, see "Master and Servant," § 40.

### Annotation.

Relevancy of evidence as to character or reputation on issue of fraud or dishonesty in civil case.—49 L. R. A. (N. S.) 724, note.

Right of accused to show unchastity of prosecutrix in statutory rape.—48 L. R. A. (N. S.) 269, note.

Admissibility of evidence as to reputation of one injured or killed, on the question of his own negligence or freedom from negligence.—41 L. R. A. (N. S.) 683, note.

Admissibility of evidence of bad character or reputation where justification is filed.—38 L. R. A. (N. S.) 1185, note.

Right of witness to testify to character from personal knowledge.—22 L. R. A. (N. S.) 650, note.

Evidence of specific instances to prove character.—14 L. R. A. (N. S.) 690, note.

Evidence of specific instances to prove character of victims of crime.—14 L. R. A. (N. S.) 708, note.

Evidence of specific instances to prove character of servant in action against master.—14 L. R. A. (N. S.) 756, note.

Fact that witness' testimony is contradicted by opposing testimony as warranting introduction of evidence of his reputation for truth and veracity.—12 L. R. A. (N. S.) 364, note.

Proving house disorderly by evidence of its general reputation.—20 L. R. A. 611, note.

(a) Evidence that the general reputation of the plaintiff among his neighbors was that he was a tricky man, and would take liberties with paper in his hands, thereby altering its character, is not sufficient to prove that he had perpetrated a fraud on the defendant; nor is it when followed by testimony showing that the note given in evidence had been altered, sufficient or admissible to prove forgery or alteration of the note by the plaintiff.—*Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545. [Cited and annotated in 49 L. R. A. (N. S.) 726, on relevancy of evidence as to character or reputation on issue of fraud or dishonesty in civil case.]

(b) Where a deed is impeached for the grantee's fraud, he cannot offer evidence of his good character and general upright conduct in its support.—*Brooke v. Berry*, 2 Gill 83. [Cited and annotated in 38 L. R. A. 745, on nonexpert opinions as to sanity or insanity; in 49 L. R. A. (N. S.) 726, on relevancy of evidence as to character or reputation on issue of fraud or dishonesty in civil case.]

## § 107. Pecuniary condition.

### Cross-References.

See ante, § 106; post, § 108; "Breach of Marriage Promise," § 27.

Evidence of financial ability to prove value of services, see post, § 112.

Hearsay evidence, see post, § 322.

Opinion evidence, see post, §§ 471, 474, 479, 501.

Action against decedent's estate, see "Executors and Administrators," § 221.

As evidence of payment, see "Payment," § 70.

In action for alienation of affections, see "Husband and Wife," § 333.

Insolvency in general, see "Insolvency," § 99.

Of bankrupt, see "Bankruptcy," § 303.

Of beneficiary of person wrongfully killed, see "Death," § 72.

Of person wrongfully killed, see "Death," § 70.

Poverty of plaintiff or relative in action for personal injuries, see "Damages," § 171.

Relatives of plaintiff not beneficiaries, see "Death," § 64.

(a) In a suit on an injunction bond given by one of the members of a firm to restrain the enforcement of a judgment against himself and the prosecution of a suit against the firm of which he was a member, evidence that the firm had failed near the time the injunction was granted was admissible on the issue that such partner was himself insolvent at that time.—*Hopkins v. State*, 53 Md. 502.

(b) Evidence that a man in 1852 was worth \$30,000, besides owning lands, is admissible as a step towards proving the general truthfulness and honesty of a statement made in 1848, that the same party was then worth \$100,000.—*Pegg v. Warford*, 7 Md. 582.

### § 108. Motive and intent.

#### Cross-References.

See ante, § 107; "Assault and Battery," § 28.

Admissions, see post, § 222.

Competency of testimony, see post, § 151.

Declarations showing intent or motive, see post, § 269.

Hearsay evidence, see post, § 317.

Opinion evidence, see post, §§ 471, 472.

Parol or extrinsic evidence as to intent of parties as to subject-matter of written instrument, see post, § 461.

Presumptions, see ante, §§ 64-66.

Similar facts and transactions, see post, §§ 134-136.

#### Annotation.

Intent of one purchasing goods with knowledge that he cannot pay for them.—44 L. R. A. (N. S.) 21, note.

Evidence of other crimes to show intent.—43 L. R. A. (N. S.) 668, 755, 774, 778, note.

Competency of scrivener or draftsman to testify as to his own or the testator's intention.—38 L. R. A. (N. S.) 91, note.

Admissibility of declarations of beneficiary or executor as to lack of testamentary capacity or undue influence to show intent.—38 L. R. A. (N. S.) 743, note.

Right on trial for homicide to show immorality of deceased as bearing on defendant's motives.—36 L. R. A. (N. S.) 397, note.

Admissibility of testator's declarations on issue of his intention in destroying will.—24 L. R. A. (N. S.) 180, note.

Right of one to testify as to his intent.—

23 L. R. A. (N. S.) 367; 34 L. R. A. (N. S.) 323, notes.

Proof of motive for homicide in resisting arrest.—66 L. R. A. 384, note.

Evidence of other crimes to show motive.—62 L. R. A. 199, note.

(a) Where there is evidence of artifice on the part of the defendant in obtaining money, and of threats calculated to intimidate the donor, and that they might have induced her declarations that she had given him the money, any evidence that will disclose to the jury the real motives and intentions of each of the parties, and show the true nature of the transaction, is admissible.—*Cook v. Carr*, 20 Md. 403.

### § 109. Knowledge.

#### Cross-References.

Similar facts and transactions, see post, § 137.

In action for delay in rafting logs, see "Logs and Logging," § 15.

(a) In an action to revive a judgment by one to whom it had been assigned in trust for the payment of certain debts of the assignor, the defense being a compromise with the assignor, and the question being whether or not the defendant had notice of the alleged purpose of the assignment, or whether such purpose had actually existed, a letter purporting to be from the assignor to the assignee, stating that he had agreed with defendant that the assignee should satisfy the judgment if a certain part of it was paid, was irrelevant, not tending to prove the facts in issue.—*Garey v. Sangston*, 64 Md. 31, 20 Atl. 1034.

(b) H., a guardian, having used the money of his wards to buy land, becoming embarrassed, conveyed the land by an absolute deed to K. upon a pretended consideration, telling K. he did so for the purpose of securing it to his wards. K. afterwards sold the land, and paid the whole purchase money to H. A., a surety on H.'s bond as guardian, was compelled to pay moneys misappropriated by H. On a bill filed by A. to make K. liable for having permitted H. to receive the purchase money of the property, held, that proof of statements by K., made several years after he had sold the property and paid the price to H., to the effect that H. was a rascal, and had been embarrassed, and

conveyed his property to him, K., in order to place it beyond the reach of his creditors, and to secure it to the children, whose money he had used in its purchase and improvement, did not warrant the inference that K. knew, or had reasonable ground to believe, that when he paid said purchase money to the guardian the latter intended to commit a breach of trust.—*Armitage v. Snowden*, 41 Md. 119. [Cited and annotated in 14 L. R. A. (N. S.) 488, on admissibility of previously taken testimony or deposition of party as to personal transaction with adversary after latter's death.]

(c) Information that another person was generally considered insolvent, that this was the general opinion in the neighborhood, with the knowledge that he was selling his goods by consent of the creditors, is, in contemplation of law, notice of insolvency.—*Brooks v. Thomas*, 8 Md. 367. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

#### § 110. Statements and conduct of parties.

##### Cross-References.

As part of *res gestæ*, see post, §§ 125-128.

In action for alienation of affections, see "Husband and Wife," § 333.

In actions for compensation of broker, see "Brokers," § 85.

To show novation, see "Novation," § 12.

(a) In an action by the vendee of land for breach of the covenant to convey, the vendor offered in evidence certain declarations of the vendee made the day before the contract was to be consummated, to the effect that he would not take the land according to the written contract. Held, that this evidence was immaterial, since it did not tend to prove that the vendee had himself committed a breach of the contract.—*Hartsock v. Mort*, 76 Md. 281, 25 Atl. 303. [Cited and annotated in 16 L. R. A. (N. S.) 772, on damages for breach of contract to convey realty.]

(b) In an action for damages for depositing quantities of iron ore in the stream and milldam of plaintiff, depriving him of sufficient water for working his mill, defendant, to show that the plaintiff was not injured to the extent claimed for the want of sufficient water to work his mill, may show that

shortly before the commencement of the action plaintiff took down the mill mentioned in his declaration and built, on the same site, a larger mill, which required greater water capacity, and that the plaintiff always had an abundance of water for the working of such mill.—*Brooke v. Winters*, 39 Md. 505.

(c) On the trial of a petition to set aside the probate of a will, the fact that some of the caveatees were indecently jovial at the funeral of the deceased is inadmissible to prove fraud and collusion.—*Jameson v. Hall*, 37 Md. 221.

#### § 111. Customs and course of business.

##### Cross-Reference.

Admissibility of evidence of custom as to rate or amount of compensation of broker, see "Brokers," § 85.

(a) The existence of a general usage prevailing among mercantile institutions must be established as a fact, and hence evidence of the judgment or opinion of witnesses, deduced from the manner of dealing in a few instances in particular institutions, is inadmissible to establish a custom.—*Chesapeake Bank v. Swain*, 29 Md. 483. [Cited and annotated in 21 L. R. A. 445, on banking customs; in 52 L. R. A. 608, on party's books of account as evidence in own favor.]

(b) Evidence by a justice of the peace that, where called upon by parties to prepare conveyances for them, it was his habit to inquire whether they desired absolute or conditional conveyances, that he had no doubt such inquiry was made in the present instance, that he never failed to shape the paper according to the expressed object of the parties, and that he was also in the habit of reading the papers after they were written to those for whom they were prepared, and especially if they were workmen, was inadmissible.—*Pocock v. Hendricks*, 8 G. & J. 421.

#### § 112. Value of services.

##### Cross-References.

See post, § 116.

Hearsay evidence, see post, § 317.

Judicial notice, see ante, § 18.

Opinion evidence, see post, §§ 471, 487, 501, 523, 543.

In actions for compensation of brokers, see "Brokers," § 85.

Of justice, see "Justices of the Peace," § 18.

**Annotation.**

Admissibility, on question of damages for personal injuries, of amount paid for services of substitute during incapacity.—30 L. R. A. (N. S.) 737, note.

Evidence of earnings in higher position on question of damages for injury to person who was in line of promotion.—1 L. R. A. (N. S.) 1150, note.

### § 113. Value or market price of property.

**Cross-References.**

See "Carriers," §§ 133, 408.

Admissions, see post, § 215.

Conclusiveness of evidence of market value, see post, § 601.

Evidence tending to mislead or confuse jury, see post, § 146.

Hearsay evidence, see post, § 317.

Judicial notice, see ante, § 18.

Materiality of evidence, see post, § 142.

Mortality tables as evidence of value of life estates, see post, § 364.

Opinion evidence, see post, §§ 471, 472, 474, 486, 489, 501, 522, 524, 525, 543.

Sales of, and price paid for property similarly situated as evidence of value, see post, § 142.

Sales, offers to purchase or sell, and market quotations, as hearsay evidence, see post, § 323.

Speculative evidence, see post, § 145.

In action by owner of property taken for public use, see "Eminent Domain," § 297.

In actions for compensation of broker, see "Brokers," § 85.

In condemnation proceedings, see "Eminent Domain," § 202.

**Annotation.**

Determination of the value of the use or rental of property.—44 L. R. A. (N. S.) 499, note.

Evidence as to price paid for other property by party seeking to condemn property for public use.—43 L. R. A. (N. S.) 985, note.

(a) Where, on an inquiry as to the market value of an article at a specific time and place, it appears that no market value exists there, the value at other places may be shown, if they are sufficiently near to show, in connection with the cost of transportation, etc., the value at the place in question, and the market is one legally open to the parties, the question as to what places are sufficiently near being addressed to the court's sound discretion, the determining consideration being what evidence is practically available to the litigants; and market value in the controlling market may be shown, whatever its distance, the adverse party being entitled to show why the mar-

ket price so shown is unduly enhanced or depressed.—*Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 Atl. 702.

(b) The value of property, contract for sale of which was breached, may not be proved by evidence of specific offers to purchase it.—*Horner v. Beasley*, 105 Md. 193, 65 Atl. 820. [Cited and annotated in 16 L. R. A. (N. S.) 771, on damages for breach of contract to convey realty.]

(c) In an action on a fire policy it appeared the loss occurred July 23rd, 1893, and one of the plaintiffs testified the value of the goods insured at that time was about the same as on February 23rd. *Held*, that it was not error to permit plaintiffs to ask a witness to state the value of the goods in February or March, 1893.—*Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13.

(d) In an action against an elevated railway company for damages to the rental value of abutting property, it was error to exclude testimony of plaintiff's tenant that the rent of the premises had been reduced on account of the construction and operation of the railway.—*Birch v. Lake Roland El. Ry. Co.*, 83 Md. 362, 34 Atl. 1013.

(e) The prices realized at voluntary sales of land in question, made within a reasonable time theretofore, are admissible to show its present value.—*City of Baltimore v. Smith & Schwartz Brick Co.*, 80 Md. 458, 31 Atl. 423.

(f) In an action for breach of contract to carry cotton from Savannah to Bremen via Baltimore, evidence as to the price of cotton at Baltimore was properly excluded, since the damage, if any, was the value of the cotton at Bremen, the place of delivery.—*Lazard v. Merchants' & Miners' Transp. Co.*, 78 Md. 1, 26 Atl. 897.

(g) In an action to recover for coal mined and carried away from plaintiff's land, evidence of the value of the facilities and equipments erected by the defendant for use in conveying coal from his own land was not admissible as bearing on the question of the value of the coal taken.—*Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560.

(h) The value put on property by its owner when exchanged for other property cannot



be considered reliable evidence of its market value in an action to set aside, on the ground of fraud, a deed conveying such property.—*Skidy v. Cutter*, 54 Md. 674.

(i) C., by written agreement under seal, agreed to convey to E. a tract of land, but failed to deliver possession of 5½ acres of the tract, on which there was a mill site. *Held*, in an action by the vendee, that, in order to determine the rental value of the 5½ acres, evidence was admissible to show that there was a mill site on it.—*Clagett v. Easterday*, 42 Md. 617. [Cited and annotated in 52 L. R. A. 244, on lost profits of sale or purchase as damages; in 16 L. R. A. (N. S.) 768, on damages for breach of contract to convey realty.]

(j) The plaintiff sued upon the defendant's agreement to refund any deficiency arising upon money advanced for beef shipped by the defendant to the plaintiff's principal in London for sale on the defendant's account. Both the plaintiff and defendant were residents of Maryland. The plaintiff offered evidence tending to show that the beef was not of the best quality when inspected in London, or equal in value to the sum named in the invoice. *Held*, that the defendant, having proved that the beef was of the best quality when packed, and that it was put up with great care, might show its value in the port of shipment at the time it was shipped.—*Capron v. Adams*, 28 Md. 529.

(k) Corporate stocks or bonds are themselves no evidence of their market value.—*City of Baltimore v. Norman*, 4 Md. 352.

(l) In determining the value of land in issue, it is competent for the jury to consider the actual rents derived therefrom as equaling a certain per cent. of such value.—*Brooke v. Berry*, 2 Gill 83.

(m) In the absence of direct positive proof of the value of the article at the time and place specified, the jury may infer such value from the prices at that time, at other places in the neighborhood, and particularly at a place where such articles are sent from the place specified for sale.—*Williamson v. Dillon*, 1 H. & G. 444.

#### § 114. Facts relevant to particular issues.

##### Cross-Reference.

Similar facts and transactions, see post, § 125.

(a) A witness, who has given testimony of the occurrence of any event at a particular period, the time of which is material, can strengthen his evidence by proving that it happened at the same time with, or before, or after, a particular epoch, or transaction, the date of which can be proved with greater certainty.—*Goodhand v. Benton*, 6 G. & J. 481.

(b) On the question of the execution of a bond, where forgery is claimed, evidence is admissible to show that the obligor was illiterate, and that the two subscribing witnesses lived about 60 miles from the house in which the bond was executed, and that such witnesses and the obligee were persons of generally bad reputation.—*Sides v. Schnebly*, 3 H. & McH. 243.

#### § 115. Matters showing relevancy of other facts.

#### § 116. Matters explanatory of facts in evidence or of inferences therefrom.

##### Cross-References.

See ante, § 112.

Admissibility of deed, see post, § 372.

Rebuttal of presumptions of fact, see ante, § 89.

(a) In an action on an account, two of the defendants having died while it was pending, A. testified that, being in plaintiff's employment, he had presented to S., the surviving defendant, a bill for coal shipped to defendants, and the latter had proposed that, if plaintiff would ship a further amount of coal to his firm, he would pay for the same, and also pay the previous bill; and A. testified, further, that no one else was present at this interview. Plaintiff then offered to prove by his own testimony that A. had communicated the proposition to him, that it had been accepted by the firm of which plaintiff was a member, and that the further supply of coal had been shipped. *Held*, that plaintiff's evidence was admissible.—*Simmons v. Haas*, 56 Md. 153.

(b) Though the testimony of a witness be

irrelevant or legally insufficient to establish an issue, if the case rested on such testimony alone, yet where it is rebutting evidence, and constitutes one of many items of proof, it ought not to be withheld from the jury.—*Townshend v. Townshend*, 6 Md. 295.

(c) In an action against a sheriff for falsely returning a *fi. fa. nulla bona*, a witness having proved that a distillery was carried on as usual by the judgment defendant during a certain period, and hog pens were as full as usual, it was error not to allow plaintiff to prove what was the usual number of hogs raised and what the daily produce of the distillery.—*Keedy v. Newcomer*, 1 Md. 241.

(d) Where evidence had been offered for the purpose of establishing a parol gift of a negro slave by a deceased testatrix to the plaintiff, and the defendant had read to the jury a letter from the plaintiff to him, written subsequently to the date of the testatrix's will, inconsistent with the idea of exclusive property in the plaintiff, the defendant was permitted to read the will, though executed after the alleged gift, for the purpose of explaining the plaintiff's letter, and showing his recognition of the right of the testatrix to bequeath the property.—*Divers v. Fulton*, 8 G. & J. 202.

#### § 117. Evidence irrelevant unless preceded or followed by other evidence.

(a) Where, in an action of trespass, there is a question as to the true location of the land, a deed to plaintiff for a moiety of the land is admissible, without previously showing the title of the grantors in such deed to the land, if plaintiff afterwards shows that such grantors had the right to make the conveyance.—*Lowes v. Holbrook*, 1 H. & J. 153.

#### (B) RES GESTÆ.

##### *Cross-References.*

Declarations of person since deceased as *res gestæ*, see "Witnesses," § 163.

Declaration of testator showing exercise of undue influence, see "Wills," § 165.

In criminal prosecutions, see "Criminal Law," §§ 363-368.

#### § 118. Nature of doctrine in general.

(a) To make declarations a part of the *res gestæ*, they must be contemporaneous with the main fact; but, in order to be con-

temporaneous, they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous.—*Handy v. Johnson*, 5 Md. 450. [Cited and annotated in 19 L. R. A. 737, on declarations as part of *res gestæ*.]

#### § 119. Facts forming part of same transaction.

(a) In an action on a note given by the purchaser of mortgaged land, who assumed the mortgage, the original note secured by the mortgage, and the agreement between the vendor and purchaser, in pursuance of which the note in suit was given, were properly admitted as *res gestæ*.—*McCann v. Preston*, 79 Md. 223, 28 Atl. 1102.

(b) In an action against a surety on a bond by an agent, it was shown that the agent, in a letter to the principal expressing his intention to take the agency, had stated that defendant would be offered as surety on the bond. Held, that the letter formed a constituent part of the transaction in which the bond was given, and, as such, was properly admissible in evidence.—*Roberts v. Woven Wire Mattress Co.*, 46 Md. 374.

(c) In an action of ejectment, where the lessor of the plaintiff claimed title as trustee in insolvency of the defendant, who relied upon an outstanding title in a third party by a prior deed from himself, said third party having given a bond to reconvey to the defendant at the same time, parol evidence was offered of an agreement between the defendant and said third party by which the latter agreed to purchase the land and to pay a certain judgment and other debts of the defendant, and that he paid the balance of the purchase money, and that the defendant agreed to rent said land of said grantee, and that he paid one year's rent. Held, that such evidence was admissible as part of the *res gestæ*, and to rebut the plaintiff's impeachment of the deed, on the ground that the defendant at the time contemplated applying for the benefit of the insolvent laws.—*Waters v. Riffin*, 19 Md. 536.

**§ 120. Acts and statements accompanying or connected with transaction or event.**

*Cross-References.*

Nature of doctrine in general, see ante, § 118.

In actions for compensation of broker, see "Brokers," § 85.

**§ 121.—In general.**

*Cross-References.*

Declarations of person in possession or control as to title or possession, see post, § 273.

Facts forming part of same transaction, see ante, § 119.

*Annotation.*

Does the fact that one was not a participant or actor in an accident or affray render his statements or exclamations inadmissible as res gestæ.—20 L. R. A. (N. S.) 133; 33 L. R. A. (N. S.) 109, notes.

How near the main transaction must declarations be made in order to constitute part of the res gestæ.—19 L. R. A. 733, note.

(a) There being evidence, in an action to recover \$250 paid by plaintiff on the purchase price of lots, that the money was paid after the promise to him that a contract of sale of a particular character containing the full terms of the proposed purchase was to be executed, and that the next morning a written contract was tendered him for execution, his testimony that he took the paper, handed to him at the time of payment as a receipt for \$250 is admissible as part of the res gestæ, and as tending to show that such paper, purporting on its face to be only a statement of account charging him with \$4,000 as the price of the lots, and crediting him with the \$250, and signed by him, only as to a printed direction therein as to who should be grantee in the deed, was not intended as a contract of sale or as a memorandum thereof.—*Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275.

(b) Where the defendant town, on an issue as to the existence of an alley, in trespass quare clausum fregit introduces evidence of a public and uninterrupted use of the alley for a certain time, the plaintiff may show that a former owner of plaintiff's lot closed the alley during such time, declaring that he so closed it to prevent the public from acquiring a right to use it.—*Town of New*

*Windsor v. Stocksedale*, 95 Md. 196, 52 Atl. 596.

(c) On the issue of breach of warranty in the parol sale of fertilizers, and failure of consideration for a note given therefor, letters of the seller and his agents, and of the purchaser, relative to the sale, were competent evidence.—*Walker v. Pus*, 57 Md. 155.

(d) In a proceeding to have a voluntary deed declared fraudulent and void as against the rights of the widow of the grantor, his declarations to the conveyancer with respect to the deed, and his object and purpose in making it, being contemporaneous with its preparation and execution, are admissible in evidence.—*Sanborn v. Lang*, 41 Md. 107.

(e) In an action upon a contract, letters from the plaintiff to an agent in whose name the contract was made, and letters from the agent to the plaintiff, are admissible, as part of the res gestæ, to prove that the contract was made in behalf of the plaintiff.—*Oelrichs v. Ford*, 21 Md. 489. [Cited and annotated in 53 L. R. A. 522, on use of books of account as evidence on issues between other parties; in 28 L. R. A. 229, on right in action by undisclosed principal to defenses available in action by agent.]

(f) In an action in which the defense was that plaintiff was trespassing on defendant's land, and plaintiff set up a right of way over the land, the testimony of a witness that a road existed near the place of the alleged assault is precise enough to go to the jury, as tending to establish the right of way, in the absence of objection on account of indefiniteness. The right of plaintiff does not depend on his being at the time in the exact line of the road, as he might have been driven or diverted from it by the act of defendant.—*Du Val v. Du Val*, 21 Md. 149.

(g) Where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible for the purpose of showing its true character.—*Curtis v. Moore*, 20 Md. 93.

(h) Where, in a suit to obtain a decree for the sale of mortgaged property belonging to a married woman, the defense is set up that the mortgage was executed by the wife un-

der duress, the declarations and acts of the parties inducing the execution of the mortgage are admissible as a part of the *res gestæ*.—*Central Bank of Frederick v. Cope-land*, 18 Md. 305. [Cited and annotated in 41 L. R. A. (N. S.) 1169, 1181, on impeachment of certificate of acknowledgment.]

(i) The declarations of the husband, made at the time he was passing his account as executor and taking a release from his wife, who was a devisee, are admissible, in behalf of the wife and against an assignee of the executor, as part of the *res gestæ*, to show that the release was executed without consideration and as a matter of form.—*Miller v. Williamson*, 5 Md. 219.

(j) A. and B. contemplated marriage, and their respective fathers stipulated by parol that the father of B. should purchase a farm for the use of his daughter and her husband, and that A.'s father should put upon it certain personal property. Pursuant thereto, the farm was purchased, and the husband and wife put in possession thereof, by the father of B.; and, in part performance of his part of the agreement, the father of A. put upon the farm the negroes in question. Held, that, though the agreement between the parents was void under the statute of frauds, yet, in an action of replevin brought by the executor of A.'s father against A., to recover back the negroes, the declarations of the father of the son were admissible to prove the circumstances connected with the gift, and his motives in making it.—*Tuck v. Bowie*, 1 Md. 87.

(k) Proof that the neighbors of the debtor (against whom the *fi. fa.* for a return of which *nulla bona* the suit is brought against the sheriff) cultivated a certain proportion or number of acres of his land cannot be admissible to prove the number of acres of land which the debtor, the *fi. fa.* against whom was returned *nulla bona*, was accustomed to cultivate, or cultivated in any one year.—*Keedy v. Newcomer*, 1 Md. 241.

(l) The parol declarations of the husband that he had obtained a receipt from his wife, who was one of the legatees in the will, as a matter of form, to enable him to settle an account as executor in the Orphans' Court, and not upon actual payment, made at the

time of settling, were held to constitute a part of the *res gestæ*, and, as such, admissible to contradict and overthrow the receipt, though they might operate in favor of the wife.—*Williamson v. Morton*, 2 Md. Ch. 94.

(m) Declarations of a party to an assignment assailed as fraudulent, made at the time, and showing that it was only executed after urgent persuasion on the part of the creditor, are admissible, as a part of the *res gestæ*, to explain the motive and circumstances surrounding the assignment.—*Powles v. Dilley*, 9 Gill 222. [Cited and annotated in 21 L. R. A. 418, on right to impeach one's own witness; in 41 L. R. A. (N. S.) 3, on admissibility of vendor's declaration out of court, as to purpose in making transfer attacked as fraudulent.]

(n) In replevin of a slave by an executor from one claiming by grant from the testator, evidence that testator had sent a number of slaves to work on defendant's farm, among whom was the slave in controversy, and that testator said that he "loaned" the slaves to defendant, was admissible as part of the *res gestæ*.—*Smith v. Morgan*, 8 Gill 133. [Cited and annotated in 49 L. R. A. (N. S.) 702, on admissibility of declarations as to ownership by one in possession of personalty.]

(o) Certain negroes, owned by A., remained in his possession until 1832, when they were sent to the farm of his daughter. They continued there until 1845, when they were replevied by the executor of A. from B. The defendant, B., proved that A., in 1841 or 1842, said, he had given nearly all his negroes to his sons and daughter. The plaintiff then proposed to prove the declarations of the daughter, then sole, that her father had said he would give her one-third of everything on his farm, except negroes, and would loan her one-third of them during her life, and after his death, would give her one-half of them. Held, that, as the defendant relied on the daughter's right of property to maintain his pleas, the declarations made by her about the time she obtained the slaves as to the nature and character of her possession might be used to rebut the evidence offered by the defendant to prove property in her, though her right of prop-

erty would not be affected by any decision in this case.—*Garner v. Smith*, 7 Gill 1.

(p) A bill of exchange, indorsed in blank by defendant, was negotiated with one who indorsed it specially to plaintiff. On presentation for acceptance it was refused, protested, and returned by plaintiff to his special indorser, who erased his special indorsement and by letter retransmitted it to plaintiff, claiming the amount of bill from him, informing him that it would be charged to his account. *Held*, in an action by plaintiff against the defendant, the indorser in blank, that the letter was admissible as a part of the *res gestæ* of the surrounding circumstances of the transaction.—*Burckmyer v. Whiteford*, 6 Gill 1.

(q) Declarations made by a deputy sheriff, where offered to affect a sale, on the ground that they are part of the *res gestæ*, must appear to have been made at the time of the sale.—*Miles v. Knott*, 12 G. & J. 442. [Cited and annotated in 19 L. R. A. 736, 752, on declarations as part of *res gestæ*.]

(r) Declarations of a party are admissible in his own favor, where such declarations are necessary to explain an act which takes its character from the design and intention of the party who does it; hence, declarations of a party, while preparing to remove from the state, as to his intentions about becoming a resident of another state, are admissible in his favor.—*Cross v. Black*, 9 G. & J. 198.

(s) Declarations made by the owner of slaves, when about to remove with them from the state, and when making preparations for that purpose, are admissible evidence, upon a petition by such slaves for their freedom, to show the place to which the owner intended to move.—*Cross v. Black*, 9 G. & J. 198.

(t) Where partners became embarrassed about the 17th of March, and applied for a discharge under the insolvency laws on the 27th, and the inquiry was whether a certain transfer of property on the 19th to defendant, a creditor, was made under the expectation of becoming insolvent debtors, declarations of one of the partners, made a few days before, to the plaintiff, that if certain creditors came on them they must stop pay-

ment or petition; bills of sale of furniture executed by them on the 21st, and declarations of one of them, at the same time, that the grantee therein had advanced money to them, and they wished to secure him in consequence of the situation they were placed in; entries in the daybook, dated the 19th, 20th, 21st and 23rd, showing the delivery of goods and notice to various persons, and, among others, to defendant,—were admissible, as a part of the *res gestæ*, for the purpose of enabling the jury to find when the intent to seek relief under the insolvent law originated.—*Kolb v. Whitely*, 3 G. & J. 188. [Cited and annotated in 41 L. R. A. (N. S.) 5, 7, on admissibility of vendor's declarations out of court as to purpose in making transfer attacked as fraudulent.]

(u) If, on a joint assault and battery, plaintiff severs his actions, all the facts occurring at the time of the assault and battery may go to the jury at the trial of either of the actions.—*Barnes v. Gray*, 5 H. & J. 436.

(v) A party may offer in evidence his own declarations, made at the time, to explain the object of his writing a certain letter.—*Duvall v. Medart*, 4 H. & J. 14.

(w) Where plaintiff sues to enforce an award, the whole correspondence between the parties relative to the submission is admissible, so far as it explains the terms of the reference and what it was the intent of the parties to submit.—*Walsh v. Gilmor*, 3 H. & J. 383, 6 Am. Dec. 503.

## § 122.—Before transaction or event.

(a) In an action for negligence causing the fright and running away of the plaintiff's mules, and his injury, the declaration of the driver of the wagon from which bales of paper, which caused the fright, had fallen, made near where the bales fell off and just before they did so, were admissible where there was evidence that the driver was the agent of the defendant, as declarations in the course of his employment, as part of the *res gestæ*.—*Cecil Paper Co. v. Nesbitt*, 117 Md. 59, 83 Atl. 254.

(b) In an action against an estate, declarations of a testatrix *held* inadmissible as *res gestæ* as not relevant to the subject of in-

quiry.—*Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161.

(c) Declarations of deceased, made just before boarding a train at one of defendant's depots to go to another of defendant's depots in the same place, where he could get a ticket for W., that he was going to W., are part of the *res gestæ*, he having been killed by a train at the second depot while crossing an intervening track on his way to such depot from the train on which he had come from the other depot, and are admissible as bearing on his right to be where he was killed, that being on the customary way from the train to the ticket office.—*Baltimore & O. R. Co. v. State*, 81 Md. 371, 32 Atl. 201.

(d) While an action of slander was pending, defendant therein made a bill of sale to a third person, and on recovering a judgment plaintiff attached the goods in the hands of such third person, alleging that the conveyance was fraudulent. *Held*, that acts and declarations of the defendant, made prior to the institution of the slander action, but connected with the bill of sale in question, were admissible.—*Cooke v. Cooke*, 43 Md. 522.

(e) In an action of trover by the trustees of insolvent debtors, in order to prove the contemplated or apprehended insolvency of the debtors at the time of their transfer to the defendants, the plaintiffs offered in evidence certain declarations of one of the insolvents, a short time prior to the transfer, relative to the pecuniary embarrassments of the firm, and also certain entries in their daybooks, for the purpose of showing that they were dispossessing themselves of their property generally with a view to becoming insolvent, and to enable the jury to ascertain the time when such view or expectation originated. *Held*, that the evidence was admissible as part of the *res gestæ*.—*Kolb v. Whitely*, 3 G. & J. 188. [Cited and annotated in 41 L. R. A. (N. S.) 5, 7, on admissibility of vendor's declarations out of court as to purpose in making transfer attacked as fraudulent.]

### § 123.—After transaction or event.

*Cross-Reference.*

See post, § 126.

(a) In an action against an estate, declarations of testatrix, made some time after the contract, *held* not admissible as *res gestæ*.—*Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161.

(b) In an action for coercing breach of a contract of sale made with a third party, declarations made more than six months or a year after the wrong were properly excluded as being too remote.—*Sumwalt Ice Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 Atl. 48.

(c) In an action against a street railway company for personal injuries received in a collision between plaintiff's wagon and defendant's car, where it appeared that about the time of the accident some one wearing the uniform of defendant company, with a conductor's badge, rushed into a saloon, asking for a telephone, and stating that they had struck a wagon at a certain point; that he appeared very much frightened and excited; that those hearing him reached the place stated in less than a minute, and found the broken wagon and the car without a conductor—the statements were admissible as part of the *res gestæ*, as against an objection that the one making the statements was not shown to be the conductor of the car.—*United Rys. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379. [Cited and annotated in 42 L. R. A. (N. S.) 941, on statements some time after accident as *res gestæ*.]

(d) Declarations as to "how it happened," made by A., who was riding with plaintiff when he was thrown from a carriage, and who was himself thrown out a block further on, made after they had gone a block to a drug store, to one who had come the same distance after hearing of the accident, and while plaintiff's wound was being bound up, are not admissible as part of the *res gestæ*.—*City of Baltimore v. Lobe*, 90 Md. 310, 45 Atl. 192. [Cited and annotated in 42 L. R. A. (N. S.) 963, on statements some time after accident as *res gestæ*.]

(e) A horse-car driver's statement about an accident, made to plaintiff's brother half an hour after the accident, is not admissible against the company.—*Dietrich v. Baltimore & H. S. Ry. Co.*, 58 Md. 347. [Cited and annotated in 42 L. R. A. (N. S.) 922, on

statements some time after accident as *res gestæ*.]

(f) Evidence of conversations between a defendant and his mortgagee of the property attached at suit of plaintiff for work done thereon, held subsequent to the doing of the work, and not in the presence of the plaintiff, is not admissible against him.—*Leffler v. Allard*, 18 Md. 545.

(g) Declarations of a party, made after he had signed a bond, that he signed it with the understanding that another person was to sign it as surety, are not admissible as part of the *res gestæ*.—*Miller v. State*, 8 Gill 141.

(h) Evidence of a conversation which took place between an agent of the defendant and a witness some 8 or 10 days after the loss of a package, for the value of which it was sought to hold the defendants liable, was incompetent; since such conversation constituted no part of the *res gestæ*, and therefore was not binding on the principal.—*Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co.*, 11 G. & J. 28.

#### § 124. Acts and statements of person sick or injured.

#### § 125.—In general.

#### § 126.—Statements as to cause of injury.

##### Annotation.

Statements made some time after accident as *res gestæ*.—42 L. R. A. (N. S.) 917, note.

(a) A declaration as to the cause of an accident, made by the injured person after removal to a hospital, was not admissible as a part of the *res gestæ*.—*State v. Baltimore & O. R. Co.*, 117 Md. 280, 83 Atl. 166.

#### § 127.—Statements as to and expressions of personal injury or suffering.

(a) In an action for injuries to plaintiff through being struck by defendant's wagon, plaintiff's wife was properly permitted to testify that plaintiff complained of suffering from his injuries.—*Geiselman v. Schmidt*, 106 Md. 580, 68 Atl. 202.

(b) In an action for breach of warranty of soundness of a slave, the declarations of the slave, although admissible to prove the present nature of a disease, and her present

condition, must be confined to the disease under which the slave is laboring at the time she makes her declarations, and cannot be so extended as to make those declarations evidence to show that she had been diseased at a period anterior to that time, or that the disease had existed for any considerable length of time.—*McCeney v. Duvall*, 21 Md. 166.

#### § 128.—Statements to physicians.

##### Cross-Reference.

Opinion evidence based on statements, see post, § 550.

#### (C) SIMILAR FACTS AND TRANS-ACTIONS.

##### Cross-References.

Results of experiments, see post, § 150.

Abandonment of railroad right of way, see "Railroads," § 82.

Actions against carrier for failure to deliver goods, see "Carriers," § 94.

Actions against municipality for injuries, see "Municipal Corporations," § 742.

Actions against railroad companies for injuries at crossings, see "Railroads," § 347.

Actions against railroad companies for injuries by fire, see "Railroads," § 481.

Actions against railroad companies for injuries to animals, see "Railroads," § 442.

Actions for conversion, see "Trove and Conversion," § 36.

Actions for damages arising from municipal improvement, see "Municipal Corporations," § 404.

Actions for ejection of passenger or intruders, see "Carriers," § 381.

Actions for failure to construct cattle guards, see "Railroads," §§ 102, 104.

Actions for false imprisonment, see "False Imprisonment," § 26.

Actions for injuries from blasting, see "Explosives," § 12.

Actions for injuries from defect in streets or sewers, see "Municipal Corporations," §§ 818, 845.

Actions for injuries incident to operation of mines, see "Mines and Minerals," § 125.

Actions for injuries to persons on or near railroad track, see "Railroads," § 397.

Actions for injuries to persons working on or about cars, see "Railroads," § 282.

Actions for loss of or injury to passenger's baggage, see "Carriers," § 408.

Actions for malicious prosecution, see "Malicious Prosecution," § 59.

Actions for royalty under mining lease, see "Mines and Minerals," § 70.

Actions for trespass, see "Trespass," § 45.

Actions for wages of servant, see "Master and Servant," § 80.

Actions for wrongful discharge of servant, see "Master and Servant," § 40.

Actions on adverse claim to mining location, see "Mines and Minerals," § 38.

Breach of contract of carriage, see "Carriers," § 276.  
 Carriage of live stock, see "Carriers," § 228.  
 Construction of contract of employment, see "Master and Servant," § 8.  
 Dedication, see "Dedication," § 43.  
 Establishment of boundaries, see "Boundaries," § 36.  
 Evidence of condition of highways at other times or places as bearing on issue of negligence, see "Highways," § 210.  
 Evidence of other transactions as proof of agency or authority of agent, see "Insurance," § 76; "Principal and Agent," §§ 20, 120.  
 Evidence of practice of other towns as bearing on question of what constitutes a defect in highway, see "Highways," § 210.  
 Evidence of undue influence, see "Wills," § 164.  
 Evidence relating to conspiracy, see "Conspiracy," § 19.  
 Evidence relating to nuisances, see "Nuisance," §§ 33, 49, 76.  
 Injuries by animals, see "Animals," §§ 85, 100.  
 Injuries from construction of railroad, see "Railroads," § 114.  
 Injuries from defects in bridges, see "Bridges," § 46.  
 Injuries from electric current, see "Electricity," § 19.  
 Injuries from operation of street railroads, see "Street Railroads," § 113.  
 Injuries to passengers, see "Carriers," § 317.  
 In prosecution for obscenity, see "Obscenity," § 16.  
 Investments by executors, see "Executors and Administrators," § 506.  
 Justification of libel or slander, see "Libel and Slander," § 110.  
 Loss of or injury to cattle in hands of agister, see "Animals," § 23.  
 Loss of or injury to goods in transit, see "Carriers," § 133.  
 Nature and extent of damages, see "Damages," §§ 165-182.  
 Operation of electric meters, see "Electricity," § 11.  
 Other offenses, see "Criminal Law," §§ 369-374.  
 Proof of earning capacity of person wrongfully killed, see "Death," § 67.  
 Revocation of will, see "Wills," § 296.  
 Similar accidents on highways, or absence thereof, see "Highways," § 210.  
 To show negligence or contributory negligence, see "Carriers," § 345; "Master and Servant," § 270; "Negligence," § 125; "Street Railroads," § 113.

## § 129. Relation to issues in general.

### Cross-Reference.

Fraud, see post, § 135.

### Annotation.

Evidence of other crimes in prosecution for rape or assault to rape.—48 L. R. A. (N. S.) 236, note.

Evidence of other assaults made at about the time of one for which action for damages is brought.—44 L. R. A. (N. S.) 1173, note.

Evidence of other crimes in prosecution for obtaining money or property by fraudulent means.—43 L. R. A. (N. S.) 667, note.

Evidence of other crimes in prosecution for forgery or uttering forged instrument.—43 L. R. A. (N. S.) 754, note.

Evidence of other crimes in prosecution for larceny.—43 L. R. A. (N. S.) 776, note.

(a) While the facts of the particular transaction involved are ordinarily the only legitimate evidence, facts occurring before or after the transaction in suit are admissible where they afford a fair and reasonable presumption of the fact to be tried.—*Baltimore Refrigerating & Heating Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066. [Cited and annotated in 43 L. R. A. (N. S.) 1190, on presumption and burden of proof as to care or negligence in respect to subject of bailment.]

(b) In an action for the negligent failure of a carrier to supply cars on demand, a requisition for cars for another time and for other goods is inadmissible.—*Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co.*, 104 Md. 693, 65 Atl. 425.

(c) Evidence of estimates and representations made by the president and chief engineer of a railroad company to other contractors than the plaintiff, and not brought to plaintiff's knowledge, were not admissible in an action against the company based on the ground that certain estimates and representations made by the president and engineer to the plaintiff were false and fraudulent.—*Phelps v. George's Creek & C. R. Co.*, 60 Md. 536. [Cited and annotated in 23 L. R. A. (N. S.) 375, 386, 401, on right of one to testify as to his intent.]

(d) In trespass for mesne profits, evidence is not admissible of what profits accrued to a proprietor adjoining the defendant, to show how much was made by the defendant on the tract occupied by him.—*Mitchell v. Mitchell*, 10 Md. 234.

(e) In an action against a sheriff for a false return of nulla bona to a fi. fa., evidence that another fi. fa. against the same defendant had been returned "Made" the year before the fi. fa. in question was re-



turned is inadmissible to show that the execution defendant had property to satisfy the judgment, such evidence being too remote.—*Keedy v. Newcomer*, 1 Md. 241.

### § 130. Exclusion as res inter alios acta.

#### Cross-References.

See "Witnesses," § 414.

Contradiction of witness, see "Witnesses," § 406.

(a) In an action on an undertaking by defendant to pay plaintiff for articles removed from a farm which plaintiff had bought, evidence of a suit by witness against plaintiff, in which plaintiff pleaded a set-off, and furnished a bill of particulars embracing the articles in question, and that such suit was settled and released, is immaterial, in the absence of further evidence of the terms and conditions of the settlement.—*Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342.

(b) In an action on notes, the record in a former action by plaintiff against another defendant, on notes not connected with those involved in the pending action, is not admissible on the ground that it contains evidence on the question of fraud, and for the purpose of showing the relations between plaintiff and a witness in both cases.—*Gisriel v. Burrows*, 72 Md. 366, 20 Atl. 240.

(c) In an action by one claiming an interest in property under a trust deed against the trustee to enjoin him from selling the property, an agreement between the grantor of the trustee and another, who were leaseholders of the property, setting forth a settlement of accounts between them and their respective interests in the property covered by the trust deed, is not admissible in evidence against the complainant.—*Treiber v. Lanahan*, 23 Md. 116.

(d) In a suit brought by A. to recover for the use and occupation by B.'s intestate of a farm, in which the intestate of A. had an undivided interest, B. offered in evidence the proceedings of the Orphans' Court, in the case of a reference of matters in dispute between one C. and A.'s intestate and others, children of D., who died seised of the land, and from whom it descended to A.'s intestate and the other children, and that the arbitrators had charged said D. the sum now claimed. The proceedings were rejected,

because res inter alios acta.—*Dement v. Stonestreet*, 1 Md. 116.

### § 131. Similarity of conditions.

#### Annotation.

Admissibility of evidence of condition, before and after accident, of property whose defects are alleged to have caused injury.—32 L. R. A. (N. S.) 1084, note.

### § 132. Showing physical or mental condition.

#### Cross-References.

Showing knowledge, see post, § 137.

Contributory negligence of drunken person, see "Negligence," § 132.

Of person committing assault, see "Assault and Battery," § 29.

Testamentary capacity, see "Wills," § 53.

(a) A witness familiar with the grantor in a deed for a long time, both before and after its execution, may, after testifying to the grantor's state of mind before its execution be further examined as to acts of insanity subsequent to that period.—*Negro Jerry v. Townshend*, 9 Md. 145.

### §§ 133-136. Showing intent or malice or motive.

#### Cross-Reference.

Ownership in general, see "Property," § 9.

#### Fraud.

Custom or course of business, see post, § 139.

Exclusion as res inter alios acta, see ante, § 130.

Part of series showing system or habit, see post, § 138.

Relation to issues in general, see ante, § 129.

Effect of fraud in one or more separate transactions, see "Fraudulent Conveyances," § 21.

Evidence in action for deceit in general, see "Fraud," §§ 52-57.

(a) On an issue of fraud and undue influence in the execution of a will, findings of a jury on similar issues, previously tried, with reference to a subsequent will, probate of which was denied, held inadmissible as evidence showing similar frauds; the parties to the two proceedings not being the same.—*Packham v. Glendmeyer*, 103 Md. 416, 63 Atl. 1048.

### § 137. Showing knowledge.

#### Cross-References.

See "Fraud," § 54.

Notice of defect in street, see "Municipal Corporations," § 818.

### § 138. Part of series showing system or habit.

#### Cross-References.

See "Carriers," §§ 133, 134; "Taxation," § 810.

Action for injury to person working on or about cars, see "Railroads," § 282.

Evidence to show habits of persons injured, see "Negligence," § 132.

Overloading wagon and driving at an unreasonable speed, see "Highways," § 184.

### § 139. Showing custom or course of business.

#### Cross-References.

See ante, § 129; "Carriers," § 94; "Executors and Administrators," § 221; "Master and Servant," §§ 6, 7.

### § 140. Showing methods of preventing injury.

#### Cross-Reference.

See "Nuisance," § 33.

(a) A witness, in an action for breach of contract to re-ice, at certain points on the route, a car of tomatoes, may testify as to his experience under similar conditions with cars which had gone through iced at such points.—*Pennsylvania R. Co. v. Orem Fruit & Produce Co.*, 111 Md. 356, 73 Atl. 571.

### § 141. Other injuries or accidents from same or similar causes.

#### Cross-References.

Admissibility in action for injuries to hirer of horse from liveryman from runaway of evidence of similar runaway, see "Livery Stable Keepers," § 11.

Damages to tenant's goods, see "Landlord and Tenant," § 169.

From flooding of lands, see "Waters and Water Courses," § 179.

Other injuries from defects in turnpikes, see "Turnpikes and Toll Roads," § 49.

#### Annotation.

Other accidents as evidence of negligence on part of municipality in respect to highway.—20 L. R. A. (N. S.) 665, note.

(a) In an action to recover for injuries received while riding in an elevator belonging to his employers, plaintiff introduced evidence of a similar injury to another person, received in another elevator of defendants of like structure, but under different circumstances, and at a time prior to the employment of plaintiff by defendants, of which accident defendants' general superintendent had notice. *Held*, that such evidence was wholly collateral to the issue, and should have been excluded.—*Wise v. Ackerman*, 76

Md. 375, 25 Atl. 424. [Cited and annotated in 32 L. R. A. (N. S.) 1098, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

### § 142. Showing value.

#### Cross-References.

Conclusiveness of evidence of market value, see post, § 601.

Market value of property shown by sales thereof or by offers to purchase or sell, and by market quotations, see post, § 323.

Value or market price of property in general, see ante, § 113.

Letter between attorney and client as evidence of value of stock, see "Witnesses," § 201.

(a) On an issue as to the present value of land, the prices realized at voluntary sales of similar lands in the vicinity, made within a reasonable time theretofore, are admissible.—*City of Baltimore v. Smith & Schwartz Brick Co.*, 80 Md. 458, 31 Atl. 423.

(b) In estimating the value of a lot condemned for purposes of a street, the neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned.—*Moale v. City of Baltimore*, 5 Md. 314, 61 Am. Dec. 276.

### (D) MATERIALITY.

#### Cross-References.

In criminal prosecutions, see "Criminal Law," §§ 382-384.

Materiality as affecting liability for perjury, see "Perjury," § 11.

### § 143. Importance in general.

#### Cross-Reference.

See ante, § 113.

(a) In an action for injuries to a servant, there was no error in excluding the records of a certain hospital, or in refusing to allow a physician to testify as to certain facts connected with the keeping of the records where the purpose of the evidence was to show that plaintiff was treated in the hospital on certain days, and it was shown without contradiction that he had been treated at such hospital.—*State v. Trimble*, 104 Md. 317, 64 Atl. 1026.

(b) The court properly refused to allow a witness to answer the question as to whether plaintiffs' testator knew "whether a surety who paid money for his principal could col-

lect it from the principal after having paid it," the object being to show that plaintiffs' testator knew the law in regard to which it was charged that defendant gave him improper advice, since the question could have elicited nothing more than an inference or opinion as to the legal knowledge of said testator in respect to the facts in the case.—*Cochrane v. Little*, 71 Md. 323, 18 Atl. 698.

(c) Evidence legally insufficient for the purpose for which it is offered is properly rejected.—*Baltimore Chemical Mfg. Co.'s Lessee v. Dobbin*, 23 Md. 210.

(d) A witness testified with caution and hesitation as to his having mailed certain notices, and to a cross interrogatory answered "that he had no doubt he had mailed them, but could not say he precisely remembered the distinct fact." Held, that this was competent evidence to go to the jury, and that the degree of its reliability was a question for their consideration.—*Fulton v. Mac-cracken*, 18 Md. 528.

(e) Legal evidence, pertinent to the issue, is admissible, though weak and inconclusive from its vagueness.—*Richardson v. Milburn*, 17 Md. 67.

#### § 144. Certainty.

##### Cross-References.

See "Carriers," § 228; "Fences," § 15; "Fraud," § 56; "Negligence," §§ 127, 130; "Nuisance," § 33; "Wills," §§ 53, 164.

(a) Where, in a suit to contest a will on the ground of testamentary incapacity, a witness testified that testatrix would talk sometimes and drop off to sleep, that witness' wife would be talking to testatrix and she would go off into something entirely foreign to what was being said, and that her mind did not concentrate on what the wife was saying to her, the expression of the witness that his wife would talk to testatrix as she would to a child was not objectionable for uncertainty as to meaning, but was merely a descriptive phrase in connection with his testimony.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(b) Testimony to establish the contents of an alleged waiver of a lien, which did not make certain the existence of the paper, or show it to have been signed by the plaintiffs,

or satisfactorily account for its nonproduction, was inadmissible, as being too vague to be of value.—*Gunther v. Bennett*, 72 Md. 384, 19 Atl. 1048.

#### § 145. Remoteness.

##### Cross-References.

Remoteness of declarations, see post, § 269. Results of experiments, see post, § 150.

As to financial condition of bankrupt, see "Bankruptcy," § 303.

As to transfer by insolvent, see "Insolvency," § 99.

In action against estate to recover on note, see "Executors and Administrators," § 221.

(a) The rule admitting proof of collateral facts when they illustrate the question in issue, held subject to the qualification that the time must not be too remote.—*Maryland Electric Ry. Co. v. Beasley*, 117 Md. 270, 83 Atl. 157. [Cited and annotated in 51 L. R. A. (N. S.) 846, on photographs as evidence.]

#### § 146. Tendency to mislead or confuse.

(a) Certain beef was consigned to parties in London for sale. Under the terms of the consignment the management and sale of the beef was left to the discretion of the consignee. A deficiency arose on the sale of the beef, which defendant claimed was occasioned by negligence on the part of the consignee. Held, that an inquiry to a witness on cross-examination whether the consignor could not have protected himself against loss if he had been advised of the state of the market in London during the period following the consignment is inadmissible on the part of defendant, because irrelevant and calculated to mislead the jury.—*Capron v. Adams*, 28 Md. 529.

(b) In an action on a sealed note reciting, "On a settlement this day of H.'s two notes, due B., amounting to," etc., "I fall in his debt," defendant cannot, under a plea of non est factum, give in evidence the administrator's account of H.'s estate, showing a settlement and overpayment of his debts before the date of the sealed note, since such evidence is irrelevant to the issue and tends to mislead the jury.—*Edelen v. Gough*, 5 Gill 103. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

### § 147. Negative evidence.

#### Cross-References.

Weight and conclusiveness of negative testimony, see post, § 586.

Testimony of witness from memoranda, see "Witnesses," § 258.

(a) One seeking to prove that he had had uninterrupted possession of land for 20 years, under a claim of right, may not show by a witness that the latter had never heard any talk of any one else having possession.—*Jacobs v. Disharoon*, 113 Md. 92, 77 Atl. 258.

(b) In a suit to recover money lost at play to the defendant by plaintiff's clerk, a collection book kept by the clerk, and offered by plaintiff to prove that he did not enter therein certain sums of money which he had collected for the plaintiff was held to be irrelevant evidence.—*Corner v. Pendleton*, 8 Md. 337. [Cited and annotated in 52 L. R. A. 720, on what provable by books of account.]

(c) Where plaintiff, in replevin for slaves, claimed them on the ground that while he was attending them as a physician, during the time they were owned by defendant's decedent, he was told that, if he would cure them, he might have them for his medical bill, and that he thereafter made no charge for services rendered to them, the plaintiff's bill for medical services which he had rendered to the decedent during the period in controversy was admissible, though it contained charges for medicine furnished to a negro child not named, as the fact whether such child was one of those in controversy was for the jury.—*Mudd v. Turton*, 4 Gill 233.

### (E) COMPETENCY.

#### Cross-References.

Competency of witnesses in general, see "Witnesses," §§ 35-223.

Evidence competent in part, see "Trial," § 48.

### § 148. Nature and source of evidence in general.

(a) In an action for surgical malpractice, testimony that defendant telephoned plaintiff's witness, in response to a telephone request to visit plaintiff, that he could not go at once, but would do so when he closed the office, was properly admitted, though witness

did not know defendant's voice at the time.—*Miller v. Leib*, 109 Md. 414, 72 Atl. 466.

(b) Evidence that witness telephoned defendant's place of business and ordered ice, which was received, was admissible against defendant, though the witness could not identify and did not recognize the voice of the person who answered the telephone.—*Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405.

(c) The opinions of counsel, taken before the bringing of the action, cannot be permitted to be read to the jury for any purpose.—*Dorsey v. Hammond*, 1 H. & J. 190.

§ 149. (Omitted from the classification used herein.)

### § 150. Results of experiments.

#### Cross-Reference.

Examination of expert witnesses as to experiments and results thereof, see post, § 557.

(a) Evidence is admissible for defendant in a slander suit, in which the language is denied, of experiments with the voice to determine if a person standing where plaintiff was standing when the slanderous words were spoken could have heard loud words spoken at the place where defendant was standing.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

### § 151. Testimony as to intent, motive, or condition of mind.

#### Cross-References.

See "False Imprisonment," § 24; "Libel and Slander," §§ 104, 107; "Malicious Prosecution," § 60; "Wills," § 704.

Declarations showing intent or motive, see post, § 269.

Opinion evidence, see post, § 472.

Parol or extrinsic evidence as to intent of parties as to subject-matter of written instruments, see post, § 461.

Purpose of entry on land, see "Adverse Possession," § 57.

#### Annotation.

Right of one to testify as to his intent.—23 L. R. A. (N. S.) 367; 34 L. R. A. (N. S.) 323.

(a) A question to the president of the insurance company whose policy was sued on as to what he referred to in a certain letter held properly excluded, in view of the letters being in evidence.—*Citizens Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 116 Md. 422, 82 Atl. 372.

(b) Evidence whether the agent writing an accident insurance policy would have written it had he then known of the condition of insured's organs was not admissible.—*Standard Accident & Life Ins. Co. v. Wood*, 116 Md. 575, 82 Atl. 702.

(c) Where evidence has been given of the performance of any act, the party performing it may testify as to his motives and intention in doing the act, except where the law imputes a certain intent from the act.—*Mutual Fire Ins. Co. v. Ritter*, 113 Md. 163, 77 Atl. 388. [Cited and annotated in 34 L. R. A. (N. S.) 323, on right of one to testify as to his intent.]

(d) A defendant, whose intention to resume a certain business is in issue, may testify as to his intent.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427. [Cited and annotated in 23 L. R. A. (N. S.) 397, on right of one to testify as to his intent.]

(e) Where the fact to be established is the intention with which an act has been done, to which act as a matter of law no conclusive presumption attaches, as for instance that certain estimates had been made in good faith and with no intention to defraud, the party whose intention is the subject of inquiry may testify to the nature of his intention as he might to any other material fact.—*Phelps v. George's Creek & C. R. Co.*, 60 Md. 536. [Cited and annotated in 23 L. R. A. (N. S.) 375, 386, 401, on right of one to testify as to his intent.]

## § 152. Testimony as to character or reputation.

### Cross-References.

See "Assault and Battery," § 29; "Master and Servant," § 330.

Evidence admissible by reason of admission of similar evidence, see post, § 155. Hearsay evidence, see post, § 322.

Showing specific acts, see ante, § 106.

Character of defendant or prosecutrix in bastardy proceedings, see "Bastards," §§ 59, 61.

Proof of reputation to establish insanity, see "Insane Persons," § 2.

## § 153. Excuse for failure to testify or to call witness.

### Cross-References.

Comments of counsel on failure of party to testify, see "Trial," § 123.

Instructions as to failure to testify or to call witness, see "Trial," § 211.

## § 154. Evidence wrongfully obtained.

### Cross-References.

See "Aliens," § 32; "Witnesses," § 367.

## § 155. Evidence admissible by reason of admission of similar evidence of adverse party.

### Cross-References.

See ante, § 131; "Railroads," § 443.

Explanation or limitation of admissions, see post, § 263.

In criminal prosecutions, see "Criminal Law," § 396.

Part of deposition, see "Depositions," § 95.

Rebuttal of evidence of adverse party as to transactions with person since deceased or incompetent, see "Witnesses," § 177.

Will contest, see "Wills," § 53.

(a) Where it was in controversy whether plaintiff made a certain statement in a conversation with defendant, as alleged by the latter, evidence that the statement would have been untrue if made is properly excluded, when offered by plaintiff to rebut the evidence of the statement.—*Benglesdorf v. Hanway*, 90 Md. 217, 44 Atl. 1011.

(b) The admission of immaterial testimony without objection does not authorize immaterial testimony in rebuttal thereof over objection.—*Higgins v. Carlton*, 28 Md. 115; *Lake Roland El. Ry. Co. v. Weir*, 86 Md. 273, 37 Atl. 714. [Cited and annotated in 43 L. R. A. (N. S.) 993, on evidence as to price paid for other property by party seeking condemnation for public use.]

(c) Evidence clearly irrelevant should not be admitted on the ground that other irrelevant evidence had already been introduced, unless the latter was admitted by the court after objection.—*Lake Roland El. Ry. Co. v. Weir*, 86 Md. 273, 37 Atl. 714. [Cited and annotated, see supra.]

(d) The general rule is that the introduction of irrelevant testimony by one party will not justify the introduction of similar evidence by the other.—*Hughes v. Howard*, 3 H. & J. 9; *Walkup v. Pratt*, 5 H. & J. 51; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242, 59 Am. Dec. 72; *Mitchell v. Sellman*, 5 Md. 376; *Warner v. Hardy*, 6 Md. 525; *Higgins v. Carlton*, 28 Md. 115; *Bannon v. Warfield*, 42 Md. 22; *Ruhl v. Corner*, 63 Md. 179; *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76; *Lake Roland El. Ry. Co. v. Weir*, 86 Md.

273, 37 Atl. 714. [Cited and annotated, see supra.]

(e) In an action by a tax collector to recover from county commissioners alleged over-payments made by him, plaintiff testified that he turned over a certain amount of uncollected taxes to his successor in office. *Held*, that the commissioners could show by the successor that plaintiff did not turn over to him collectible tax bills to the amount to which he testified.—*Calvert County Com'rs v. Gantt*, 78 Md. 286, 28 Atl. 101, 29 Atl. 610.

(f) In an action upon a promissory note, where the defendant's signature was disputed, and the witness had stated that the signature was not genuine, it was competent for the plaintiff to show, on cross-examination, that there had been a change in the defendant's handwriting since the signature in question.—*Armstrong v. Thruston*, 11 Md. 148. [Cited and annotated in 63 L. R. A. 175, on examination of witnesses to handwriting by comparison; in 65 L. R. A. 155, on procedure in proof of handwriting.]

(g) When the plaintiff had offered evidence to show that at the time of sale the goods were handed over to the defendant and placed under his control, but were not by him removed from the premises, and other evidence on the question of delivery, testimony by defendant that the property had never been in his use and possession, but in that of another person ever since the sale, ought to have been admitted.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

(h) Testimony inadmissible in itself becomes competent by the admission of other evidence to which it may be a reply.—*Milburn v. State*, 1 Md. 1.

(i) In an action by the state against a tax collector, the certificate of the treasurer is admissible to prove the indebtedness of the collector, although the clerk of the county commissioners, who was a witness for the state, testified that it did not appear from their books that any tax was levied during the years that the collector was charged with taxes on the books of the treasurer; the state having a right to show that the

witness was mistaken.—*Crane v. State*, 1 Md. 27.

(j) Where the defendant had offered evidence to show that a slave was unsound before he was sold, the plaintiff may rebut this by evidence that he was sound at a particular time before the sale.—*Clements v. Smith*, 9 Gill 156.

(k) Where the defendant had read in evidence a letter from the plaintiff to one A., referring to a memorandum which A. had sent to the plaintiff, such memorandum may be read in evidence by the plaintiff, for the purpose of explaining the letter.—*Barney v. Smith*, 4 H. & J. 485, 7 Am. Dec. 679.

### § 156. Evidence inadmissible by reason of exclusion of similar evidence of adverse party.

## V. BEST AND SECONDARY EVIDENCE.

### Cross-References.

Evidence admissible by reason of admission of similar evidence of adverse party, see ante, § 155.

Of execution of instrument preliminary to introduction in evidence, see post, § 374.

Impeachment of witness by proof of conviction of crime, see "Witnesses," § 359. In criminal prosecutions, see "Criminal Law," §§ 398-404.

Review of rulings as dependent on presentation of objection in lower court, see "Appeal and Error," § 204.

### § 157. Necessity and admissibility of best evidence.

### Cross-References.

Writings collateral to issues, see post, § 171.

Right of deponent to testify orally, see "Depositions," § 1.

(a) Where a testator devised first choice of his houses and lots to one devisee, second choice to another, and the remaining house and lot to another, selections made by them held to be provable by matter in pais, where the land records contained nothing showing such selection.—*Potomac Lodge No. 31, I. O. O. F. v. Miller*, 118 Md. 405, 84 Atl. 554.

(b) In an action against carriers for goods lost in transit, copies of invoices held inadmissible to show weight, in the absence of qualifying testimony.—*New York & B. Transp. Line v. Lewis Baer & Co.*, 118 Md. 73, 84 Atl. 251.

(c) Oral evidence of an offer of a note in settlement of a claim *held* competent without production of the note.—*Meyer v. Frenkil*, 116 Md. 411, 82 Atl. 208, Ann. Cas. 1913C, 875.

(d) Where there was no entry on the minutes of the Orphans' Court of the issuance of letters testamentary, the authority of the executors and the issuance of letters to them could be shown by other evidence.—*Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 530.

(e) Where a waybill is a copy of a copy, oral evidence of the weight of the goods described in such bill is admissible.—*Young v. Mertens*, 27 Md. 114.

(f) Although an agent may be called to prove the agency, it is not necessary to call him when it can be proved aliunde.—*Oelrichs v. Ford*, 21 Md. 489. [Cited and annotated in 53 L. R. A. 522, on use of books of account as evidence on issues between other parties; in 28 L. R. A. (N. S.) 229, on right in action by undisclosed principal to defenses available in action by agent.]

(g) To prove the ownership of a fence in dispute between plaintiff and defendant, a witness testified that he saw a line run by a surveyor in the presence of the parties throwing the entire fence in dispute on land then owned by him, but now owned by plaintiff, and that the line so run was a few yards from the fence, and on the land then and now owned by defendant, and that the surveyor named by him was alive and resided in a certain county. *Held*, that this testimony was not objectionable on the ground that it was not the best evidence, as the rule requiring the best evidence relates to its grade only, and not to its conclusiveness, and does not require that the strongest or most satisfactory proof shall be produced.—*Richardson v. Milburn*, 17 Md. 67.

(h) The mere circumstance that a written instrument exists, which may be made evidence of the particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law constituted the authentic and sole medium of proving that fact.—*Glenn v. Rogers*, 3 Md. 312.

(i) The contents of letters are inadmissible evidence, where the party who wrote them

is present, giving testimony on the same subject, and can testify.—*Bland v. Dowling*, 9 G. & J. 19.

(j) It is incompetent to prove by oral testimony the existence of facts to be ascertained by public officers preparatory to laying a tax, and which they are required to certify in writing.—*City of Baltimore v. Hughes*, 1 G. & J. 480.

(k) The protest of a promissory note is not evidence of itself in chief of the fact of a demand on the drawer, though if the notary public was dead the case would be different.—*Whittington v. Farmers Bank*, 5 H. & J. 489.

(l) A., as B.'s agent, agreed with C., in writing, to sell him a house and lot, and that on payment of the money B. should give C. a deed. The money was paid to A., who before the payment had told C. that, if any difficulty should arise about the title, he (A.) was good for the money, and would return it. In an action by C. against A. to recover back the money, it was proved that a claim had been made to part of the lot, and that it had been inclosed with a fence by D., and that no deed had been made or offered C. *Held*, that the court properly refused to direct the jury that parol evidence was inadmissible to prove that a claim had been made to the lot, as there was no other evidence of the adverse claim.—*Cloherly v. Creek*, 3 H. & J. 428.

(m) Original entries of an auctioneer's clerk are not the best evidence of a sale at auction.—*Walsh v. Gilmor*, 3 H. & J. 383, 6 Am. Dec. 503.

(n) A receipt by A. to the defendant for money paid him for the use of the plaintiff was offered in evidence in an action of assumpsit, and a witness was offered to prove the handwriting of A. *Held*, that the evidence could not be received, A. being alive, and the best evidence of the receipt of the money.—*Leatherbury v. Bennett*, 4 H. & McH. 392. [Cited and annotated in 29 L. R. A. 738, on receipt as evidence of payment as against third parties.]

#### § 158. Facts or transactions described in or evidenced by writing.

(a) In proving the amount of the dividend allowed on a note by an administrator in

his account, a copy of the account, and not the administrator's evidence was the best evidence.—*Harper v. Davis*, 115 Md. 349, 80 Atl. 1012.

(b) The question whether an engineer was expected to report the condition of his engine, if it was in bad condition when he brought it in, in effect asked for a rule of the railroad company, and the best evidence would have been the rule itself.—*Maryland, D. & V. Ry. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005. [Cited and annotated in 32 L. R. A. (N. S.) 1086, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(c) Though the best evidence of the existence of a corporation is the production of its charter or certificate of incorporation, secondary evidence of general reputation is admissible for that purpose.—*Dick v. State*, 107 Md. 11, 68 Atl. 286.

(d) In an action for injuries to plaintiff through being struck by defendant's milk wagon, a city collector of licenses, whose duty it was to issue licenses to owners of wagons, and to keep the numbers in consecutive order, and so record them, was properly permitted to testify from his record that licenses were issued for a certain year to defendant.—*Geiselman v. Schmidt*, 106 Md. 580, 68 Atl. 202. [Cited and annotated in 24 L. R. A. (N. S.) 258, on admissibility of expressions or statements, subsequent to injury, of present pain.]

(e) Possession being a fact provable by parol, a witness may be asked from whom an occupant of lands derived possession.—*Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166.

(f) On an issue as to the execution of a contract to sell a patent right to a corporation, the minutes of a corporate meeting, showing that the stockholders ratified a proposition by the inventor to subscribe for a certain amount of stock, and pay therefor by an assignment of his patent, was the best evidence of such ratification.—*Harrison v. Morton*, 83 Md. 456, 35 Atl. 99. [Cited and annotated in 53 L. R. A. 530, on use of books of account as evidence on issues between other parties.]

(g) In an action for damages for injury alleged to be done to plaintiff's property by the making of improvements by defendant on an adjacent lot, parol evidence of the existence of a mortgage on plaintiff's property is inadmissible, since the original instrument, or a certified copy of the record, is the proper evidence of the mortgage, if any such exist.—*Arnd v. Amling*, 53 Md. 192. [Cited and annotated in 42 L. R. A. 554, 555, 559, on religious belief as qualification of witness.]

(h) Where, in an action to enforce the individual liability of a stockholder, it appeared either that no written evidence of the organization of the corporation ever existed, or, if it did, that the writing had been lost, parol evidence of the organization was admissible; and entries in the stock book and parol evidence offered in connection therewith were also admissible for the purpose of proving that the plaintiff was the owner of shares of stock fully paid up at the time he became a creditor of the corporation, and that the defendant at that time was the owner of stock which had not been fully paid for.—*Weber v. Fickey*, 52 Md. 500.

(i) Where an executor, being duly appointed and qualified to act in that capacity, has assumed the trust, the revocation of his powers and his discharge from the trust cannot be proved by parol, but must be evidenced by the proceedings of record in the proper court.—*Wright v. Gilbert*, 51 Md. 146.

(j) If a license is specially pleaded as a defense in an action of trespass, parol proof of such license is admissible in evidence in bar of the plaintiff's right to recover.—*Hamilton v. Windolf*, 36 Md. 301, 11 Am. Rep. 491.

(k) Where a defendant debtor states that his garnishee took possession of garnished property under a bill of sale, it is proper to require the production of the bill of sale.—*Troxall v. Applegarth*, 24 Md. 163.

(l) It is not giving parol testimony of the contents of written papers for a witness to testify that certain notes described in a memorandum and identified were sent to their correspondents for collection, that the amount thereof was received, and when it



was received.—*Cecil Bank v. Snively*, 23 Md. 253.

(m) The grant of letters is a judicial act, and must be proved by the record.—*Smith v. Wilson*, 17 Md. 460.

(n) Parol evidence of the seizure and sale of personal property by a sheriff is incompetent to show title in the purchaser, unless the execution under which the sale was made is produced, or its absence accounted for.—*McKee v. McKee*, 16 Md. 516.

(o) That a party is an agent of a corporation need not be proved by the record of the corporation, but may be shown by parol evidence.—*Elysville Mfg. Co. v. Okisko Co.*, 5 Md. 152.

(p) Levy of or sale under execution cannot be proved by parol, unless a foundation is laid.—*Giese v. Thomas*, 7 H. & J. 458; *Gaither v. Martin*, 3 Md. 146. [Cited and anontated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

(q) Parol testimony of what took place at the trial of a cause must be preceded by record evidence of the cause.—*Harker v. Dement*, 9 Gill 7, 52 Am. Dec. 670.

(r) A plaintiff cannot, by oral testimony, prove the existence of a note against the defendant, other than the one sued on, for the purpose of meeting the defendant's proof of payments, without accounting for the nonproduction of such other note itself.—*Trundle v. Williams*, 4 Gill 313.

(s) The qualification of a guardian can only be established by introduction of his bond, or office copy thereof, unless it has been lost and the record destroyed.—*Clarke v. State*, 8 G. & J. 111.

(t) In a suit by the assignee of a single bill against his assignor, the obligee, brought on the obligor's failure to pay, parol evidence of the notorious insolvency of the obligor is admissible on the issue of due diligence by the assignee in pursuing the obligor, and it is not necessary to introduce the record of the latter's discharge as an insolvent petitioner, or a certificate thereof, or the return of an execution nulla bona.—*Crawford v. Berry*, 6 G. & J. 63.

(u) The owners of a vessel sent her to Havana, consigned to P., who, having discharged his duties as consignee, paid the

then customary duties at the custom house and made up his accounts accordingly, and transmitted them to the owners, on the vessel's return. It appeared that the intendant of Havana, by an order of a certain date, but not made public until some time after, directed that vessels entering that port after such date should pay an additional duty, and that P. was called on to pay such duty, which he did. Held, that, though the contents of the order could not be proved by parol, yet payments under the order might be so proved, without any proof of the order itself, as the evidence established a usage or custom as to the amount of duties payable there, which may always be proved by parol.—*Drake v. Hudson*, 7 H. & J. 399.

(v) An agent may testify by parol that moneys received by him, arising from the proceeds of a sale under a foreign judgment, were paid by him, pursuant to such judgment, to his principals.—*Owings v. Nicholson*, 4 H. & J. 66.

(w) The protest itself of a copy from the notary's books is the only evidence that the bill was protested, unless it be shown that the original and the books are lost.—*Chase v. Taylor*, 4 H. & J. 54.

(x) That written notices were given of the protest and nonacceptance of a bill of exchange may be shown by parol.—*Clarke v. Harris*, 3 H. & J. 167.

(y) A witness having proved that he had received a power of attorney from a person, to act for her in all things relating to her estate, as well in collecting debts as in making sales of property, etc., it was held that unless the original power of attorney was produced, or proved to be lost, or that the party had issued a subpoena to the witness, with a duces tecum, no evidence could be given of it.—*Rusk v. Sowerwine*, 3 H. & J. 97.

(z) Where a deed for 86 acres of land (being part of a tract), without courses or distances, but referring to another deed (not produced) to ascertain the same, is introduced in evidence, facts and circumstances are not admissible to prove the location of the 86 acres, or to show title thereto, or that the deed referred to, or some bond or contract for conveying the 86 acres by metes and bounds, etc., as located on plots, has

been executed.—*Hammond v. Norris*, 2 H. & J. 130.

(aa) A commissioner for the purpose of taking depositions under a commission cannot testify as to anything a witness swore to before him, as the deposition itself is the best evidence.—*Lowes v. Holbrook*, 1 H. & J. 153.

(bb) Parol evidence is admissible to prove a person an innkeeper, in an action against him by a guest for goods lost in his house; and it is not necessary to produce the record of his license.—*Owings v. Wyant*, 3 H. & McH. 393.

### § 159. Fact of making or existence of writing.

### § 160. Contents of writings.

#### Cross-Reference.

In criminal prosecutions, see "Criminal Law," § 400.

### § 161.— In general.

#### Annotation.

Oral proof of foreign laws.—25 L. R. A. 451, note.

(a) Where a policy provides for ascertaining the loss by appraisers, in an action on the policy the appraisal cannot be proved by oral evidence unless the absence of the paper is accounted for.—*Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13.

(b) Parol evidence of the contents of a written instrument is inadmissible, where the instrument itself can be produced.—*Mulliken v. Boyce*, 1 Gill 60; *Marshall v. Haney*, 9 Gill 251; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Morrison v. Welty*, 18 Md. 169.

(c) The words of a written libel cannot be proved until an attempt has been made to procure the libel itself.—*Winter v. Donovan*, 8 Gill 370.

(d) The owners of a vessel sent her to Havana, consigned to P., who, having discharged his duties as consignee, paid the then customary duties at the custom house, and made up the accounts accordingly, and transmitted them to the owners, on the vessel's return. It appeared that the intendant of Havana, by an order of a certain date, but not made public until some time after, directed that vessels entering that port after such date should pay an additional duty,

and that P. was called on to pay such duty, which he did. *Held*, in assumpsit by P. against the owners to recover the amount so paid, that, though the order of the intendant was in writing, its contents might be proved by parol, and that it was not necessary to prove it by an authentic or sworn copy; the rule requiring such proof being applicable only to such foreign laws or public edicts of which a regular record is necessarily presumed to have been kept.—*Drake v. Hudson*, 7 H. & J. 399.

(e) In an action quare clausum fregit, where a warrant of resurvey is granted and executed at plaintiff's prayer, and plats accordingly returned, the plaintiff may introduce evidence of the trespasses marked and mentioned on the plats, without producing the plats to the jury.—*Trammell v. Hook*, 1 H. & McH. 259.

### § 162.— Judicial acts, proceedings, and records.

(a) Proceedings in court are only provable by the record, and not by parol, if the purpose is only to get evidence of the facts concluded by the judgment in such proceedings.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

(b) A seizure and sale on a distress warrant, the proceedings on which are required to be in writing, cannot be proved by parol.—*Myers v. Smith*, 27 Md. 91.

(c) A party cannot introduce the testimony of a solicitor in chancery that he had used due diligence in certain chancery proceedings, but the record should be produced.—*Duvall v. Peach*, 1 Gill 172.

### § 163.— Official acts, proceedings, and records.

(a) Evidence of the contents of land office receipts is not admissible, even on proof that it was the custom of that office to require such receipts to be given up on the issuing of patents.—*Marshall v. Haney*, 9 Gill 251.

### § 164.— Corporate acts, proceedings, and records.

### § 165.— Conveyances, contracts, and other instruments.

(a) Testimony of plaintiff's wife, in an action for breach of contract for sale of a

house made by an agent, as to conversations between her and her husband with the agent in reference to purchasing the house, is inadmissible, the written contract furnishing the best evidence of the terms of the sale.—*Horner v. Beasley*, 105 Md. 193, 65 Atl. 820.

(b) A deed is the best evidence of the name of the grantor.—*Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166.

(c) On the issue whether an entry in partnership books to balance a debit was authorized by the articles of co-partnership, the articles themselves are the best evidence.—*Trump v. Baltzell*, 3 Md. 295.

(d) Evidence of the contents of receipts given at a land office to parties who take up lands is not admissible, although a custom of such office is shown which required such receipts to be delivered up when the patents for the land were issued.—*Marshall v. Haney*, 9 Gill 251.

(e) Parol evidence of the contents of a sealed instrument cannot be given, until its loss has been proved.—*Clarke v. State*, 8 G. & J. 111.

#### § 166.—Books of account.

##### *Cross-References.*

See post, § 167.

Grounds for admission of secondary evidence, see post, § 177.

##### *Annotation.*

Admissibility in evidence of books of account produced on notice.—52 L. R. A. 602, note.

(a) In an action on a contract, evidence of entries contained in a book, which purported to be a copy of original entries made by the witness and used by him, not for the purpose of aiding his memory, but as substantive and independent evidence of charges contained in the bill of particulars, was improperly admitted.—*Dick v. Biddle Bros.*, 105 Md. 308, 66 Atl. 21.

(b) In an action on the bond of a city tax collector for failure to turn over money collected, the court did not err, where the entries in the tax books were numerous, in permitting a witness to testify to the sum total, as added by himself, of the items which the collector had admitted to him that he had collected, when this evidence was accompanied by a caution from the court that

the jury were not bound by that addition, but could make the calculation themselves.—*Lynn v. City of Cumberland*, 77 Md. 449, 26 Atl. 1001.

(c) In a suit to recover money lost at play to the defendant by plaintiff's clerk, a collection book kept by the clerk, and offered by plaintiff to prove that he did not enter therein certain sums of money which he had collected for the plaintiff, was held to be irrelevant evidence.—*Corner v. Pendleton*, 8 Md. 337. [Cited and annotated in 52 L. R. A. 720, on what provable by books of account.]

(d) It being proved that an inventory and appraisal of the property was made in writing when the distress for rent was levied, parol proof of the contents of such inventory and appraisal cannot be received unless their loss be first established.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

#### § 167.—Private memoranda and statements.

(a) Where plaintiff, in replevin for slaves, claimed them on the ground that while he was attending them as a physician, during the time they were owned by defendant's decedent, he was told that, if he would cure them, he might have them for his medical bill, and that he thereafter made no charge for services rendered to them, the plaintiff's bill for medical services which he had rendered to the decedent during the period in controversy was admissible, though it contained charges for medicine furnished to a negro child not named, as the fact whether such child was one of those in controversy was for the jury.—*Mudd v. Turton*, 4 Gill 233.

#### § 168.—Letters, telegrams, and other correspondence.

(a) An original telegram is the one sent to the office to be transmitted, and not the message received at the place to which it is transmitted.—*Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. [Cited and annotated in 44 L. R. A. 438, on admissibility of reply telegram on behalf of addressee.]

(b) Parol evidence of the contents of a letter which is not produced or accounted for, is not admissible.—*Beall v. Poole*, 27 Md. 645.

#### § 169.— Notices.

(a) Parol proof of a written notice, where no ground is laid for the introduction of secondary evidence, is inadmissible.—*Young v. Mertens*, 27 Md. 114.

#### § 170.— Inscriptions, labels, names, and marks.

#### § 171. Writings collateral to issues.

##### *Cross-Reference.*

Necessity and admissibility of best evidence, see ante, § 157.

#### § 172. Admissions as to contents of writings.

##### *Cross-Reference.*

Admissions to prove notice, see ante, § 158.

#### §§ 173-175. Original writing as best evidence.

##### *Cross-References.*

See post, § 182.

Exclusion of documentary as inferior to oral evidence, see ante, § 157.

(a) A bank's report published, as required by Code 1904, art. 11, § 12, in some newspaper of the county in which the bank was located, attested by its president, is not necessarily a copy of the report made to the State Treasurer, and such report is not a copy, in the sense that there is an original which must be produced, instead of the copy, but, if shown to be authentic, is admissible as an original.—*Marine Bank of Crisfield v. Stirling*, 115 Md. 90, 80 Atl. 736. (See Code 1911, art. 11, § 19.)

(b) Carbon copies of letters shown to have been sent by the party offering the copies in evidence are properly admitted, when their custody is properly proven, being regarded as duplicate originals.—*Goodman v. Saperstein*, 115 Md. 678, 81 Atl. 695.

(c) A copy of a telegram is not the best evidence, and therefore the original must be produced, or its absence be accounted for.—*Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. [Cited and annotated, see supra, § 168.]

(d) A press copy of a letter is not admis-

sible as evidence until the loss or nonproduction of the original has been accounted for.—*Marsh v. Hand*, 35 Md. 123.

(e) A memorandum is inadmissible, even if it be a copy made by the witness himself from his own original memoranda, as it is only secondary evidence.—*Green v. Caulk*, 16 Md. 556.

#### § 176. Grounds for admission of secondary evidence.

#### § 177.— In general.

##### *Cross-Reference.*

Best and secondary evidence of contents of books as account, see ante, § 166.

(a) In an action on the bond of a city tax collector for failure to turn over money collected, the court did not err, where the entries in the tax books were numerous, in permitting a witness to testify to the sum total, as added by himself, of the items which the collector had admitted to him that he had collected, when this evidence was accompanied by a caution from the court that the jury were not bound by that addition, but could make the calculation themselves.—*Lynn v. City of Cumberland*, 77 Md. 449, 26 Atl. 1001.

(b) Under act 1868, c. 471, § 5, which requires the presidents and directors of a corporation to keep a full, fair, and correct account of their transactions, and prepare an annual report of the same, where it appeared, in an action against a stockholder of a corporation, either that no writing of the organization of the corporation ever existed, or, if it did, that the writing had been lost, parol evidence of the organization of the corporation is admissible.—*Weber v. Fickey*, 52 Md. 500. (See Code, art. 23, § 74.)

#### § 178.— Destruction or loss of primary evidence.

##### *Cross-References.*

See ante, § 158.

Preliminary evidence of loss or destruction, see post, § 183.

(a) Where a relevant exhibit is shown to be lost, its contents may be proved by parol.—*Koch v. Wimbrow*, 111 Md. 21, 73 Atl. 896.

(b) A duplicate protest of a bill may be given in evidence, without producing the

original bill, if it be shown that the bill was lost after protest.—*Usher v. Gaither*, 2 H. & McH. 457.

(c) A copy of a will, with letters testamentary, under the hand and seal of the deputy commissary, were admitted in evidence, upon proof that diligent search had been made for the original, and that the name of the commissary was in his handwriting.—*Smith v. Steele*, 1 H. & McH. 419. [Cited and annotated in 38 L. R. A. 457, on evidence to establish lost or destroyed wills.]

### § 179.— Possession or control of primary evidence.

#### Cross-References.

See ante, §§ 177, 178.

Preliminary evidence as to possession or control, see post, § 184.

(a) In an action for a balance due on a contract, where it was shown that a proposal from plaintiff, made out by the witness, had been received and accepted by one of the defendants, who declined to produce it in response to a written notice, plaintiff was properly allowed to show by the witness the contents of the proposal.—*Dick v. Bidde Bros.*, 105 Md. 308, 66 Atl. 21.

(b) In an action on a fire policy, where the insured after the loss had furnished the insurer's agent a list of the articles destroyed and damaged, and had requested that the list be returned, which request was refused by the agent because the list was in possession of the insurance company, a duplicate was admissible in evidence.—*Spring Garden Ins. Co. v. Whayland*, 103 Md. 699, 64 Atl. 925.

(c) Where the primary evidence is in the possession, or under control, of the adverse party, who fails or refuses to produce it, secondary evidence is admissible.—*Walsh v. Gilmor*, 3 H. & J. 383, 6 Am. Dec. 503.

### § 180. Preliminaries to admission of secondary evidence.

#### § 181.— In general.

#### Cross-Reference.

See ante, § 173.

(a) Where the issue was whether a carbon copy of a letter written by defendant was made on the date of the letter, evidence that after such date he made no carbon copies

of letters was inadmissible.—*Sherley v. Sherley*, 118 Md. 1, 84 Atl. 160.

(b) Where the issue was whether a carbon copy of a letter written by defendant was genuine, and made on the date of the letter, carbon copies of other papers were inadmissible, when based wholly on the testimony of defendant.—*Sherley v. Sherley*, 118 Md. 1, 84 Atl. 160.

### § 182.— Proof as to existence of primary evidence.

(a) A statement of a garnishee that "he thought" there was a bill of sale by the debtor to the goods sought to be attached is not sufficient proof of a written instrument to sustain an objection to oral proof of a transfer.—*Hadden v. Linville*, 86 Md. 210, 38 Atl. 37.

(b) Until full proof be given of the existence at some time of a written obligation, secondary evidence as to its contents is inadmissible.—*Young v. Mackall*, 4 Md. 362.

### § 183.— Proof as to destruction or loss of and search for primary evidence.

(a) A copy of parol testimony to show the contents of a letter is inadmissible where there is no evidence tending to show the loss or destruction of the letter itself or any effort to secure its production.—*Seaboard Air Line Ry. v. Phillips*, 108 Md. 285, 70 Atl. 232.

(b) Testimony concerning a paper used as a wrapper for an article of food, that witness had not preserved papers of that character, and did not know where it was, sufficiently accounted for its nonproduction, and it became competent for him to testify as to what was printed on it.—*Wright v. State*, 88 Md. 436, 41 Atl. 795.

(c) On a showing that the original paper evidencing a contract to sell a patent right to a corporation had been diligently searched for among the corporate records, and could not be found, a copy from the corporate minutes was admissible.—*Harrison v. Morton*, 83 Md. 456, 35 Atl. 99. [Cited and annotated in 53 L. R. A. 530, on use of books of account as evidence on issues between other parties.]

(d) In a prosecution for forgery of a note, it was shown that the note was, so far as could be ascertained, last in the possession of the state's attorney, who testified that he had searched for it among his papers and elsewhere without finding it; and members of the grand jury and others who had possession of it testified to having searched and being unable to find it. *Held*, that sufficient foundation had been laid for the introduction of secondary evidence.—*Brashears v. State*, 58 Md. 563.

(e) A letter written to the secretary of the navy, asking for the delivery of an original letter on the files of the navy department, and his reply, giving his reasons for declining to deliver up said original, are, after proof of their genuineness, admissible for the purpose of laying a foundation for the admission of secondary evidence.—*Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384.

(f) The destruction of all original messages sent from the telegraph office on the day of the transmission of a dispatch, secondary evidence of which is attempted to be introduced, as against the sender, is sufficient foundation for its admission, but only on proof that the copy offered is a correct transcript of a message actually authorized by the sender.—*Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. [Cited and annotated in 44 L. R. A. 438, on admissibility of reply telegram on behalf of addressee.]

(g) To lay the foundation for the introduction of a copy of an assignment of a contract, it is not enough that the plaintiff "could not find it, although he had made search for it."—*Bartlett v. Wilbur*, 53 Md. 485.

(h) A letter may be presumed to have been lost or destroyed, so as to render admissible secondary evidence of the address written thereon, where the letter is not shown to have been of such importance as to require its preservation, and the addressee has been dead for several years, leaving no personal representative through whom inquiry could be made regarding it.—*Jones v. Jones*, 45 Md. 144.

(i) Where there is evidence which raises a presumption that a bond of a trustee in insolvency, if it requires a stamp, has been

executed and stamped, and diligent search has been made by the deputy clerk in the clerk's office without finding the same, parol evidence is properly admitted of its contents.—*Dowler v. Cushwa*, 27 Md. 354.

(j) To admit of the introduction of secondary evidence to prove that M. was an insolvent debtor, and had taken the benefit of the insolvent laws of the state, the testimony of a former clerk of the court was introduced that he had never made any search for the insolvent papers until the present trial; that he had then done so, at the request of the defendant's (B.'s) counsel; that he had examined a confused mass of papers lying on the floor in an upper room in the court house; that the papers were generally put up in bundles, and marked on the envelopes "appearances," "trials," etc., of the terms to which they belonged; that he examined these envelopes, but did not examine the indorsements of any of the papers in the envelopes; and that all bundles marked "Trials" he laid aside, and did not examine their contents. It was also proven by the clerk of the court that, when a final discharge is granted, the papers are put in the judgment bundle of that term. *Held*, that, as the witness did not make an examination of the contents of these bundles, secondary evidence could not be admitted.—*Basford v. Mills*, 6 Md. 385.

(k) Where, in assumpsit to recover money loaned by plaintiff's intestate under written request from defendant, a witness states that he never looked for the particular paper among those of the intestate, though he had made a general examination for such as were of importance, and that he had found no such written request, and that it might possibly be among the papers, secondary evidence of the contents of such request is inadmissible in evidence, since the law requires bona fide and diligent search for the paper itself, in the place where it is most likely to be found, before secondary evidence of its contents can be received.—*Glenn v. Rogers*, 3 Md. 312.

(l) Where the only evidence tending to show defendant was the party last in possession of an inventory of property, the contents of which he wished to show, was the declaration of a witness which should not

have been admitted, defendant's testimony as to its loss was inadmissible.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

(m) Where, according to the best of witnesses' recollection, he had given an inventory and appraisal to a certain person, who was too sick to come into court, but who stated that he did not have them, but was under the impression that he handed them over to defendant, together with witness' testimony that he had made diligent search, is not sufficient proof of their loss.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated, see *supra*.]

(n) The certificate of a county clerk that a note was deposited in his office on a certain date, and the deposition of another clerk that at the request of the plaintiff he had made search for the note and could not find it, both certificate and deposition being *ex parte*, were incompetent evidence to establish the loss of the note.—*Young v. Mackall*, 3 Md. Ch. 398.

(o) Where a witness stated that a letter written to himself was either lost or delivered to one of the counsel in the case, and that he had made a diligent search for it, but could not find it, proof of its loss was not sufficient to admit secondary evidence of its contents.—*Clements v. Ruckle*, 9 Gill 326.

(p) Where a warrant is traced to the hands of the magistrate, who swears to its loss, parol evidence of its contents is admissible.—*Hall v. Hall*, 6 G. & J. 386.

(q) Where the evidence is such as to leave the mind in doubt whether, by a further search, books of record might not be found, parol evidence of their contents will not be admitted.—*State v. Wayman*, 2 G. & J. 254.

(r) The return to a commission for establishing the boundaries of land being defective, as appeared from the record offered in evidence, from the fact that legal notice had not been given, the plaintiff in the ejectment offered evidence that the original commission and testimony, and their return, were duly returned and recorded, and in the margin of the record thereof marked, "Examined and delivered. R. D.;" that R.

D. attended to the execution of the commission for the persons who obtained it, they residing and having continued to reside more than 100 miles distant; that they and R. D. were all dead; that the original commission, etc., were not to be found, although diligent search had been made among the papers of R. D. He then offered to prove by the commissioners that the persons examined by them were dead, and then offered to prove what they said when examined, and that their declarations were reduced to writing, and returned by said commissioners as the depositions of said witnesses. *Held*, that the loss of the depositions, etc., was not sufficiently proved to let in the parol evidence.—*Ringgold v. Galloway*, 3 H. & J. 451.

(s) Where it has been proved that a paper which has been recorded cannot be found among the papers remaining in the clerk's office, and has been lost or destroyed, the record thereof is admissible.—*Shorter v. Rozier*, 3 H. & McH. 238.

#### § 184.—Proof as to possession or control of primary evidence.

(a) A witness having stated that he had given a bond of conveyance to his son, was asked by the plaintiff, on cross-examination, when he gave it, and in whose possession it was at the time. He replied that he did not know, that the bond would speak for itself, and that it had been, and he supposed it then was, in the possession of his son's counsel. *Held*, that this did not prevent the plaintiff from excepting to parol proof of the date and contents of the bond, and that such exception should be sustained.—*Bullett v. Worthington*, 3 Md. Ch. 99.

#### § 185.—Notice to produce primary evidence.

##### Cross-References.

See ante, §§ 179, 183.

Compelling production of documentary evidence by adverse party, see post, § 368.

(a) Where, in an action against partners for an accounting, they denied in their answers that they had the books in their possession, and stated that they did not know where they were, it was not necessary to serve them with notice to produce the books in order to warrant secondary evidence of

entries therein.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

(b) Where a contract has been executed in duplicate, each part is an original, and notice to produce one part is not a prerequisite to the introduction of the other part as evidence upon a trial.—*Totten v. Bucy*, 57 Md. 446. [Cited and annotated in 12 L. R. A. (N. S.) 344, on copies of documents by mechanical means, as originals.]

(c) Where notice to produce a paper would be nugatory, or the adverse party or his attorney swears or admits that the paper is not in their control, and cannot, therefore, be produced, the giving of such notice is not an essential prerequisite to the introduction of secondary evidence of the contents of the paper.—*Union Banking Co. v. Gittings*, 45 Md. 181.

(d) Notice to produce a notice is not requisite to let in evidence of its contents.—*Atwell v. Grant*, 11 Md. 101.

(e) A notice given at the bar during the progress of a trial, to produce a paper, is not sufficient, unless it appears satisfactorily that the paper is in court at the time, and in possession of the party upon whom demand is made, or if elsewhere, that it could be easy of access.—*Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294. [Cited and annotated in 52 L. R. A. 558, on party's books of account as evidence in own favor.]

(f) Where it does not appear that the paper is in the court, a notice to produce a paper, served on the adverse party when the jury to try the case is about to be drawn, is insufficient.—*Glenn v. Rogers*, 3 Md. 312.

(g) Secondary evidence of a document not in possession of the party offering such evidence is not admissible, without notice to the adverse party to produce the document.—*Kennedy v. Fowke*, 5 H. & J. 63; *Winter v. Donovan*, 8 Gill 370; *Robertson v. Parks*, 3 Md. Ch. 65.

(h) The defendant gave notice to plaintiff's attorney at 4 o'clock p. m. on Monday, the first day of the term, to produce a paper to be read on the trial of a cause, which came on on the following Wednesday. Held, that it was sufficient notice to let in secondary evidence of the contents of such paper,

though the paper was in possession of the plaintiff himself, and the attorney did not see him until the intervening Tuesday at a quarter past 4 o'clock p. m.—*Divers v. Fulton*, 8 G. & J. 202.

(i) In an action of trover for an instrument, it is not necessary to give notice to the defendant to produce the note alleged to be converted. If the note is shown to be in the defendant's possession or under his control, the action is notice.—*Smith v. Robertson*, 4 H. & J. 30.

### § 186. Character and degrees of secondary evidence.

(a) Where there is no ground for legal presumption that better secondary evidence exists, any proof is received which is not inadmissible by the rules of law, unless the objecting party can show that better evidence was previously known to the other and might have been produced.—*Robinson v. Singerly Pulp & Paper Co.*, 110 Md. 382, 72 Atl. 828.

(b) As an agreement of compromise requires neither attestation nor acknowledgment, a statement of a witness testifying as to a lost agreement that it was duly signed, is sufficient to indicate its proper execution.—*Robinson v. Singerly Pulp & Paper Co.*, 110 Md. 382, 72 Atl. 828.

(c) On the introduction of secondary evidence, it is only necessary to prove the substance of the material facts.—*Robinson v. Singerly Pulp & Paper Co.*, 110 Md. 382, 72 Atl. 828.

(d) Where a contract of sale was shown to have been executed in triplicate, each original being signed by the brokers, one being given to each party and one retained by the brokers, a fac-simile of all three, except that the signatures were omitted, was not objectionable when offered in evidence because not signed by the brokers.—*Anderson v. Stewart*, 108 Md. 340, 70 Atl. 228.

(e) In an action against partners for an accounting, trial balances and balance sheets taken from the firm books, in connection with the testimony of the bookkeeper who made them, and who identified them, were admissible as secondary evidence to prove the contents of the books, which were shown



to have been lost, and not found after a diligent search.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

(f) In an action to revive a judgment in ejectment against terre-tenants, where the records had been destroyed, it was held that the existence of the original judgment might be proved by the production of the docket entries of a fiat or a scire facias against previous terre-tenants of the defendant.—*Boothe v. Dorsey*, 11 G. & J. 247.

(g) A copy of a contract with a corporation signed by its clerk, but not verified on his oath, and proved by two witnesses, who, looking at the copy, said it was a true copy, but did not say that they had examined it with the original, was not admissible in evidence, though the company had refused to give up the original to be returned as evidence with an ex parte commission.—*Grove v. Fresh*, 9 G. & J. 280.

(h) A witness cannot testify to the contents of a letter purporting to be from a certain person, where witness' only knowledge of its genuineness was the signature, and he had no knowledge of such person's writing, as the original letter, if produced, would not have been admissible without proof of the writing.—*Dorsey v. Dorsey*, 3 H. & J. 410, 6 Am. Dec. 506.

(i) A copy of an ancient deed which does not appear to have been acknowledged is inadmissible in evidence, though the record book appears to have been lost.—*Hoddy v. Harryman*, 3 H. & McH. 581. [Cited and annotated in 35 L. R. A. 341, on necessity for calling subscribing witnesses to prove attested instruments.]

#### § 187. Determination of question of admissibility.

(a) It is a question for the determination of the court, and not of the jury, whether the loss of a paper is sufficiently established to render secondary evidence of its contents admissible.—*Union Banking Co. v. Gittings*, 45 Md. 181.

### VI. DEMONSTRATIVE EVIDENCE.

#### Cross-References.

As item of costs, see "Costs," § 178.

In criminal prosecutions, see "Criminal Law," § 404.

Physical examination of injured person on assessment of damages, see "Damages," § 206.

#### § 188. Exhibition of person or object in general.

##### Cross-Reference.

Evidence of personal resemblance in bastardy proceedings, see "Bastards," § 63.

##### Annotation.

Exhibition of article or sample to jury on issue of quality of goods.—35 L. R. A. (N. S.) 1021, note.

Exhibition of person for purpose of comparison.—52 L. R. A. 502, note.

#### § 189. Identity.

##### Annotation.

Identification of a person by voice.—13 L. R. A. (N. S.) 373, note.

Necessity and sufficiency of identification as foundation for admission of conversation or communication by telephone.—6 L. R. A. (N. S.) 1180, note.

#### § 190. (Omitted from the classification used herein.)

#### § 191. Race, color, sex, and age.

#### § 192. Wounds and other injuries.

##### Cross-Reference.

Subject and title of act relating to physical examination in action for personal injuries, see "Statutes," § 117.

#### § 193. Weapons, missiles, and other instruments.

#### § 194. Articles subject of or connected with controversy.

##### Cross-Reference.

Implements used in gaming, see "Gaming," § 97.

(a) In an action for the death of a person struck by an engine, a shoe worn by decedent at the time of the injury held inadmissible in evidence.—*State v. Baltimore & O. R. Co.*, 117 Md. 280, 83 Atl. 166.

(b) An electric wire, contact with which caused an injury, and which had been repaired from time to time after the accident, and finally so damaged by a storm that it had to be removed, was inadmissible to show its former condition.—*Annapolis Gas & E. L. Co. v. Fredericks*, 112 Md. 449, 77 Atl. 53.

(c) In an action for injury to chattels, the plaintiff is not entitled to produce in court and exhibit to the jury the things injured. The proper way of proving the nature and extent of the injury is by calling witnesses

acquainted with the facts.—*Jacobs v. Davis*, 34 Md. 204.

§ 195. Duplicates, models, and casts.

§ 196. Writings submitted for comparison.

*Cross-References.*

Comparison of handwriting by experts, see post, §§ 561-567.

Comparison as infringement of right to jury trial, see "Jury," § 34.

§ 197.—In general.

(a) A letter confined to a presidential campaign, and forcibly giving the opinion and prejudice of the writer is not admissible against him for the purpose of identifying a writing in question at a trial during such campaign, where a comparison may be made with other available writings, notwithstanding Code 1888, art. 35, § 6, permitting the comparison of a disputed writing with any genuine writing, as it is clearly an attempt to prejudice the jury.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427. (See Code 1911, art. 35, § 7.) [Cited and annotated in 63 L. R. A. 937, 943, on competency of expert witnesses for comparison of handwriting; in 63 L. R. A. 964, on competency of witness to handwriting; in 64 L. R. A. 303, 313, 315, on limitations of evidence to handwriting; in 65 L. R. A. 151, on procedure in proof of handwriting; in 23 L. R. A. (N. S.) 397, on right of one to testify as to his intent.]

(b) Where a paper admitted or clearly proved to be genuine is already in a cause, and another paper pertinent to the issue, alleged to be in the same handwriting, is offered in evidence, the jury may compare the latter with the former.—*Williams v. Drexel*, 14 Md. 566. [Cited and annotated in 27 L. R. A. 640, on drawee's duty to know drawer's signature; in 62 L. R. A. 845, on comparison of handwriting.]

(c) The fact that the genuine and disputed signatures are both upon the same paper cannot render a comparison by the jury less proper than where there are two separate papers.—*Williams v. Drexel*, 14 Md. 566. [Cited and annotated, see supra.]

§ 198.—Reproduction and enlargement.

*Annotation.*

Photographic copies of documents as originals.—12 L. R. A. (N. S.) 343, note.

Competency of photographic copy as standard for comparison of handwriting.—63 L. R. A. 438, note.

Use of photographs of documents for purpose of comparison of handwriting.—35 L. R. A. 812, note.

(a) When the genuineness of a signature is put in issue, photographic copies of the genuine (or admitted) and forged (or disputed) signatures of the person signing are not admissible in evidence. Nor does it make any difference that the photographer, who made the copies, is also an expert in the matter of handwriting.—*Tome v. Parkersburg B. R. Co.*, 39 Md. 36, 17 Am. Rep. 540. [Cited and annotated in 35 L. R. A. 812, on photographs as evidence; in 62 L. R. A. 845, on comparison of handwriting; in 63 L. R. A. 978, on competency of witnesses to handwriting; in 63 L. R. A. 439, on competency of handwritings as standards for comparison.]

§ 199. Experiments in court.

*Cross-References.*

Other experiments, see ante, § 150.

Conduct of experiments at trial, see "Trial," § 27.

*Annotation.*

Propriety of experiments by jury.—34 L. R. A. (N. S.) 717, note.

Probability, without direct evidence, of existence of condition as basis for admission of experiment.—8 L. R. A. (N. S.) 974, note.

Experiments during view by jury.—42 L. R. A. 384, note.

Making experiments in the presence of the jury as a mode of adducing evidence.—15 L. R. A. 221, note.

## VII. ADMISSIONS.

*Cross-References.*

As part of *res gestæ*, see ante, §§ 118-128.

As to contents of writings, effect on requirement of best evidence, see ante, § 172.

Relevancy of evidence of statements and conduct of parties, see ante, § 110.

Admissibility of prior or subsequent conduct of parties or persons interested to show fraud in conveyance, see "Fraudulent Conveyances," § 286.

Admissibility on issue of limitations, see "Limitation of Actions," § 196.

Admissions by master receivable against owner of vessel, see "Admiralty," § 73.

As distinguished from privileged communications, see "Witnesses," § 211.

Burden of proof as to voluntary character of confessions, see "Criminal Law," § 334.

By defendant in bastardy proceedings, see "Bastards," § 60.

Charges in contempt proceedings, see "Contempt," § 58.  
 Competency of witnesses as to admissions, see "Witnesses," § 37.  
 Competency of witnesses to testify to admissions by person since deceased or incompetent, see "Witnesses," § 168.  
 Evidence of authority of corporate officer or agent, see "Corporations," § 432.  
 Ground of estoppel in pais, see "Estoppel," § 88.  
 In actions for alienation of affections or criminal conversation, see "Husband and Wife," §§ 333, 348.  
 In actions for compensation of broker, see "Brokers," § 85.  
 In criminal prosecutions, see "Criminal Law," §§ 405-421.  
 In divorce proceedings, see "Divorce," § 111.  
 Of Chinese person arrested for deportation, see "Aliens," § 32.  
 Of marriage, see "Marriage," § 47.  
 Of witness, as evidence for purpose of impeachment, see "Witnesses," § 374.  
 Operation and effect of tender, see "Tender," §§ 19, 26.  
 Petition and schedule in bankruptcy as evidence of insolvency, see "Bankruptcy," § 303.  
 Precautions against recurrence of injury, see "Master and Servant," § 270; "Municipal Corporations," § 818; "Negligence," § 131.

#### (A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§§ 200-203. (See Analysis.)

§ 204. Persons to whom made.

*Cross-Reference.*

Confidential communications, see "Witnesses," §§ 184-223.

§ 205. Mode of making and form in general.

*Cross-Reference.*

Interpreters as agents, see post, § 242.

(a) A receipt given by a ward to a guardian, and included by the guardian in his account to the Orphans' Court, purporting to be in full for the share of the personal estate inherited by such ward from a certain estate, is not admissible in evidence as an incidental admission that the ward was privy to a suit for the partition of land belonging to such estate, in an action of ejectment brought against such ward's lessee by another party.—*Burke v. Chamberlain's Lessee*, 22 Md. 298. [Cited and annotated in 29 L. R. A. 738, on receipt as evidence of payment as against third parties.]

(b) In an action of trespass for carrying

away negroes, the evidence was that the defendant took them, alleging that he took them as a distress for rent due him from the plaintiff; that he stated to the plaintiff at the time the amount of the rent due him, and that he was going to take them as distress for such rent; that the plaintiff made no objection to the sum stated to be due, and no acknowledgment that he did or did not owe any rent, but simply requested the defendant to take other property than the negroes, which he refused to do. *Held*, that this was not sufficient evidence to prove that the rent was due for which the distress could be made, though sufficient to show that some rent was due, and that it was not sufficient to entitle the defendant to a verdict.—*Benson v. Anderson*, 4 H. & J. 315.

#### § 206. Judicial admissions.

*Cross-References.*

Conclusiveness and effect, see post, § 265.

Explanation or limitation, see post, § 263.

Estoppel by judicial records in general, see "Estoppel," §§ 2-5.

In exception to administrator's report, see

"Executors and Administrators," § 504.

Operation and effect of tender, see "Tender," § 26.

#### § 207.— In general.

(a) A record in bankruptcy, containing an admission of indebtedness on a note, is admissible in evidence in a subsequent suit on the note between the parties to the bankruptcy proceedings.—*Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484.

(b) In the case of a pending controversy before arbitrators, where the parties were contesting their rights as adversely as before any other tribunal, the statements and admissions made by a party contesting are admissible, and may be proved by an arbitrator before whom they were made, or by any other person hearing them.—*Calvert v. Friebeus*, 48 Md. 44.

(c) Where, in a controversy before arbitrators, one of the arbitrators made a statement of the account of one of the parties thereto, the items of which she furnished from her book then present, *held*, that such statement was admissible in an action between the same parties, in reference to the same disputed matters, to show of what the account consisted, and the amount as then claimed.—*Calvert v. Friebeus*, 48 Md. 44.

(d) Admissions made in a cause are competent evidence on a second trial.—*Elwood v. Lannon's Lessee*, 27 Md. 200.

(e) Admissions made at a hearing before an arbitrator by one of the parties to the submission to arbitration cannot be given in evidence against such party in an action to recover the claim so submitted, where an award thereon was duly made by the arbitrator.—*Willard v. Horsey*, 22 Md. 89.

(f) The counsel in a cause may bind their clients by admissions and agreements of facts made for the purposes of the trial.—*Farmers Bank v. Sprigg*, 11 Md. 389.

(g) Admissions or agreements made on the original trial of a case in regard thereto are admissible on a subsequent trial of the cause.—*Farmers Bank v. Sprigg*, 11 Md. 389.

(h) Admissions by counsel of certain facts in a special verdict taken at a former trial between the same parties, and in the same action, are not evidence at a new trial of the same cause.—*Dorsey v. Gassaway*, 2 H. & J. 402, 3 Am. Dec. 557.

(i) In an action of trespass quare clausum, a plot returned in the former action, in which the defendant was the same, and which plot was located on the plots returned in this action, was admitted as evidence to show the admissions of the defendant in the former action.—*Reeves v. Middleton*, 2 H. & McH. 414.

### § 208.—Pleadings.

(a) Plaintiff, a subcontractor, sued the contractor for the unpaid price of materials furnished in the erection of a building. Defendant claimed damages in the sum of \$11,000 by the failure of plaintiff to furnish materials according to contract. Previous to the action, after futile attempts to settle their differences, defendant sent to plaintiff a statement of account, check, and voucher showing a balance due plaintiff of \$3,350, which plaintiff refused to accept as a full satisfaction, and defendant then advised plaintiff that he might accept the check to apply on account, and their differences could be settled in some other way. *Held*, that the statement and voucher were not inadmissible in evidence against the defendant as an offer of compromise.—*Stewart v. American Bridge Co.*, 108 Md. 200, 69 Atl. 708.

(b) Where the administrator of the assignee of a judgment seeks to revive it, and other parties (plaintiffs) assert that the judgment was assigned in trust to pay, among other claims, debts due them from the assignor, and defendant contends that he was released from liability on the judgment by a compromise with the assignee before he had notice of the interest claimed by plaintiffs, the records of an attachment suit against the assignor in which defendant was garnished by plaintiffs, and in his answer admitted the judgment against him, but did not claim to be discharged from liability, are admissible as tending to refute this contention.—*Garey v. Sangston*, 64 Md. 31, 20 Atl. 1034.

(c) In assumpsit to recover for work and labor, defendant offered a paper alleged to be a contract under which the work was done, in connection with the declaration which had been filed by the plaintiff in another action against the defendant, wherein he had alleged that defendant had entered into a contract filed with the declaration. *Held*, that the testimony was admissible to show an admission on the part of the plaintiff that the terms set out in such paper were the terms on which the work was done.—*Western Maryland R. Co. v. Orendorff*, 37 Md. 328.

(d) At a sheriff's sale of real estate under an execution upon a judgment against R., A., B., and C. became purchasers. F. bought the shares of B. and C., agreeing with R. to convey them to him upon payment of the purchase money. At a trustee's sale, S., by order of the chancellor, purchased all the right of F. and R. in said land. R. filed his bill prior to the trustee's sale, making the heirs of F. defendants, for the execution of the agreement. An heir of F. filed a cross-bill against R. A bill was then filed by the heirs at law of A., making S. defendant, who claimed title to an undivided third part of said land; and S., in his answer, relied upon the title of R. and F. *Held*, that the bill of R. against F., since it was sworn to by the complainant, and since his answer in the cross-bill admitted its filing, might be used in evidence in regard to the title under which he held the land.—*Stump v. Henry*, 6 Md. 201, 61 Am. Dec. 300.

### § 209.— Stipulations and agreed statements.

#### Cross-References.

Conclusiveness and effect in general, see "Stipulations," §§ 17, 18.

Construction and operation in general, see "Stipulations," § 14.

(a) An agreement of facts made and filed in a cause prior to its first trial, which, after judgment, was reversed upon appeal, is competent evidence upon a second trial, under a *procedendo*, as an admission of the parties to the facts therein set forth.—*Merchants Bank v. Marine Bank*, 3 Gill 96, 43 Am. Dec. 300.

### § 210.— Petitions, affidavits, and depositions.

(a) In an action against a corporation, the affidavit of the president thereof, made for the purpose of procuring a continuance, in another cause than that in which it was offered as evidence, is not competent testimony against such corporation, though the subject-matter of the affidavit is pertinent to the issue.—*Kemp v. Baltimore Fire Ins. Co.*, 2 G. & J. 108.

### § 211.— Testimony.

#### Cross-Reference.

Ground of estoppel in pais, see "Estoppel," § 69.

### § 212. Offers of compromise or settlement.

#### Cross-References.

See ante, § 205.

Admissibility of evidence of executed compromise or settlement, see post, § 219.

Explanation or limitation, see post, § 263. By alleged father of bastard, see "Bastards," § 60.

### § 213.— In general.

(a) Where a conversation relative to effecting a settlement included admissions as to the circumstances leading up to and the cause of the accident, the admissions were admissible, but not the proposal for a settlement.—*Kalus v. Bass*, 122 Md. 467, 89 Atl. 731.

(b) Statements and admissions of fact made during an attempt to compromise held competent evidence.—*Meyer v. Frenkil*, 116 Md. 411, 82 Atl. 208, Ann. Cas. 1913C, 875.

(c) An offer to plaintiff by defendant of a compromise of differences, which plaintiff

refused, is not admissible in evidence against defendant.—*Acker, Merrill & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17.

(d) Plaintiffs having an option to purchase 4,000 bushels of corn, contracted with ship-brokers for the charter of defendants' schooner to transport the same from Baltimore to Georgetown, S. C., where they could have sold it at a large profit. Plaintiffs, on defendants' refusal to perform the charter, wrote them that they (plaintiffs) had obligated themselves to deliver the corn at Georgetown, and stated that if their customers instituted proceedings against them their loss would be several hundred dollars; that they desired, however, to settle the matter amicably, and if defendants would pay \$40 to \$50, plaintiffs would accept such sum in lieu of all claims against the vessel, etc. Held, that such letter was a bona fide offer of compromise, and was therefore inadmissible in evidence, though plaintiffs at the time had not sold the corn in Georgetown.—*Richard J. Biggs & Co. v. E. Langhammer & Son*, 103 Md. 94, 63 Atl. 198.

(e) An offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made.—*Pentz v. Pennsylvania Fire Ins. Co.*, 92 Md. 444, 48 Atl. 139.

(f) An unaccepted offer by way of compromise is not evidence against the party making it.—*Groff v. Hansel*, 33 Md. 161.

(g) In an action on a note, evidence of admissions of payment made before an arbitrator in an attempt at a settlement were inadmissible to defeat the rights or affect the relations of the parties.—*Willard v. Horsey*, 22 Md. 89.

### § 214.— Admissions made without prejudice.

(a) A payment offered in a pending suit as a complete settlement, is generally to be regarded as a compromise offer, though not stated at the time to be offered without prejudice, and therefore it is incompetent to show it at the trial.—*Reynolds v. Manning*, 15 Md. 510. [Cited and annotated in 52 L. R. A. 565, on party's books of account as evidence in own favor.]

### § 215. Statements in writing.

#### Cross-References.

Books of account, see post, § 354.

Conveyances, contracts, and other instruments, see post, § 353.

Corporate records and proceedings, see post, § 352.

Persons to whom statements are made, see ante, § 204.

Writings as hearsay, see post, § 318.

(a) A letter written by the purchasers of coke to a third person, wherein they admitted having the contract with plaintiff, is admissible in evidence as an admission.—*Dimmick v. Hendley*, 117 Md. 458, 84 Atl. 171.

(b) In an action against a street railway company for injuries received in a collision with a street car, receipts written by one admitted to be a special agent of defendant, and signed by plaintiff's son, acknowledging receipt from the company of the horse plaintiff was driving at the time of the collision and articles which she had at the time, which the receipts stated were taken charge of October 20, 1906, after "collision with 931 car, Federal street line," were admissible as tending to show that there had been a collision between the car and plaintiff's wagon.—*United Rys. & Electric Co. v. Cloman*, 107 Md. 681, 69 Atl. 379.

(c) In an action for the destruction of a vessel, evidence of the assessment value of the vessel as it appeared upon the books of the county commissioners, followed up by evidence that plaintiff had appeared before the commissioners, and asked for a reduction of the assessment, stating that it was more than the boat was worth, whereupon the assessment was reduced to the amount appearing on the books, was competent against plaintiff as an admission.—*Gossage v. Philadelphia, B. & W. R. Co.*, 101 Md. 698, 61 Atl. 692.

(d) C. contracted with the Mt. V. Co. to construct for its mill water wheels guaranteed to be of from 20 to 110 horse power, and to save a certain amount of water. In an action of assumpsit brought by C. on the contract, he offered evidence that his wheels attained the maximum of power stipulated in the agreement, while the defendants testified without objection that the old wheels of 85 horse power were sufficient to drive all the machinery of the mill, while the new

wheels could not do this. *Held*, that a written computation by C. of the power of the former wheel, appended to a paper indorsed "Proposals," was admissible as an admission of the capacity of the former wheel.—*Conner v. Mt. Vernon Co.*, 25 Md. 55.

### §§ 216-218. Oral statements.

(a) In an action for injuries to plaintiff through being struck by defendant's wagon, plaintiff's wife was properly permitted to testify that plaintiff complained of suffering from his injuries.—*Geiselman v. Schmidt*, 106 Md. 580, 68 Atl. 202. [Cited and annotated in 24 L. R. A. (N. S.) 258, on admissibility of expressions or statements, subsequent to injury, of present pain.]

(b) A statement by testator's grandson, who was his principal legatee, at a time when he was about 17 years old, after having been deprived of his night's rest by testator, that the latter was crazy and did not know what he was doing, and a statement made a few days thereafter that his grandfather "was drinking and crazy, and had him up all the rest of the night, running for the doctor or medicine," did not amount to an admission by him that testator was insane.—*Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481. [Cited and annotated in 27 L. R. A. (N. S.) 86, 91, 95, on what is testamentary capacity; in 38 L. R. A. (N. S.) 737, on admissibility of declarations of beneficiary or executor to show lack of testamentary capacity or undue influence.]

### § 219. Acts or conduct.

#### Cross-References.

See ante, § 215.

Presumptions arising from suppressing testimony, see ante, § 78.

Admissibility of prior or subsequent conduct of parties or persons interested to show fraud in conveyance, see "Fraudulent Conveyances," § 286.

Precautions against recurrence of injury, see "Master and Servant," § 270; "Municipal Corporations," § 818; "Negligence," § 131.

(a) Acceptance of security for all notes on which the party has become liable for another is not evidence that the cestui que trust authorized the signing of his name to notes not particularly specified in the deed, nor identified as having been secured thereby.—*Walters v. Munroe*, 17 Md. 150.

(b) Acceptance of security for all notes on which the party may have become liable for another is not an admission that the party's signature to any particular note is genuine.—*Whiteford v. Munroe*, 17 Md. 135.

(c) A., by his will executed in 1850, manumitted his negro John, and, after giving his daughter \$100, directed the residue of his property to be sold, and the proceeds divided equally between his son and daughter. After the death of the testator, the daughter presented a bill of sale, executed 22 years before the making of the will, by which the testator had conveyed the mother of the negro John to the daughter, the legatee. The slave remained in possession of A. from his birth to the time of his decease. *Held*, that the legatee's acceptance of the negro from the executor, and her receipt for the same, furnished evidence of an acknowledgment that the testator had a right to manumit the negro.—*Pierce v. Negro John*, 6 Md. 28.

## § 220. Acquiescence or silence.

(a) The failure of a partner to inspect the firm books and object to any charges against him amounts to such an acquiescence in the entries therein relating to himself or his relation to his partners as to bind him by them in an action for an accounting.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

(b) Plaintiff leased premises to defendant under a written lease, with the privilege of renewal for 6 or 12 months, and thereafter defendant continued in possession, claiming to rent from month to month, while plaintiff claimed that the lease had been renewed for 12 months, and renewed for each succeeding year until October 1, 1899. Defendant abandoned the premises on October 31, 1899, sending the keys to plaintiff, who replied by letter that there having been no 30-day notice given, according to contract, he received the keys under protest, and should rent at defendant's account and risk, charging him with the loss, to which defendant did not dissent, though he answered the letter. Plaintiff, to re-rent the premises, made repairs, and sued defendant for the rent during the time the premises were unoccupied, and for the repairs and expense of advertising. *Held*, that it was proper to refuse

plaintiff's prayer that, if defendant never dissented in any way from the terms of plaintiff's letter to him, the court, sitting as a jury, was authorized to infer from such silence that he assented to such terms, since the letters did not have the force and effect of verbal statements made in defendant's presence.—*Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727. [Cited and annotated in 35 L. R. A. (N. S.) 1133, on caring for and repair of premises by landlord as acceptance of surrender.]

(c) Where plaintiff in replevin put into the case a written contract under which he claimed the property in question, and the defendant offered evidence of a conversation tending to show a surrender of the plaintiff's rights to the person under whom the defendant claimed, and who had, at that time, made an assignment to the defendant, it was *held* that the plaintiff might prove a subsequent conversation, in which such third person, in presence of the defendant, admitted that he had not authorized the defendant to interfere with the plaintiff's rights.—*Brooke v. Berry*, 1 Gill 153.

## (B) BY PARTIES OR OTHERS INTERESTED IN EVENT.

### § 221. Parties of record.

### § 222.—In general.

(a) In an action for being bitten by defendant's dog, based on his negligence in setting it at large after being warned not to do so, and when he had good reasons to suspect that it was suffering with rabies, his declaration, subsequent to the injury complained of, that his hired man did not want the dog turned out because he thought it was mad, and so informed the defendant, was admissible, as it tended to prove scienter, and was therefore a declaration against interest.—*Buck v. Brady*, 110 Md. 568, 73 Atl. 277. [Cited and annotated in 24 L. R. A. (N. S.) 463, on scienter necessary to owner's liability for injury by dog; in 37 L. R. A. (N. S.) 866, on measure of damages for personal injury by dog.]

(b) In an action by a real estate broker to recover from other brokers half the commissions received by them from the sale of a lot, wherein the defense was made that, though plaintiff brought defendants into communication with the purchaser of the lot

sold, yet the negotiations through plaintiff were abandoned and a new deal effected, evidence by the purchaser, after stating when and how he abandoned the negotiations with plaintiff, as to conversations thereafter had with plaintiff out of defendants' presence, was properly excluded.—*Walker v. Baldwin & Frick*, 106 Md. 619, 68 Atl. 25.

(c) The statements of a partner, when informed that a balance sheet taken from the firm's books showed him to be indebted in a certain sum, that, if they were in the handwriting of the bookkeeper, who, as a matter of fact, made them, they must be correct, could not of itself amount to an admission of a specific indebtedness appearing thereon, the sheets not being present at the time.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

(d) In an action by creditors of a deceased resident of a foreign state to procure a sale of deceased's land in the state, admissions by an heir, against his interest, are competent to establish the indebtedness to plaintiffs.—*Jarrell v. Felton*, 86 Md. 691, 39 Atl. 416.

(e) In a suit to set aside a deed for fraud in obtaining it, the court allowed letters to be introduced, written by parties to the suit, alleged to be the chief perpetrators of the fraud, but written after the deed was obtained. Held, that, as the letters contained admissions of parties to the suit in regard to the fraudulent obtaining of the deed, those portions containing the admissions were admissible.—*Canton v. McGraw*, 67 Md. 583, 11 Atl. 287.

(f) Where a contract for the performance of work is silent as to the time within which the work is to be done, the declarations of the party who agreed to do the work are admissible to show what he considered a reasonable time, since the law allows a reasonable time for performance.—*Coates v. Sangston*, 5 Md. 121.

(g) An answer of one defendant is not evidence against his codefendant.—*Hayward v. Carroll*, 4 H. & J. 518; *Briesch v. McCauley*, 7 Gill 189.

(h) An agreement of a mortgagee with a feme covert and her husband to secure to her, as a consideration for her entering into the mortgage, the payment of a certain sum of money as an equivalent for her interest

in the land mortgaged, cannot be proved against the mortgagee by evidence of his declarations at a time subsequent to the delivery of the mortgage to him.—*Chambers v. Chalmers*, 4 G. & J. 420, 23 Am. Dec. 572.

#### § 223.—Nominal and unnecessary parties.

(a) The admission of the nominal plaintiff, after he has parted with his interest, cannot be given in evidence to defeat the beneficial plaintiff.—*Owings v. Low*, 5 G. & J. 134. [Cited and annotated in 52 L. R. A. 557, 594, on party's books of account as evidence in own favor.]

#### § 224. Real party in interest.

#### § 225. Interest in suit of persons not parties.

#### § 226. Joint interest.

#### Cross-References.

Conclusiveness and effect of admission, see post, § 265.

Co-parties, see ante, § 222.

(a) C. and H. were seised of undivided moities in a mill rented to E., and C. brought an action to recover one-half of the rent claimed to be due her. After evidence on both sides in regard to the renting, E., the defendant, offered to prove by a witness that H., since deceased, admitted that by the terms of renting E. was to pay H. and C. an annual rental of a certain sum, and that the lessors "were to keep or pay for keeping the mill in repair." This declaration was made after the contract in writing, and not in the presence of C. Held, that such evidence was inadmissible, because its effect would be to attempt to bind one tenant in common by the declarations of another, made after the contract of renting, and without the privity of the party against whom the evidence was offered.—*Eakle v. Clarke*, 30 Md. 322.

(b) It is settled that the admissions of an executor or administrator cannot be received in evidence, as against his co-executors or co-administrators.—*Walkup v. Pratt*, 5 H. & J. 51.

(c) In an action against two or more defendants on a joint contract, the admissions of one of the defendants are evidence against all.—*Lowe v. Boteler*, 4 H. & McH. 346.



§ 227. Persons suing or defending in different character or capacity.

(a) A declaration of an executor before he had qualified, as to testator's mental capacity held inadmissible.—*Whisner v. Whisner*, 122 Md. 195, 89 Atl. 393.

§ 228. Persons interested in subject-matter without interest in suit.

(a) In an action for criminal conversation, a confession made by the wife, who was not a party to the action, purporting to be a recital of past events, made in the absence of both plaintiff and defendant, was not binding on either.—*Kohlhoss v. Mobley*, 102 Md. 199, 62 Atl. 236.

(C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

*Cross-Reference.*

Widow of former owner, see ante, § 202.

§ 229. Privies and former owners in general.

(a) The admissions of an owner of land, made while he was owner, bind those who claim under him.—*Keener v. Kauffman*, 16 Md. 296.

(b) Where a plaintiff relies on title by adverse possession, the declarations of one of the occupants under whom he claims as to the character and extent of the declarant's possession, showing that it was without claim of title, are admissible in evidence against plaintiff.—*Keener v. Kauffman*, 16 Md. 296.

(c) Admissions of facts, made at a time when they were not in dispute, by a person having then no interest to make false admissions, and making them to charge himself, are evidence against him and those claiming under him by title subsequent to such admissions.—*Richards v. Swan*, 7 Gill 366.

(d) The declarations of a person in possession of land as to his title are admissible evidence against him and all persons claiming under him.—*Dorsey v. Dorsey*, 3 H. & J. 410, 6 Am. Dec. 506.

§ 230. Grantors, vendors, or mortgagors of real property.

*Cross-References.*

See ante, §§ 121, 229; post, § 231.

Declarations of conspirators, see post, § 253.

(a) Declarations of a grantor in his own favor, made after he has parted with his interest in land, are inadmissible to affect the title of the grantee.—*Stewart v. Redditt*, 3 Md. 67; *Worthington v. Worthington*, 73 Md. xvi, memorandum case, 20 Atl. 911, full report.

(b) While declarations of a grantor in support of his deed are admissible as against himself and all persons claiming under him, his declarations tending to impeach the deed cannot be received.—*Kerby v. Kerby*, 57 Md. 345.

(c) Declarations of a grantor in a deed or bill of sale, impairing the rights of those claiming thereunder, made subsequent to its execution, are inadmissible against the grantee and those claiming under him.—*Dodge v. Stanhope*, 55 Md. 113.

(d) The admissions or declarations of a grantor or former owner of land are not admissible, as against those claiming under him, when made after he has conveyed the land.—*Mutual Fire Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 678.

(e) A bill in chancery was filed by A. to set aside a conveyance made to B. of real estate as fraudulent against creditors of the grantor. Held, that the declarations of the grantor, made before the execution of the deed, may be given in evidence.—*McDowell v. Goldsmith*, 6 Md. 319, 61 Am. Dec. 305. [Cited and annotated in 41 L. R. A. (N. S.) 5, 6, 8, on admissibility of vendor's declarations out of court, as to purpose in making transfer attacked as fraudulent.]

(f) A guardian passed his account in the Orphans' Court on the 27th of June, 1843, admitting therein a large indebtedness to his wards, and on the 15th of July, 1844, executed a deed and bill of sale, conveying certain real and personal estate to his daughter. Upon proceedings by the wards to vacate these deeds as fraudulent, as against them and other creditors, it was held that the admissions in this account were evidence against the grantee in said deeds, though similar admissions in the answer of the guardian might not be evidence against the said grantee, his codefendant.—*Richards v. Swan*, 7 Gill 366.

(g) The declarations of a mortgagor, made after the execution of the mortgage, are not admissible to affect the rights of the mortgagee.—*Carson v. White*, 6 Gill 17.

(h) Parol evidence of declarations by a grantor, made after the date of her deed, of her intention to dispose of the same land by will, and that she had made a will, written by the grantee, which she afterwards destroyed, was held inadmissible evidence for the purpose of showing that she was ignorant of the contents of the deed, and that it was obtained by fraud and imposition.—*Hurn v. Soper*, 6 H. & J. 276. [Cited and annotated in 20 L. R. A. 108, on parol evidence as to consideration of deed; in 19 L. R. A. (N. S.) 439, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

### § 231. Sellers or mortgagors of chattels.

#### Cross-References.

See ante, § 230.

Declarations of conspirators, see post, § 253.

(a) The declarations of a grantor of a bill of sale are inadmissible to impeach or vary his contract.—*Cooke v. Cooke*, 29 Md. 538.

(b) The declarations of the seller, made after sale and transfer of possession, are incompetent to impeach the bona fides of the transaction.—*Hall v. Hinks*, 21 Md. 406. [Cited and annotated in 13 L. R. A. (N. S.) 703, on right of purchasers of, or creditors levying on, goods sold for cash, delivered without payment; in 25 L. R. A. (N. S.) 792, on right of one leaving chattels in another's possession as against latter's vendees on creditors.]

(c) Declarations of a defendant in a fi. fa. that he had given a list of property to the sheriff in order that the latter might not go to his house to make a levy, if admissible at all, could only be so when made prior to the sale under the fi. fa., being then adverse to the party's interest, and not in conflict with the rights of others.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

(d) The statements of a vendor of a negro, made after the sale, and out of the presence of his vendee, are not competent evidence

against the vendee.—*Lark v. Linstead*, 2 Md. Ch. 162. (See *Same v. Same*, 2 Md. 420.)

(e) Declarations of a party, under whom defendant claims by title subsequently acquired, as to a receipt which he was about to execute to defendant, and which receipt constituted the title conveyed, are admissible against the defendant.—*Robinet v. Wilson*, 8 Gill 179.

### § 232. Bankrupts and assignors for benefit of creditors.

(a) The statements of the grantor in a deed of assignment, made at the time of his application for the benefit of the insolvency laws, and after the execution of the conveyances, that he was to have the property reconveyed to him upon certain terms, cannot, standing by themselves, be used to defeat or impair the title of the grantee.—*Glenn v. Grover*, 3 Md. 212. [Cited and annotated in 20 L. R. A. 111, on parol evidence as to consideration of deed; in 36 L. R. A. 359, on creditor's right to buy property from debtor to satisfy debt; in 41 L. R. A. (N. S.) 20, on admissibility of vendor's declarations out of court, as to purpose in making transfer attacked as fraudulent.]

### § 233. Donors.

### § 234. Assignors of rights in action in general.

(a) The declarations of the assignee of a title bond, made while he holds and owns the bond, are evidence against a subsequent assignee claiming under him.—*Clary v. Grimes*, 12 G. & J. 31.

(b) Where A. and B. were partners in trade, and upon their dissolution B. assigned, for value, all his interest in the partnership effects to A., a court of law will not permit B., by his mere declaration, made after such assignment, to defeat an action brought in their joint names.—*Owings v. Low*, 5 G. & J. 134. [Cited and annotated in 52 L. R. A. 557, 594, on party's books of account as evidence in own favor.]

(c) The admissions of the assignor of a bond, made subsequent to the assignment, of payments in part of the bond having been made to him, are admissible in evidence.—*Thomas' Ex'x v. Denning*, 3 H. & J. 242.

**§ 235. Former holder of bills or notes.****§ 236. Testators and intestates.****Cross-References.**

Persons to whom admissions are made, see ante, § 204.

Writing not signed by testator, see ante, § 215.

Competency of witnesses to testify as to admissions by persons since deceased, see "Witnesses," § 163.

(a) In an action by a widow to enforce a claim against her husband's estate for money alleged to have been advanced by her to him for the purchase of certain real estate under an agreement to convey a portion thereof to her which he failed to perform, evidence of declarations made by him either to her or in her presence that no deed was necessary, because after the purchase she had inherited the land from the grantor, was admissible, as admissions as against the heirs.—*Cross v. Iler*, 103 Md. 592, 64 Atl. 33.

(b) Where, on an issue as to the title to land, the will of a third person is put in evidence containing a devise to the plaintiff which, it is alleged, includes the land in suit, the defendant may prove declarations and admissions, made by the testatrix both before and after the execution of the will, tending to show that she never claimed any interest in the land.—*Hale v. Monroe*, 28 Md. 98. [Cited and annotated in 38 L. R. A. 446, on evidence to establish lost or destroyed wills.]

(c) Admissions and declarations of the wife, made both before and after marriage, of the making and execution of a parol antenuptial agreement, by which the husband was to have her choses in action, and pay her the interest thereon for pin money, are admissible in favor of the husband's representatives against those of the wife, who seek to get possession of the bonds and notes of the wife which had been delivered to the husband pursuant to such agreement.—*Crane v. Gough*, 4 Md. 316.

**(D) BY AGENTS OR OTHER REPRESENTATIVES.****Cross-Reference.**

Res gestæ, see ante, § 121.

**§ 237. Authority in general.**

(a) Evidence of the declarations of a third

person is not admissible to explain a contract, unless there is evidence to show that he was either agent or partner of the party against whom they are to be used in the transaction from which the suit sprang.—*Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206.

(b) In an action for work and labor performed for the defendant by the plaintiff, while he was a minor, declarations of the mother, the only parent of the plaintiff, that she sent the plaintiff to serve the defendant under an agreement that the plaintiff was to serve for his food and clothing, are not admissible evidence for the defendant.—*Berry v. Waring*, 2 H. & G. 103. [Cited and annotated in 41 L. R. A. 455, on entries in family Bible or other religious book as evidence.]

**§ 238. Authority at time of admission.****Cross-Reference.**

See ante, § 237.

(a) Where the husband's agency was only to sell the property of his wife, and the deed had been executed by her, the consideration paid by the grantee, and the deed recorded and accepted, subsequent declarations by the husband were not admissible as against her.—*Hartman v. Thompson*, 104 Md. 389, 65 Atl. 117.

**§ 239. Interest of party or representative.****Cross-Reference.**

See ante, §§ 237, 238.

**§ 240. Agents or employees.****Cross-References.**

Preliminary evidence of agency or authority, see post, § 258.

As to agency or authority, see "Principal and Agent," §§ 22, 122.

**§ 241.— In general.**

(a) In an action for personal injuries, where it was shown that defendant was not liable because the injury was due to the negligence of an independent contractor, it was not error to exclude the declaration of the contractor made at the time of the injury.—*Symons v. Road Directors for Allegany County*, 105 Md. 254, 65 Atl. 1067.

(b) Declarations of an agent, to bind the principal, must be made so as to constitute a part of the res gestæ.—*City of Baltimore*

*v. Lobe*, 90 Md. 310, 45 Atl. 192. [Cited and annotated in 42 L. R. A. (N. S.) 963, on statements some time after accident as *res gestæ*.]

(c) Declarations of an agent while engaged in performing an act within the scope of his authority are evidence against his principal.—*City Bank v. Bateman*, 7 H. & J. 104; *Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co.*, 11 G. & J. 28. [Cited and annotated in 21 L. R. A. 420, 421, 425, 427, on right to impeach one's own witness.] *Whiteford v. Burckmyer*, 1 Gill 127, 39 Am. Dec. 640; *Thomas v. Sternheimer*, 29 Md. 268.

(d) Declarations of an agent, to bind a principal, must be made at the very time he is doing an act he is authorized to do, and must be concerning the act he is then doing.—*Bradford v. Williams*, 2 Md. Ch. 1.

(e) An agent's admissions are only evidence against his principal when they constitute a part of the *res gestæ*.—*Bradford v. Williams*, 2 Md. Ch. 1.

#### § 242.—Scope and extent of agency or employment.

(a) In an action against the owner of a building for injuries from the operation of an elevator, proof of statements by a person who operated the elevator was admissible to discredit his testimony, but not as proof of the defective condition of the elevator and appliances.—*Belvedere Bldg. Co. v. Bryan*, 103 Md. 514, 64 Atl. 44.

(b) Evidence that an assistant superintendent of an elevator owned by defendant declared, of the captain of a tug, while watching him bringing in a vessel to the wharf, that "the longer he was in the employ the worse he got," is admissible to show knowledge on the part of the owner of the elevator and negligence in retaining an unfit servant.—*Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338.

(c) Although the relation between the owner of a building and the contractor is not one of agency, yet the statute (Code 1860, art. 61, § 1), provides that the building shall be liable for materials furnished the contractor and his receipt for such materials, being part of the *res gestæ*, and being also against his interest, may be offered

in evidence against the owner to prove delivery.—*Treusch v. Shryock*, 51 Md. 162. (See Code 1911, art. 63, § 1.)

(d) The declarations of a merchant's clerk, made to a notary public, cannot be admitted in evidence to show who was the holder of a note, unless such declarations were immediately connected with the solemnity of protesting.—*Burt v. Guinn*, 4 H. & J. 507.

(e) In an action against a sheriff for an escape of a runaway negro, an advertisement in a newspaper that such negro had been apprehended and was in custody, purporting to be made by the sheriff, is not evidence, though the deputy sheriff confessed that he had advertised the negro.—*Somervell v. Hunt*, 3 H. & McH. 113.

#### § 243.—Admissions before or after transaction or event.

(a) In an action by a contractor for a subcontractor's alleged failure to complete his work, in which an item for bricking in beams because defendant did not use concrete was an issue, *held*, that admissions by the contractor's foreman that it was not possible to use concrete in such part of the work made after the beams were incased in brick were not binding on the contractor, and that their admission was error.—*Noel Const. Co. v. Armored Concrete Const. Co.*, 120 Md. 237, 87 Atl. 1049.

(b) In an action for a balance due on a factory building contract, wherein it was contended the cement floor was defective, evidence that defendants' superintendent in charge of the factory and the processes in operation there said that the defect was due to the acid or stuff they used for pickling, that they could not help it and were bound to get it over the floor, and it would have to go just that way, and that it was no fault of the contractor, was admissible as tending to show an admission by defendants that the floor had been injured in the manner stated.—*Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son*, 112 Md. 360, 76 Atl. 854.

(c) Testimony that after plaintiff was shot, and while he was lying on the ground, defendant's employee, in the presence of plaintiff and another, said, "Yes, if I hadn't shot \* \* \* [him] I would have kicked his ribs in," is evidence against defendant that

the employee shot plaintiff.—*Baltimore & O. R. Co. v. Deck*, 102 Md. 669, 62 Atl. 958.

(d) Where one of the parties to a contract is sued by the other party for misrepresentations, by which the latter claims to have been deceived in making the contract, the declarations of an agent, made subsequent to the negotiations which culminated in the contract, are inadmissible.—*Phelps v. George's Creek & C. R. Co.*, 60 Md. 536. [Cited and annotated in 23 L. R. A. (N. S.) 375, 386, 401, on right of one to testify as to his intent.]

(e) Admissions made by an agent after the fact or transaction to which they relate, and unconnected with any act of agency, are inadmissible as evidence against the principal.—*Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co.*, 11 G. & J. 28. [Cited and annotated in 21 L. R. A. 420, 421, 425, 427, on right to impeach one's own witness.] *Bradford v. Williams*, 2 Md. Ch. 1.

#### § 244. Corporate officers or agents.

##### Cross-References.

As part of *res gestæ*, see ante, §§ 121-123. Representation of bank by officers and agents, see "Banks and Banking," § 111. Representation of corporations in general, by officers and agents, see "Corporations," § 422.

(a) Declarations of a local freight agent without authority to adjust claims held inadmissible against a railroad company in an action for goods lost in transit.—*New York & B. Transp. Line v. Lewis Baer & Co.*, 118 Md. 73, 84 Atl. 251.

(b) Declarations of its agents of general authority, such as general managers and general freight agents, may be competent, as admissions to affect a carrier, if made within the reasonable discharge of their duty.—*Pennsylvania R. Co. v. Orem Fruit & Produce Co.*, 111 Md. 356, 73 Atl. 571.

(c) In an action against a railroad company for personal injuries, alleged to be due to the dangerous conditions in which defendant had left a highway, evidence of statements by defendant's foreman as to the condition of the road is inadmissible against defendant.—*Rowe v. Baltimore & O. R. Co.*, 82 Md. 493, 33 Atl. 761. [Cited and annotated in 51 L. R. A. (N. S.) 582, on

opinion evidence as to safety of place or appliance.]

(d) Where the defendant bank issued its certificate of deposit to a party in another city, which was mailed to him, but was received by another party, who forged the indorsement on it, and it passed into the hands of the plaintiff, who, before the discovery of the forgery, credited the defendant bank with the amount of the certificate, the promise of the cashier of the defendant bank to pay the erroneous certificate, or his admission that the instrument was genuine, is not competent evidence to bind the defendant bank, unless it had authorized the statement or adopted the action of its cashier.—*Merchants Bank v. Marine Bank*, 3 Gill 96, 43 Am. Dec. 300.

(e) In an action to recover money which plaintiff claimed he had deposited in the defendant bank, evidence of admissions by the president to a clerk that certain money had been taken into the bank by a director is inadmissible, not being binding on the bank, since not made in pursuance of his authority.—*City Bank v. Bateman*, 7 H. & J. 104.

(f) An action by a depositor against the "president, directors, and company" of a certain bank, being against the president in his corporate capacity, evidence of an admission by him that certain money received by the bank belonged to plaintiff is not admissible under the rule that admissions of a party are always admissible against himself.—*City Bank v. Bateman*, 7 H. & J. 104.

#### § 245. Public officers or agents.

(a) In an action against a city for failing to construct a sewer of sufficient size to carry off surface water, thereby causing an overflow of the land of an individual, the recommendation of a city officer for the construction of a sewer, embodied in a report made to the city, was inadmissible; the city not being bound by recommendations for improvements by its different officers.—*Kurrle v. City of Baltimore*, 113 Md. 63, 77 Atl. 373.

#### § 246. Attorneys.

##### Cross-Reference.

Authority of attorney to make admissions binding on client, see "Attorney and Client," § 86.

### § 247. Persons referred to for information.

(a) Where the grantee first called on the scrivener who prepared the deed, and told him the grantor would call on him and give him instructions about it, and the grantor did call accordingly, and gave the instructions, according to which the deed was prepared and executed, and the declarations of the grantor then made, were offered to show that the object of the deed was to defeat the creditors of the grantor, it was *held* that, by referring the draftsman of the deed to the grantor for instructions, the grantee must be considered, to some extent, at least, as constituting the grantor his agent, and then, of course, the declarations of the agent made in the course of and accompanying the transaction, would be admissible.—*McDowell v. Goldsmith*, 2 Md. Ch. 370. [Cited and annotated in 41 L. R. A. (N. S.) 5, 8, on admissibility of vendor's declarations out of court, as to purpose in making transfer attacked as fraudulent.]

(b) In an action on a warranty by C. that certain slaves sold to J. were sound and healthy, knowing them to be unsound, the evidence was that when the slaves were about to be delivered the agent of J. said to C., "Do you deliver these slaves as sound?" He answered that he knew nothing of them, but referred him to D., of whom he got them, stating that D. would deliver them. The agent then put the same question to D., who replied that they were sound, to the best of his knowledge. D. then delivered the slaves to the agent. One of the slaves was unsound at the time they were delivered. J. then offered to give in evidence the declarations of D., made some time before the sale to J., for the purpose of proving that he knew the slaves to be unsound before and at the time of their delivery. *Held*, that the evidence was inadmissible.—*Chilton v. Jones*, 4 H. & J. 62.

### § 248. Husband or wife.

#### Cross-References.

Acquiescence or silence, see ante, § 220.

Admission by husband as nominal or unnecessary party to action, see ante, § 223.

Admissions by husband or wife as trustee, see post, § 251.

Interest in suit of persons not parties, see ante, § 225.

Of husband as to agency as to wife's separate property, see "Husband and Wife," § 138.

(a) The declarations of a husband cannot be received against his wife as those of her agent.—*Bradford v. Williams*, 2 Md. Ch. 1.

### § 249. Partners and joint contractors.

#### Cross-References.

Preliminary evidence, see post, § 259.

Power of partner to bind firm in general, see "Partnership," § 152.

To prove partnership, see "Partnership," §§ 44-56.

(a) Entries made by a deceased partner in the regular course of business are not admissible in evidence in a suit by the surviving partner against a debtor of the firm, either at common law, or under the statutes.—*Romer v. Jaechsch*, 39 Md. 585. [Cited and annotated in 52 L. R. A. 562, 568, on party's books of account as evidence in own favor; in 52 L. R. A. 837, on partnership books of account as evidence.]

(b) Where, in an action against two persons as partners, evidence of the partnership has been offered by the plaintiff, by submitting to the jury a partnership notice published in the newspapers, the subsequent declarations of one of the partners concerning the partnership affairs though made out of the presence of the other, and not communicated to him, are admissible as evidence against the firm.—*Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599. [Cited and annotated in 20 L. R. A. 599, on proof against one person of declarations by another to show partnership; in 52 L. R. A. 841, on partnership books of account as evidence.]

(c) Where the plaintiffs, as partners, were doing business as machinists in the city of Baltimore, the acts and declarations of one of them in reference to the subscriptions to and formation of an association to purchase an ice and tow boat for the purpose of keeping open the harbor of that city are not binding upon his co-partner; such an association not being within the scope of their partnership business.—*Wells v. Turner*, 16 Md. 133.

(d) In general, the acts and declarations of one partner, acting within the scope of the

partnership business, are competent against the firm.—*Doremus v. McCormick*, 7 Gill 49.

(e) In an action of debt against a surviving partner, he pleaded a release. The plaintiffs rejoined that it was obtained by misrepresentation and fraud; that the defendant had represented that the partnership was not able to pay more than about one-fourth of the debt, when in fact it was possessed of sufficient property to pay the whole claim, which the defendant well knew; and that in consequence of said false and fraudulent representation the plaintiffs executed the release. The plaintiffs gave general evidence of the condition of the partnership affairs, as represented by the defendant to them, the alleged insolvency of the firm prior to and at the time of the release, and that the firm continued until the death of the other partner. The deceased partner, on being informed, prior to his death, of the settlement with the plaintiffs at one-third of their claim, said that the firm had, at the time of said alleged settlement, funds sufficient to have paid the plaintiffs in full, in the hands of the defendant as liquidating partner. Held, that this admission was evidence to affect the defendant, as his survivor.—*Doremus v. McCormick*, 7 Gill 49.

(f) Where, in an action against a surviving partner, a release was pleaded and it was alleged in rejoinder that the release was obtained by misrepresenting that the partner was not able to pay its debts, which the defendant knew to be false, evidence is admissible that the decedent's partner, on learning the facts, had stated that the partnership had funds sufficient to pay such claim.—*Doremus v. McCormick*, 7 Gill 49.

(g) In an action by one partner, after a dissolution of the partnership and an assignment of the effects of the partnership to his use, for hardware sold and delivered to the defendant, the defendant proved that during the existence of the partnership one of the partners had informed the witness that they had an interest of three-fourths in certain houses building by the defendant, and that the defendant was to take hardware for that interest. The defendant then proposed to prove that, in a conversation after the dissolution, the partner, other than

the plaintiff, informed the witness that the partners had taken an interest of three-fourths of a house in the houses aforesaid, and that they were to give the defendant the hardware, for which the suit was brought, for such interest. Held, that the testimony was incompetent. Declarations of a partner, made after dissolution, cannot, of themselves, establish a contract against his co-partner.—*Owings v. Low*, 5 G. & J. 134. [Cited and annotated in 52 L. R. A. 557, 594, on party's books of account as evidence in own favor.]

(h) The admission of one partner as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is not binding on the other partners.—*Ward v. Howell*, 5 H. & J. 60.

#### § 250. Principal or surety.

(a) The admissions by a cashier as to his indebtedness to the bank are competent, though not conclusive, evidence against his sureties.—*McShane v. Howard Bank*, 73 Md. 135, 20 Atl. 776.

(b) Where A., in a letter to B., guaranteed the payment of the amount of such goods as C. should purchase of B., it was held, in a suit by B. against A., that the verbal admissions of C., not made in the presence of A., were not evidence of the purchase of the goods on the strength of such guaranty.—*Griffith v. Turner*, 4 Gill 111.

(c) A settlement in writing in which the deputy of a county collector acknowledges a certain sum to be due from the collector is prima facie evidence against the sureties of such collector, on his official bond, that the collector has collected and received such money.—*State v. McKee*, 11 G. & J. 378.

#### § 251. Trustee or beneficiary.

(a) The admission of an administrator, made before he is clothed with the trust, cannot be received in evidence against him, or bind the heirs or creditors of the estate.—*Webster v. Le Compte*, 74 Md. 249, 22 Atl. 232.

(b) The admissions of a party on the record, though only a trustee, are evidence, if made after he became trustee.—*Beatty v. Davis*, 9 Gill 211. [Cited and annotated in 49 L. R. A. (N. S.) 424, on right of attorney to testify.]

(c) No admission by an administrator before his appointment is evidence against him when suing as such.—*Dent v. Dent*, 3 Gill 482.

(d) Admissions by the personal representative of a co-obligor are not admissible in evidence in a suit against the surviving obligor by the obligee.—*Wilmer v. Harris*, 5 H. & J. 1.

#### § 252. Insured or beneficiary.

##### *Cross-Reference.*

Persons to whom admissions are made, see ante, § 204.

#### § 253. Conspirators and persons acting together.

##### *Cross-References.*

See "Malicious Prosecution," § 60.

Parties to fraudulent conveyance, see ante, § 230.

Preliminary evidence of conspiracy, see post, § 260.

In criminal prosecutions, see "Criminal Law," § 422.

(a) Where an assignor for the benefit of creditors confessed judgment in favor of the assignee some six days before the deed of assignment was made, and evidence was given to the jury tending to show the assignor's fraudulent purposes, and tending to show participation therein by the assignee, the grantor's declarations and acts after the assignment were properly admitted.—*Main v. Lynch*, 54 Md. 658. [Cited and annotated in 30 L. R. A. 467, 474, 481, 486, on intent to defraud sustaining attachment.]

(b) On a bill for the specific performance of a contract to convey land, where the evidence shows that the disability to perform the contract was the result of a fraudulent arrangement and conspiracy between the vendor and another for the purpose of depriving complainant of the benefit of their contract, the vendor's declarations tending to implicate such other in the fraudulent transactions are admissible in evidence as a part of the res gestæ.—*Powell v. Young*, 45 Md. 494.

### (E) PROOF AND EFFECT.

##### *Cross-References.*

Effect of admissions on trial as relieving adverse party from necessity of offering proof, see "Trial," § 36.

In criminal prosecutions, see "Criminal Law," § 409.

Waiver of rights acquired by adverse possession, see "Adverse Possession," § 85.

#### § 254. Laying foundation for impeachment of testimony of party.

(a) The admissions of a party against interest are admissible in evidence against him, though he was not interrogated in regard thereto.—*Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089.

#### § 255. Preliminary evidence.

##### § 256.—In general.

##### § 257.—Identity of title or interest.

##### § 258.—Existence and extent of agency or authority.

##### *Cross-References.*

Evidence preliminary to admission of agent's declarations and acts to prove agency, see "Principal and Agent," § 22. Order of proof, see "Trial," § 60.

(a) A party seeking to show that admissions were made by an agent must show that they were made at a time and under such circumstances as to bind the principal, and, where there is any doubt as to whether such admissions were made during or after the work in question, the burden is on such party to show that they were made at a time when the principal was bound by them.—*Noel Const. Co. v. Armored Concrete Const. Co.*, 120 Md. 237, 87 Atl. 1049.

(b) In an action to recover the contract price of canned goods sold through a broker, where the broker testified that he represented both parties, but was paid by plaintiff in accordance with custom, a letter from the broker to plaintiff, saying that defendant had not approved samples sent, and had requested the broker to have plaintiff send others, was admissible in connection with an offer to show that the broker was defendant's agent.—*Webster v. P. W. Moore & Son*, 108 Md. 572, 71 Atl. 466.

(c) In an action on a contract alleged to have been made by defendant's agents on his behalf, neither the contract, the letters of the agents, nor their declarations or acts in making the contract, were admissible to bind defendant until some proof aliunde had been offered tending to prove the existence of the agency.—*Fifer v. Clearfield & Cambria Coal & Coke Co.*, 103 Md. 1, 62 Atl. 1122.



(d) The acts or declarations of a person who assumes to act as the agent of another are not admissible evidence against his supposed principal, without some independent proof of his authority or agency.—*Rowland v. Long*, 45 Md. 439.

(e) The rule which permits irrelevant testimony to be introduced on the assurance of counsel that it will be made relevant by other testimony, to be subsequently introduced, does not apply to a case where the declarations or acts of agents are offered for the purpose of binding their principals, but in such case the fact of agency must be first clearly established.—*Rosenstock v. Torrey*, 32 Md. 169, 3 Am. Rep. 125.

§ 259.— **Existence of partnership.**

§ 260.— **Existence of conspiracy or common purpose.**

§ 261. **Determination of question of admissibility.**

(a) Whether a letter written by plaintiffs to defendants should be construed as a bona fide offer of compromise, and hence inadmissible as evidence, was for the court.—*Richard J. Biggs & Co. v. E. Langhammer & Son*, 103 Md. 94, 63 Atl. 198.

§ 262. **Mode and requisites of proof of admissions.**

*Cross-References.*

Necessity of introducing pleadings to prove their contents, see "Trial," § 34.  
Testimony of witness as to substance or part thereof, see "Witnesses," § 37.

(a) In an action by a sheriff against his deputy, the admission of the deputy that he had received certain sums of money on executions put into his hands as a deputy sheriff was admitted in evidence without producing the execution.—*Mantz v. Collins*, 4 H. & McH. 65.

§ 263. **Explanation or limitation.**

*Cross-Reference.*

Proving affirmative facts by reading other parts of testimony used as an admission, see ante, § 155.

(a) Complainant having read the part of the answer admitting the creation of the debt, the other allegations, which were parts of the sentences read, denying liability thereon, by affirmatively setting forth the

facts constituting payment, were thereby brought before the court as evidence for defendant.—*Fehsenfeld v. Crockett*, 88 Md. 249, 41 Atl. 66; *Davis v. Crockett*, Id.

(b) After the introduction of evidence in the nature of declarations against interest by a woman since deceased, her will cannot be offered in rebuttal as a declaration in her interest.—*Taylor v. Brown*, 65 Md. 366, 4 Atl. 888.

(c) If part of a conversation which goes to remove the bar of the statute be put in, the other part, which amounts to a denial of any indebtedness, must also be admitted.—*Higdon v. Stewart*, 17 Md. 105.

(d) The party talked with S. in the presence of the witness about business with M., and S. then left the room, and half an hour afterwards the party talked with the witness about the same matters. Held, that there was but one conversation, and that, upon proof of the first part of it, the party should be allowed to prove the second part in his discharge.—*Higdon v. Stewart*, 17 Md. 105.

(e) If admissions or declarations be used for a purpose adverse to the claim of the party making them, those made at the same time and in such party's favor must be also received.—*Bowie v. Stonestreet*, 6 Md. 418, 61 Am. Dec. 318.

(f) The whole of a conversation between witness and one of the parties must be given, where it is proposed to give it in evidence.—*Turner v. Jenkins*, 1 H. & G. 161.

§ 264. **Construction.**

(a) An admission by a party that he has been fully indemnified means indemnified against legal liabilities, and, though he knew at the time that the person from whom he received the security had forged his signature, is not to be construed as applicable to such forged signature.—*Walters v. Munroe*, 17 Md. 150.

§ 265. **Conclusiveness and effect.**

*Cross-References.*

See ante, § 245.

Effect as proof of consideration for conveyance, see "Fraudulent Conveyances," § 300.

In actions for divorce, see "Divorce," § 125.

In connection with other evidence to show gift, see "Gifts," §§ 49, 82.

(a) An admission by a party competent to bind himself obviates, as a general rule, the necessity of proof of the fact admitted.—*Scarlett v. Robinson*, 112 Md. 202, 76 Atl. 181.

(b) In an action by an heir to recover of a former executor certain bonds alleged to be wrongfully withheld by defendant from the estate, mere declarations of decedent were insufficient of themselves to show that decedent had parted with his title to one-half the bonds.—*Gerting v. Wells*, 103 Md. 624, 64 Atl. 298, 433.

(c) In an action by an executor for an accounting of the affairs of a partnership between defendants and testator, it appeared that one of defendants had produced from his own possession balance sheets taken from the books of the firm, and that he had acknowledged the indebtedness with which they showed him chargeable, and that he had written letters relative to the business in which he admitted the indebtedness. Held, that he could not be heard to say that the balance sheets were erroneous.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

(d) Where a record in bankruptcy proceedings between the parties to an action is introduced in evidence to prove an admission in an answer made therein, the party against whom the evidence is introduced may deny the making of the answer and the facts evidenced thereby.—*Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484.

(e) Admissions made by defendant in a former bankruptcy proceeding between herself and plaintiff, which was dismissed at plaintiff's instance, were not conclusive though made under oath, and, there being no element of estoppel present, could be explained by any competent evidence.—*Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484.

(f) Where the owner of buildings concedes, at a trial for the enforcement of liens for work done and materials furnished, that certain liens are valid, he cannot withdraw such concession.—*Hensel v. Johnson*, 94 Md. 729, 51 Atl. 575.

(g) On an issue as to whether a loan made by decedent was paid, the uncontradicted testimony of a witness that decedent had stated to him that the loan had been paid

is conclusive, in the absence of evidence to the contrary.—*Koontz v. Koontz*, 79 Md. 357, 32 Atl. 1054.

(h) Evidence that defendant had for a number of years prior to any controversy, and when no motive to misrepresent existed, recognized and acknowledged complainant's beneficial interest in a corporation, is sufficient to destroy the effect of his present testimony that complainant had no such interest.—*Davis v. Gemmell*, 70 Md. 356, 17 Atl. 259.

(i) The effect of testimony of one party to a suit, when offered by the other party, is governed by the common-law rules of evidence. If the admissions made by the witness are admissible under them as testimony in chief, they apply to the issues in the case; but, if such admissions can only be introduced by way of impeaching the credibility of the witness, they are to be confined alone to that purpose.—*Mason v. Poulson*, 43 Md. 161. [Cited and annotated in 22 L. R. A. (N. S.) 556, on applicability of rule preventing impeachment of one's own witness by proof of contradictory statements out of court where admissible in chief as against interest.]

(j) In an action on a sheriff's bond to recover fees placed in his hands for collection by the clerk of the court, an admission by the sheriff, that he had received the clerk's fee bill for collection is prima facie evidence that such fees were collected at the proper time, and in the manner required by law.—*Logan v. State*, 39 Md. 177.

(k) In an action against joint administrators to recover a debt alleged to be due from their intestate, evidence of an acknowledgment of the debt by one of the administrators is not admissible for the purpose of taking the debt out of the operation of the statute of limitations, unless the debt is established by proof aliunde.—*McCann v. Sloan*, 25 Md. 575.

(l) Notwithstanding the admission by the defendants of a judgment as evidence from which the jury might find a verdict for the whole amount of the claims sued on, but not conceding it to be conclusive evidence, it is competent for them to claim any credit to which they might show themselves entitled by proof.—*Matthews v. Dare*, 20 Md. 248.

(m) Admissions of a party are strong evidence against him when invoked in behalf of one whose conduct was influenced by them, but they are of no avail to the advantage of one not a privy to them; and the party making them may, as against a stranger, show that they were founded in mistake.—*Starr v. Yourtee*, 17 Md. 341.

(n) In an action of trespass, admissions of the defendant, who disclaimed title, that the trespass was committed by him, and that the land was the property of plaintiff, are evidence from which the jury are authorized to infer that the land was in the possession of the plaintiff.—*Tyson v. Shuey*, 5 Md. 540.

(o) Parol admissions of one, under whom the defendant claims, that the land belonged to the plaintiff, and that he and the plaintiff had planted a boundary, and agreed upon a line of division between them, may be evidence of boundary, location, and possession, but not sufficient to prove the title in the plaintiff by possession, when he has admitted that defendant's deed embraces the land in dispute.—*Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115.

(p) On a bill by a landlord against his tenant to account for rents due on a lease defective at law, the tenant denied that he entered on the premises by virtue of the lease; but his admissions, in a suit at law to recover the rent, between the same parties, and in his answer to a bill filed by a third party, touching the same property, made a part of the cause, were held sufficient to defeat this ground.—*Williams v. City of Annapolis*, 6 H. & J. 529.

### VIII. DECLARATIONS.

#### Cross-References.

- As part of *res gestæ*, see ante, §§ 118-128.
- As rebuttal evidence, see ante, § 155.
- As secondary evidence, see ante, § 186.
- By grantors or former owners as constituting admissions by grantees and subsequent owners, see ante, §§ 229-236.
- Failure to deny statements of others as admissions by party present, see ante, § 220.
- Relevancy of evidence of statements and conduct of parties, see ante, § 110.
- Admissibility of prior or subsequent conduct of parties or persons interested to show fraud in conveyance, see "Fraudulent Conveyances," § 286.

As evidence of new promise after discharge in bankruptcy, see "Bankruptcy," § 436.

As evidence on question of probable cause for prosecution, see "Malicious Prosecution," § 59.

As proof of domicile, see "Domicile," § 9.

As to advancements, see "Descent and Distribution," § 116; "Wills," § 761.

As to marriage, see "Marriage," § 47.

By agent as to his authority to prove agency, see "Principal and Agent," §§ 22, 122.

By attorney as evidence of authority, see "Attorney and Client," § 72.

By defendant in bastardy proceedings, see "Bastards," § 60.

By person wrongfully killed to show disposition to provide for support of beneficiary, see "Death," § 64.

By principal or agent to prove authority of agent, see "Principal and Agent," §§ 120, 122, 123.

By prosecution in bastardy proceedings, see "Bastards," § 58.

By testator, as showing mistake, fraud, or duress in execution of will, see "Wills," § 165.

By testator, as showing testamentary capacity, see "Wills," § 54.

By testator, as to execution or revocation of will, see "Wills," § 297.

By testator on issue of testamentary capacity, see "Wills," § 54.

Evidence of authority of corporate officer or agent, see "Corporations," § 432.

Evidence of malice in instituting prosecution, see "Malicious Prosecution," § 60.

Evidence thereof in actions for alienation of affections or criminal conversation, see "Husband and Wife," §§ 333, 348.

In actions for compensation of broker, see "Brokers," § 85.

In criminal prosecutions, see "Criminal Law," §§ 412-415, 417-421.

Of elector as bearing on his qualifications, see "Elections," § 293.

Of subscribing witnesses to will, see "Wills," § 294.

Of voter as to how he voted, see "Elections," § 293.

Of witness, as evidence for purpose of impeachment, see "Witnesses," § 374.

#### (A) NATURE, FORM, AND INCIDENTS IN GENERAL.

#### § 266. Nature and grounds for admission in general.

(a) Where, in replevin, defendant pleads that the property sued for belonged to a decedent, statements of such decedent affecting the title to the property are inadmissible for plaintiff, where such decedent was not represented in the suit, and defendant had not shown that he claimed under him, and such title was not in issue.—*Smith v. Wood*, 31 Md. 293.

### § 267 Making of statement fact in issue.

(a) A purchaser of mortgaged premises assuming the mortgage may testify in an action between the mortgagee and the purchaser's grantee, to the statements of the mortgagor that certain back interest due from the mortgagor to the mortgagee was to be paid by the mortgagor, whereby he accepted the deed.—*Eareckson v. Rogers*, 112 Md. 160, 75 Atl. 513.

### § 268. Statements showing physical or mental condition.

### § 269. Statements showing intent, motive, or nature of act.

#### Cross-References.

Self-serving declarations, see post, § 271.

Alienation of affections or criminal conversation, see "Husband and Wife," §§ 333, 348.

Declarations ratifying sale of property by infant, see "Infants," § 30.

Evidence of malice in instituting prosecution, see "Malicious Prosecution," § 60.

#### Annotation.

Admissibility of declarations by vendor, made out of court, as to his purpose in making a conveyance or transfer attacked as fraudulent against creditors.—41 L. R. A. (N. S.) 1, note.

(a) Declarations of a grantor at the time of the execution of a deed of a part of his premises, or subsequent thereto, are inadmissible to affect the rights of a stranger to the deed purchasing the remainder of the premises on the faith of the records.—*Kensington Ry. Co. of Montgomery County v. Moore*, 115 Md. 36, 80 Atl. 614.

(b) In an action by a wife for alienation of her husband's affections, statements of the husband made to the wife in the absence of defendant to the effect that defendant objected to arranging a room in a certain way on the wife visiting the husband while he lived at the home of defendant, and that defendant did not want the wife there, if regarded as expressions of opinion of the attitude of defendant toward plaintiff, were inadmissible, especially when unaccompanied by a statement of facts affording a reasonable foundation for them.—*Hillers v. Taylor*, 108 Md. 148, 69 Atl. 715.

(c) While a parent's declarations are admissible to show whether property given to a child was intended as an advancement, they are not admissible to prove the fact

that money was given. This fact must be shown, like other facts, by the ordinary rules of evidence.—*Dilley v. Love*, 61 Md. 603.

(d) The defendants in an action of ejectment offered evidence tending to prove that the right, title, and interest of the party under whom the plaintiff claimed had been seized by the sheriff, and sold to the party under whom the defendants claimed. *Held*, that the declarations of one of the defendants, made long after such seizure and sale, were admissible against such defendant for the purpose of showing that there had been no valid and effectual seizure and sale by the sheriff, and of explaining the real character and effect of the sale itself.—*Kershner v. Kershner*, 36 Md. 309.

(e) Where testator conveyed a tract of land to a third party, who reconveyed it to testator's wife, and at the same time she executed a will, to which he consented in writing, devising the same tract of land to testator for his natural life, and at his death to her son by a former marriage, and, after the death of the wife, testator executed a will in which he declared that, by mistake of the draftsman, they did not carry out his intention, which was to convey only a life estate to the wife, the declarations of testator contained in his will were inadmissible in evidence to show his intention in having the deeds executed, in an action by testator's executors to set aside such deeds.—*Groff v. Rohrer*, 35 Md. 327.

(f) On an issue as to whether money obtained by defendant was a loan or a gift, evidence having been introduced showing artifice on the part of defendant in obtaining the money, the conduct and declarations to each other in presence of other persons were admissible.—*Cook v. Carr*, 20 Md. 403.

### § 270. Difficulty of producing direct evidence.

(a) The fact that a witness was taken sick the day previous to the trial is not a circumstance sufficient to warrant the admission of his declarations on the ground of necessity.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

### § 271. Self-serving declarations in general.

#### Cross-References.

As part of *res gestæ*, see ante, §§ 125-128.

Books of account, see post, § 354.

Opinion based on self-serving declarations, see post, § 537.

Entries of credit on account as evidence of payment tolling limitations, see "Limitation of Actions," § 196.

In criminal prosecutions, see "Criminal Law," § 413.

Nature of indorsements tolling limitations, see "Limitation of Actions," § 160.

To show reduction of invention to practice, see "Patents," § 91.

#### Annotation.

Admissibility against one spouse of evidence of facts revealed by physical examination of other spouse who would be incompetent witness.—49 L. R. A. (N. S.) 563, note.

Evidence of declarations of testator to identify legatee or devisee.—47 L. R. A. (N. S.) 540, note.

Admissibility of reports by agent or employee to employer, to prove fact in issue.—18 L. R. A. (N. S.) 231; 25 L. R. A. (N. S.) 930; 47 L. R. A. (N. S.) 830, notes.

(a) In an action between a husband and the administrator of his wife to determine whether a deposit in her name was a gift to her, or belonged to him, as having been made with his money, the wife's assertions of ownership, not made in the presence of her husband, *held* inadmissible.—*Martin v. Munroe*, 121 Md. 679, 89 Atl. 319.

(b) Declarations of the mortgagor and others that the mortgage has been paid are inadmissible to affect the assignee.—*Shipley v. Fox*, 69 Md. 572, 16 Atl. 275.

(c) It is not competent for persons objecting to the validity of a will, for the purpose of showing that they never recognized the validity thereof, to prove by one of the objectors that he and another of the objectors on the day of the burial of the testator had a consultation, and determined to contest the validity of the will, and to employ counsel to do so.—*Jameson v. Hall*, 37 Md. 221.

(d) In an action by a servant against his master to recover for his wrongful discharge, and for the balance of a year's salary claimed to be due him, evidence of his declarations to the general superintendent in charge of the master's business to the

effect that he intended to hold the defendant responsible for his year's salary is not admissible.—*Adams Exp. Co. v. Trego*, 35 Md. 47.

(e) A party's own declarations, not made in the presence of his adversary, are not admissible in his own favor.—*Boyle v. McLaughlin*, 4 H. & J. 291; *Bowie v. Stone-street*, 6 Md. 418, 61 Am. Dec. 318; *Green v. Sprogle*, 16 Md. 579; *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515.

(f) In an action for a breach of warranty in the sale of a horse, it appeared that the horse had been seized and taken from the vendee by the government on the ground that F., a former provost marshal of the city of Baltimore, had unlawfully appropriated and sold the horse, which was government property, to the party from whom the vendee had purchased it. *Held*, that the declarations of F., claiming the horse as his property, were inadmissible in evidence.—*Johnson v. Frisbie*, 29 Md. 76, 96 Am. Dec. 508.

(g) In an action by an administrator to revive a judgment, defendant put in evidence a receipt purporting to be signed by plaintiff's intestate, and plaintiff questioned defendant's witness, on cross-examination, as to certain characteristics of the intestate, stating at the time that, for the purpose of showing the signature to be a forgery, he would show that, shortly before the day the receipt was given, deceased was pressing the collection of the judgment of which such receipt was claimed to be a release. *Held*, that the intimation that the object of the testimony was to establish forgery or fraud did not take the evidence relating to intestate's characteristics out of the rule which prohibits a party's acts or declarations from being given in evidence in his own case, but, on the contrary, made the enforcement of the rule more imperative, since, the higher the crime, or the deeper the fraud sought to be established, the more stringently the rules of evidence should be enforced.—*Blackburn v. Beall*, 21 Md. 208.

(h) Declarations of a party, offered to show that he claims the funds attached in the hands of the garnishee, are not admissible evidence against the plaintiff.—*Leffler v. Allard*, 18 Md. 545.

(i) It is a general rule of evidence that a party's declarations in his own favor are not admissible.—*Whiteford v. Burckmyer*, 1 Gill 127, 39 Am. Dec. 640; *Hagan v. Hendry*, 18 Md. 177.

(j) Declarations of a party to an action, in his own behalf, made in the absence of the other party, and forming no part of the *res gestæ*, are not admissible.—*Nusbaum v. Thompson*, 11 Md. 557.

(k) In an action against an executor on a bond executed by his testator, plaintiff alleged that the bond was the outgrowth of a conveyance of certain property in secret trust to defendant's testator, which defendant denied, and offered in evidence testator's will, whereby it appeared that testator claimed the right to dispose of, as his own, the property alleged by plaintiff to have been conveyed to him in secret trust. *Held*, that the will was inadmissible on the part of the defendant, as it was but the declaration of the testator himself as to his title to the property.—*Edelin v. Sanders*, 8 Md. 118.

(l) Evidence of declarations made by a husband during coverture is not admissible against creditors of the husband, to establish a secret parol agreement between him and the wife in reference to property standing in the husband's name during his lifetime.—*Brooks v. Dent*, 1 Md. Ch. 523.

(m) The declaration of a tenant in tail that he got the land in controversy by entailment is not admissible to prove his title, as such estates, being created by deed or will, are not to be proved by parol.—*Maslin v. Thomas*, 8 Gill 18.

(n) A copy of a letter addressed by a creditor to his debtor, and contained in a letter book of the former, advising the debtor that he had drawn on him for the amount of a particular purchase, is not evidence for such creditor, in an action against a guarantee of the debtor, to establish that a payment shortly after received from such debtor, who was indebted on several accounts, was made in discharge of such purchase.—*Mitchell v. Dall*, 2 H. & G. 159.

(o) Where a debtor owed several accounts, and the creditor, in an action against the guarantor of one of the accounts, desired to show that a payment made by the debtor was on an account other than the one in

controversy, a draft which he had drawn on the debtor, accompanied by a letter from the debtor to the creditor regretting his inability to meet the draft, and promising a speedy payment of the demand, followed by a payment a few days after such letter, was competent to show that the payment was in discharge of that particular claim.—*Mitchell v. Dall*, 2 H. & G. 159.

(p) In an action of assumpsit, by one claiming to be the owner of property insured, to recover from D. the amount received by him on certain policies of insurance effected in his name, letters of a third person to D. are admissible to show that he had insured the property for such third person, and not for the benefit of plaintiff.—*Newson's Adm'r v. Douglass*, 7 H. & J. 417, 16 Am. Dec. 317.

(q) The answer of a defendant to a bill in chancery is not legal evidence for his representatives in a new suit against them relative to the same transactions.—*Drury v. Conner*, 6 H. & J. 288.

(r) As the act of 1796, c. 67, prohibiting the importation of slaves, applies only to "voluntary importations," and to cases where the importer "intends to sell" the slaves, or "to reside" in the state, in an action under said statute against an owner of slaves driven from St. Domingo by insurrection in that island, and coming with her slaves to Maryland, the declarations of such owner of her intention to return to the island when the troubles there had ceased were admissible to establish such intention, and, with the fact that she never became naturalized, were held conclusive, though she continued actually to reside in the state for a number of years.—*Baptiste v. De Volunbrun*, 5 H. & J. 86.

(s) The declarations of a person now deceased, who at the time held the mother of a petitioner for freedom in slavery, that she was a slave, were held inadmissible in evidence.—*Walls v. Hemsley*, 4 H. & J. 243.

## § 272. Declarations against interest in general.

(a) In an action for slaves, in which the plaintiff claimed title under a bill of sale from the former owner, and the defense was that such owner had afterwards manumitted

them, declarations of the owner, made between the date of the bill of sale and the deed of manumission, that he had sold the slaves to the person under whom plaintiff claimed, was competent evidence for the plaintiff.—*Coale v. Harrington*, 7 H. & J. 147.

**§ 273. Declarations of person in possession or control as to title or possession.**

*Cross-References.*

Acts and statements accompanying or connected with transaction or event in general, as *res gestæ*, see ante, § 121.

Admissions, see ante, §§ 230, 231, 236, 242.

*Annotation.*

Admissibility of declarations as to ownership by one in possession of personal property.—49 L. R. A. (N. S.) 700, note.

(a) In a contest between the heirs of deceased *ex parte materna* and *ex parte paterna*, the title records having been destroyed, statements made by deceased while living on the land that he got it from his mother on her death were admissible to show the character of his possession and title by which he held it.—*Gantt v. Trott*, 107 Md. 325, 68 Atl. 612.

(b) Where a plaintiff relies on title by possession, which must be adverse to the owner, the declarations of one of the occupants under whom he claims, as to the character and extent of the possession, showing that such occupant entered without claim of title, are admissible in evidence against the plaintiff.—*Keener v. Kauffman*, 16 Md. 296.

(c) Certain negroes, owned by A., remained in his possession until 1832, when they were sent to the farm of his daughter. They continued there until 1845, when they were replevied by the executor of A. from B. The defendant, B., proved that A., in 1841 or 1842, said, he had given nearly all his negroes to his sons and daughter. The plaintiff then proposed to prove the declarations of the daughter, then sole, that her father had said he would give her one-third of everything on his farm, except negroes, and would loan her one-third of them during her life, and after his death would give her one-half of them. *Held*, that, as the defendant relied on the daughter's right of property to maintain his pleas, the declarations made by

her about the time she obtained the slaves as to the nature and character of her possession might be used to rebut the evidence offered by the defendant to prove property in her, though her right of property would not be affected by any decision in this case.—*Garner v. Smith*, 7 Gill 1.

(d) On a *scire facias* by W. against S., a *terre-tenant* of D., he pleaded that D. was not seised of the land, etc. Evidence was offered of a grant for the land issued in 1764 to R., and a deed from D. to S. in 1803; that D. cleared a part of the land, and built a dwelling house thereon, and lived therein 24 or 25 years; and that he declared when he first took possession that he had rented the land of S. C. It was also proved that D. paid rent for the land to S. C. before it was cleared, for 7 or 8 years. *Held*, that the declarations of D. were admissible in evidence, and that W. was not entitled to recover.—*Webster v. Saunders*, 4 H. & J. 287.

**§ 274. Declarations as to boundaries.**

(a) Declarations of a deceased person having peculiar means of information and no interest in the matter, and made *ante litem motam*, are admissible to prove private boundaries.—*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273.

(b) Where a grantor expressly excepted from the deed a landing and subsequently conveyed the landing to another, declarations thereafter made by him as to the boundary of the landing were not, after his death, inadmissible as impairing the rights of the first grantee.—*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273.

(c) Declarations of the former owner and occupant of land as to the boundaries of a part thereof conveyed by him, made after conveying the land and before any controversy as to the location of the boundary, are, after his death, admissible to establish the boundary.—*Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273.

(d) The guardian of children in charge of a tract of land belonging to them is interested in the subject of the boundary, and his declarations are not receivable.—*Peters v. Tilghman & Purnell*, 111 Md. 227, 73 Atl. 726.

(e) Declarations as to the true boundary of land, made by persons who have an interest in establishing such boundary, are inadmissible in evidence.—*Jarrett v. West*, 1 H. & J. 501; *Medley v. Williams*, 7 G. & J. 61.

(f) The declarations of a deceased person, seized at the time of a particular tract of land, not located on the plots in the case, were offered in evidence by the defendant in ejectment to prove the end of the first line of that tract, which was the beginning of the land claimed and located on the plots by the defendant. *Held*, that they were not admissible in evidence.—*Hall v. Gittings*, 2 H. & J. 380.

(g) The declarations of a former holder of the adjoining lands as to the bounds of the land in dispute were admitted in evidence, it not appearing by the plots that he was interested in establishing the facts related by him.—*Hall v. Gittings*, 2 H. & J. 112.

(h) Though the authority of commissioners appointed to perpetuate the bounds of lands was insufficient, and the depositions of witnesses taken before them were inadmissible as such, the statements of such witnesses were admissible as declarations.—*Tolley's Lessee v. Ford*, 1 H. & J. 413.

(i) In an action of ejectment, the declarations of the father of the lessor of the plaintiff, under whom he claimed, as to the boundaries, etc., were admitted, in favor of defendant, although such declarations were made, on the running of the lines of the land by surveyors, at the time of executing a land commission, which commission was not produced.—*Weems v. Disney*, 4 H. & McH. 156.

(j) In ejectment, hearsay evidence of the location of the land was admitted in evidence.—*Scott v. Ollabaugh*, 3 H. & McH. 511.

(k) Evidence of the declarations of a witness respecting the boundaries of land, made before commissioners appointed to take his deposition, is admissible, where the deposition is not in the possession of the one offering the evidence.—*Long v. Pellett*, 1 H. & McH. 531.

(l) Evidence of what former owners of land, through whom plaintiff claims, said with regard to the boundary of the land, is admissible on behalf of plaintiff.—*Redding's Lessee v. McCubbin*, 1 H. & McH. 368.

(m) Evidence of what the plaintiff's ancestor said with regard to the boundary of the land, is admissible in ejectment on behalf of plaintiff.—*Howell v. Tilden*, 1 H. & McH. 84.

(n) Traditional evidence of what an ancestor of plaintiff in ejectment, who was seized of the lands in question 50 years before suit, said as to the bounds of the land, *held* admissible.—*Howell v. Tilden*, 1 H. & McH. 84.

#### § 275. Declaration in course of business or performance of duty.

(a) Where action is brought to recover for refusal to accept and pay for goods contracted for, a letter written by plaintiff, bearing on the question whether he was able and willing to make delivery as required by the contract, is admissible in evidence to show such ability and willingness.—*Walter v. Victor G. Bloede Co.*, 94 Md. 80, 50 Atl. 433.

(b) The declarations of a commissioner authorized by act of the Legislature to receive subscriptions to the capital stock of a private corporation that a particular individual subscribed for a certain number of shares, and paid the first installment thereon, are neither against his pecuniary interest, nor made in the ordinary course of his duty. They are, therefore, not admissible in evidence to prove the fact of subscription, in an action brought by the corporation, after the death of the commissioner, against the alleged subscriber, to compel payment of the subscription.—*Western Maryland R. Co. v. Manro*, 32 Md. 280.

#### (B) BY DECEDENTS AGAINST INTEREST.

##### Cross-References.

Admissibility against successor in interest, see ante, § 236.

As to advancements, see "Descent and Distribution," § 116.

As to legitimacy, see "Bastards," § 5.

Competency of witnesses to testify to declarations, see "Witnesses," § 163.

For purpose of removing bar by limitation, see "Limitation of Actions," § 196.

#### § 276. Declarations against interest in general.

(a) The declarations of the ancestor, under whom a petitioner for freedom derives his



freedom, are evidence against such petitioner, and are not within act 1717, c. 13.—*Walkup v. Pratt*, 5 H. & J. 51.

§§ 277-282. (See Analysis.)

§ 283. Mode and form of declaration.

(a) A statement in writing, made by a party who was dead at the time of the trial, in reference to the location of a building which was one of the points in controversy, was inadmissible, where it was not made in the ordinary course of declarant's business or duty, and was not within the rules relating to the admissions of entries by deceased persons.—*Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166.

§ 284. Death of person making declaration.

(C) AS TO PEDIGREE, BIRTH, AND RELATIONSHIP.

§ 285. Nature of questions of pedigree and matters relating thereto.

(a) The term "pedigree" embraces, not only descent and relationship, but also the facts of births, marriages, and deaths, and the times when those events happen.—*Copes v. Pearce*, 7 Gill 247.

(b) It is upon the ground of necessity that these declarations are admitted, as an exception to the general rule excluding hearsay evidence; cases of pedigree being often incapable of proof, and depending entirely upon reputation.—*Copes v. Pearce*, 7 Gill 247.

(c) Hearsay testimony is admissible in questions of pedigree.—*Walkup v. Pratt*, 5 H. & J. 51.

§ 286. Matters of pedigree facts in issue.

§ 287. Family records.

Annotation.

Entries in family Bible or other religious book as evidence.—41 L. R. A. 449, note.

(a) Entries in a family Bible or Testament as to the date of the birth of children are admissible in evidence, even without proof that they have been made by a parent or a relative.—*Weaver v. Leiman*, 52 Md. 708. [Cited and annotated in 41 L. R. A. 451, 456, on entries in family Bible or other religious book as evidence.]

(b) Entries in a family Bible or Testament, produced from the proper custody, and shown to have been in fact the family Bible or Testament, are admissible on questions of marriages, births, deaths, and the like, without proof that they were made by a relative, or of the handwriting or authorship of such entries.—*Jones v. Jones*, 45 Md. 144. [Cited and annotated in 41 L. R. A. 450, 455, on entries in family Bible or other religious book as evidence.] See *Amey v. Cockey*, 73 Md. 297. [Cited and annotated in 41 L. R. A. 454, on entries in family Bible or other religious book as evidence.] *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505. [Cited and annotated in 41 L. R. A. 450, 455, on entries in family Bible or other religious book as evidence.]

§ 288. General and family reputation.

(a) The general reputation and tradition in a family of the death of one of its members, and of his having died seised of certain real estate, is evidence of such fact.—*Pan-coast's Lessee v. Addison*, 1 H. & J. 350, 2 Am. Dec. 520.

(b) Evidence of common reputation was admitted to prove two persons to be brothers of the whole blood, it appearing to the court that no better evidence could be procured.—*Johnson v. Howard*, 1 H. & McH. 281.

§ 289. Declarations by members of family.

§ 290.—In general.

(a) Declarations of the members of a family as to pedigree are admissible in evidence in a suit instituted to determine who are entitled to share, as next of kin, in the distribution of the estate of an intestate.—*Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505. [Cited and annotated, see supra, § 287.]

(b) The declarations of a tenant in tail that he got the land in controversy by entailment are admissible for the purpose of proving pedigree.—*Maslin v. Thomas*, 8 Gill 18.

(c) A witness stated that he was well acquainted with the family of two brothers, and was at their father's, and heard, on the day of their burial, from their father and sisters, that one of them (naming him) died a few hours before the other. At the time

of such examination one of the sisters was alive, and within reach of the process of the court; the father and the other sister being dead. *Held*, that such testimony so far as the information of the witness was derived from the father and the dead sister was admissible to show which of the two brothers survived the other.—*Raborg v. Hammond*, 2 H. & G. 42.

#### § 291.— By deceased members.

(a) The declarations of deceased members of the family are primary evidence on questions of pedigree, turning on a question of marriage. They are not admitted as evidence in its nature secondary, but taken because it is the best attainable.—*Craufurd v. Blackburn*, 17 Md. 49. [Cited and annotated in 15 L. R. A. (N. S.) 190, on admissibility of declarations of deceased person against his own marriage; in 36 L. R. A. (N. S.) 534, on admissibility of declarations of relatives upon issue of relationship or heirship.]

(b) In cases of pedigree, the declarations of a deceased person and of the deceased members of the family are admissible to prove, per se, not only the issue, but the marriage; and the rule of evidence admitting such declarations is not subject to the qualification that cohabitation must be first shown, to raise the inference of marriage.—*Copes v. Pearce*, 7 Gill 247.

(c) In an action against an administrator for the residue of an estate, the declarations of the deceased intestate were held competent evidence to prove that a particular person was his relative, and the degree of consanguinity or affinity between them; but a conversation between the deceased and another, in which each reckoned up their descendants, when the deceased remarked, "If that be the case, we are second cousins," is not admissible evidence for such purpose.—*State v. Greenwell*, 4 G. & J. 407.

#### § 292.— Necessity that declarant be dead.

#### § 293.— Relationship to family.

##### Cross-Reference.

Preliminary evidence, see post, § 309.

##### Annotation.

Admissibility of declarations of relatives of claimant upon the issue of his relationship or heirship to decedent.—36 L. R. A. (N. S.) 530, note.

(a) Relationship to a person cannot be proved by the declarations of one not shown by the evidence aliunde to be related to that person.—*Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752. [Cited and annotated in 16 L. R. A. (N. S.) 102, on presumption flowing from marriage ceremony; in 36 L. R. A. (N. S.) 534, on admissibility of declarations of relatives upon issue of relationship or heirship.]

(b) Hearsay evidence on matters of pedigree, to be admissible, must come from some member of the family to whom it relates. The declarations of an illegitimate member have been held inadmissible, but proof that the declarant is connected with one branch only of the family is sufficient to render his declarations competent evidence.—*Craufurd v. Blackburn*, 17 Md. 49. [Cited and annotated, see supra, § 291.]

#### §§ 294-297. (See Analysis.)

#### (D) AS TO MATTERS OF PUBLIC OR GENERAL RIGHT OR INTEREST.

#### §§ 298-301. (See Analysis.)

#### § 302. General reputation.

(a) Traditional evidence of what an ancestor of plaintiff in ejectment, who was seized of the lands in question 50 years before suit, said as to the bounds of the land, held admissible.—*Howell v. Tilden*, 1 H. & McH. 84.

#### §§ 303-308. Declarations as to specific facts.

##### Cross-Reference.

Declarations of undersheriff as evidence of title to office, see "Sheriffs and Constables," § 17.

#### (E) PROOF AND EFFECT.

#### §§ 309-312. (See Analysis.)

#### § 313. Conclusiveness and effect.

##### Cross-References.

Declarations by principal or agent as proof of agent's authority, see "Principal and Agent," § 123.

In connection with other evidence to show gift, see "Gift," §§ 49, 82.

(a) Where the husband pays the price of realty, and title is taken in the name of the wife, evidence, other than admissions of the wife, to overcome the presumption that the transaction was intended as a gift, must be contemporaneous with the purchase; subse-

quent acts or declarations of the husband, though of the most unequivocal character, not being sufficient.—*Johnson v. Johnson*, 96 Md. 144, 53 Atl. 792.

(b) Where land was claimed by escheat, the declarations of the owner, made shortly before his death, in 1826, that he had no relations, unless it might be an aunt in Ireland, far advanced in years when he left that kingdom, in 1798, and whom he supposed to be dead, are sufficient to warrant the presumption that he died without relations within the fifth decree of consanguinity or affinity.—*Thomas v. Visitors of Frederick County School*, 7 G. & J. 369.

### IX. HEARSAY.

#### Cross-References.

Admissions and declarations in general, see ante, §§ 200-313.

Res gestæ as exception to rule against hearsay, see ante, §§ 118-128.

Weight and sufficiency of evidence improperly admitted, see post, § 593.

Contradiction of witness, see "Witnesses," § 406.

Declarations of agent to prove agency, see "Principal and Agent," § 22.

Declarations of voter as to how he voted, see "Elections," § 293.

Establishment of agency by hearsay evidence, see "Principal and Agent," § 23.

In affidavits on application to open default judgment, see "Judgment," §§ 159, 160.

In criminal prosecutions, see "Criminal Law," §§ 419-421.

Introduction of former statement of witness for purpose of impeachment, see "Witnesses," § 390.

Rejection of hearsay evidence taken before commissioners in admiralty, see "Admiralty," § 77.

Testimony as to declarations of decedent, see "Witnesses," § 177.

#### § 314. In general.

(a) In an action against an ice manufacturer for coercing plaintiff dealer into desisting sales under a contract with a third company, testimony as to reason given by a certain person why plaintiff could not supply ice to the third company was properly excluded as being hearsay.—*Sumwalt Ice Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 Atl. 48.

(b) In an action for being bitten by a dog, an investigation whether it had rabies seemed to have been scientifically made according to the established system in vogue at a Pasteur Institute, and all the physicians who took part in it testified as to their re-

spective parts, making a complete chain of investigation, and the entries in the record books and on a card in relation thereto were admitted in connection with their testimony. *Held*, that the testimony was admissible as against an objection that the opinions of the witnesses were based on hearsay because all the work of making experiments at the institute was not done by one person, but different parts of the process of investigation were performed by different members of the staff.—*Buck v. Brady*, 110 Md. 568, 73 Atl. 277.

(c) Facts of great antiquity, resting wholly in parol, and of which no written evidence can be presumed to exist, may be established by hearsay evidence.—*Casey v. Inloes*, 1 Gill 430, 39 Am. Dec. 658.

(d) Where a witness proved the admission of a debt by the defendant in a conversation with him, he cannot, in reply to the question of why he called on the defendant, be permitted to testify to information which he had received from other persons, strangers to the action. Though it constituted the inducement to call on the defendant, still it was hearsay.—*Wolfe v. Hauver*, 1 Gill 84.

#### § 315. Statements by persons other than parties or witnesses.

§ 316.—(Omitted from the classification used herein.)

#### § 317.—Oral statements.

(a) In an action for breach of a contract to furnish lumber for a building for a railroad company according to the specifications furnished, evidence of statements by the railroad company's inspector in inspecting the lumber would be hearsay and not admissible.—*Canton Lumber Co. v. Liller*, 112 Md. 258, 76 Atl. 415.

(b) A question what, apart from his observation, a witness had heard that enabled him to say what would be done by others in his line of work, was properly excluded as hearsay.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818.

(c) In an action by a discharged employee for damages sustained in consequence of being unable to obtain employment because of a letter written and circulated by his employer, testimony of the employee as to what reason the various persons to whom he ap-

plied for employment gave for their refusal to employ him was hearsay.—*Willner v. Silverman*, 109 Md. 341, 71 Atl. 962.

(d) One who was in another's office, while a telephone conversation was in progress between the latter and a third person could not testify as to such conversation, based on what was repeated to him at the time.—*Willner v. Silverman*, 109 Md. 341, 71 Atl. 962.

(e) In an action by a wife for alienation of her husband's affections, statements of the husband made to his wife in the absence of defendant, if considered as repetitions of declarations made to him by defendant, are inadmissible against defendant as hearsay.—*Hillers v. Taylor*, 108 Md. 148, 69 Atl. 715.

(f) Testimony as to statements of a third person as to the mental condition of testatrix is hearsay.—*Robinson v. Jones*, 105 Md. 62, 65 Atl. 814.

(g) On the issue as to the capacity of a testator, testimony as to statements by the testator's wife, as to what the testator had said, was inadmissible as hearsay.—*Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082.

(h) In an action for the abduction of a child a witness was asked to state what the child told him, shortly before she went to defendants, as to what defendant had promised her if she would go there. *Held*, that the question was properly excluded as calling for hearsay evidence.—*Baumgartner v. Eigenbrot*, 100 Md. 508, 60 Atl. 601.

(i) The testimony of an administrator as to statements made by his intestate with reference to the matters involved in the suit instituted by him is hearsay.—*Duvall v. Hambleton & Co.*, 98 Md. 12, 55 Atl. 431.

(j) In an action for assault, a physician testified that he examined plaintiff, who came to him complaining of a pain, and he found him suffering from an enlargement of the parts complained of, and suggested treatment, and stated that if it continued he would have to have an operation performed; that he did not thoroughly diagnose the case; that the next time he examined him he saw that an operation had been performed; and that he knew nothing about the cause of the trouble. *Held*, that such evidence was not inadmissible on the ground that it was hear-

say.—*Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 512.

(k) In an action against a railroad company for causing the death of a man, a switchman testified that it was the engineer's duty to inform him of any obstructions on the track, that he might hold the following train till the obstruction was removed. *Held*, that this witness might testify that the engineer told him there was a man killed, but that no statements of the engineer as to how he was killed or how he looked were admissible.—*Baltimore & O. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 233.

(l) On an issue as to whether checks paid by a bank were a forgery, confessions made by the alleged forger are inadmissible against the bank.—*Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

(m) Where a lien is claimed upon the property of the owner for materials furnished a contractor, and the question is whether the building was finished and accepted at the time of the delivery of the materials charged, the declarations of the contractor, not made in the presence of the owner, cannot be offered in evidence to bind the latter.—*Treusch v. Shryock*, 51 Md. 162.

(n) In an action against a street railway company to recover damages for an injury sustained by plaintiff, an infant, in being run over by a car, defendant offered in evidence a conversation touching the accident, in which the father of the infant stated that he did not blame the driver, and that the child was injured through a pure accident. The father was not present when the accident occurred, saw nothing of it, and had no knowledge of the particulars, further than the information derived from others. *Held*, that the evidence was inadmissible.—*Baltimore City Pass. Ry. Co. v. McDonnell*, 43 Md. 534. [Cited and annotated in 34 L. R. A. (N. S.) 785, on evidence as to speed of street cars.]

(o) In an action upon a contract to purchase flour, it appeared that a tender of the flour was made in the plaintiff's name by a clerk of a third party. *Held*, that a statement of the clerk that he did not know whose the flour was, but that his employer informed him that it was the plaintiff's flour, and told

him to tender it as such, was inadmissible.—*Oelrichs v. Artz*, 21 Md. 524.

(p) A witness, neither a manufacturer of nor dealer in hardware, cannot give evidence of the value of items in a hardware bill, based upon information derived from buyers and sellers of such articles. Such evidence is but hearsay.—*Green v. Caulk*, 16 Md. 556.

(q) Declarations of third persons are not admissible in evidence.—*Whiteford v. Burckmyer*, 1 Gill 127, 39 Am. Dec. 640.

(r) Information received by a witness from his co-partner of the price of merchandise purchased by him at A., for which the witness knew that his house at B., where he resided, paid at the price mentioned, is but hearsay evidence of the price of such merchandise at A.—*Williamson v. Dillon*, 1 H. & G. 444.

(s) Hearsay is inadmissible to prove the sale of a slave.—*Walkup v. Pratt*, 5 H. & J. 51.

(t) Evidence that the witness had heard certain people, since deceased, talk about the right of a certain slave to freedom, but could not recollect what they said, more than that they censured those who kept the slave for not making her free, was inadmissible.—*Mahoney v. Ashton*, 4 H. & McH. 63; *Same v. Same*, Id. 295.

### § 318.—Writings.

#### Cross-Reference.

Verdict of coroner's jury, see "Coroners," § 22.

(a) In an action by one tug owner against another to recover compensation for towing scows, the record in another suit between the owner of the scows and plaintiff held properly excluded, where admissions in plaintiff's pleadings in that suit were read in evidence.—*American Towing & Lightering Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 84 Atl. 182, Ann. Cas. 1914A, 46.

(b) In an action by the seller of coke which he had to buy from the plant of a third person against the buyer for breach of contract, the admission of letters written by the superintendent of the manufacturer held error; they being no more than hearsay declarations which tended to show the buyer's ability to perform his contract.—*Dimmick v. Hendley*, 117 Md. 458, 84 Atl. 171.

(c) A report by an engineer of his inspection of a building in process of erection under a contract therefor, not in any manner authenticated, and in effect but an unsworn statement of the engineer, is inadmissible as hearsay. So, also, such a report, though supported by a voluntary affidavit, is inadmissible as hearsay.—*United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775; *Summers v. United Surety Co.*, Id.

(d) On an issue whether a certain note had been discounted by a bank, it was error to admit a letter which accompanied the note when it was sent to the bank, and which tended to show that it had been discounted; the effect of such letter being to admit the unsworn statement of a third party.—*Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88.

(e) A letter written by a third person to plaintiff is not admissible in a slander suit, unless defendant is shown to have some connection therewith.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

(f) In an action on a policy of life insurance, copies of the city death record cannot be introduced to show the nature of the disease from which insured's relatives died, as they were unsworn statements and hearsay evidence.—*Metropolitan Life Ins. Co. of New York v. Anderson*, 79 Md. 375, 29 Atl. 606.

(g) When a stockbroker fills an order for the purchase of stocks through the agency of a business correspondent in another city, the letters of such correspondent are not admissible in evidence, in a suit by the broker against his principal, to establish the fact that the stocks were actually purchased.—*Rosenstock v. Tormey*, 32 Md. 169.

### § 319. Evidence founded on hearsay.

#### § 320.—In general.

(a) Where a witness neither recollects the fact, nor remembers to have recognized the written statement as true, and the writing was not made by him, his testimony, so far as founded on the written paper, is but hearsay, and he can be no more permitted to give evidence of his inference, from what a third person has written, than from what such person has said.—*Green v. Caulk*, 16 Md. 556; *Lewis v. Kramer*, 3 Md. 265.

### § 321.—Testimony of person as to his age.

### § 322.—Reputation as to persons.

#### Cross-Reference.

See "Trespass," § 45.

(a) The insolvency of a guardian may be proved by parol evidence of his general reputation as to insolvency in the community in which he resides and is known.—*Griffith v. Parks*, 32 Md. 1.

(b) In an action of ejectment, where the fact of the marriage of certain persons is in issue, general reputation in regard to such marriage may be proved by a witness who has knowledge of such general reputation.—*Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713.

(c) Where plaintiff claims under a certain person by collateral descent, vague, indefinite, traditionary evidence is not legally sufficient to establish such person's death without lawful issue.—*Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698.

(d) General reputation, as to a petitioner for his freedom, or his maternal ancestor, that they were entitled to their freedom, is not admissible evidence.—*Walkup v. Pratt*, 5 H. & J. 51.

(e) The reputation of the neighborhood that the mother of a petitioner for freedom was a free woman is not admissible in evidence.—*Walls v. Hemsley*, 4 H. & J. 243.

(f) In a petition for freedom, the testimony of a witness that he had "always understood that she [the ancestor of the petitioner] came from R. N., but did not know it of his own knowledge, and heard that she went by the name of P. S. [the name of the petitioner]," was held competent evidence. So, also, this part of the deposition of another witness, "that his mother, in her lifetime, told him it was generally reported, and she always understood, that a woman named P. S. came to the family of J. L. from the family of R. N."—*Shorter v. Boswell*, 2 H. & J. 359.

(g) In a suit for freedom, the deposition of a witness who stated that he had heard his uncle (who was dead) say at sundry times that it was the report of the neighborhood that, if the ancestor of the petitioner had justice done her, she would be free, was admitted in evidence.—*Mahoney v. Ashton*, 4 H. & McH. 63; *Same v. Same*, Id. 295.

### § 323.—Market value shown by sales, offers to purchase or sell, or market quotations.

#### Cross-References.

Offer as admission, see ante, § 219.

Relevancy of evidence of market value, see ante, § 113.

Sales of, and price paid for property similarly situated as evidence of value, see ante, § 142.

(a) Quotations in a newspaper as to the value of stock are not admissible to prove its value, without evidence that such paper is accepted by the trade as trustworthy and reliable in stating prices of the articles in question, or without evidence as to how the paper obtains the information published.—*Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030.

(b) It being proper to prove the market price of articles by newspaper quotations, and a witness in an action involving the market value of malt at Baltimore on a specific date having testified that a paper published in New York quoted the market price of malt daily, he could be asked whether the prices differed in the two cities.—*Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 Atl. 702.

(c) A newspaper shown to be accepted by a trade as reliable in stating the market price of an article, is admissible in evidence to show such price without proof as to how the information published was obtained.—*Mount Vernon Brewing Co. v. Teschner*, 108 Md. 158, 69 Atl. 702.

(d) In an action for a balance due for work and materials furnished in repairing a ship, schedules of the established prices in the hardware trade, used by defendant's witnesses called to state the fair retail price of the materials, are not inadmissible on the ground that plaintiff's prices cannot be proved to be excessive except by persons who are also in the business of building and repairing ships.—*Morris v. Columbian Iron Works & Dry Dock Co.*, 76 Md. 354, 25 Atl. 417.

### § 324.—Repute as to facts.

#### Cross-Reference.

Reputation as to boundaries, see "Boundaries," § 35.

(a) Where defendants in a suit on a note given for the price of oyster lots, purported to be conveyed to them by plaintiff, claimed

that the lots lay across the line in an adjoining state, and that, hence, plaintiff could make no valid transfer thereof, it was error to exclude questions asked one of the defendants as to where the lots were located, whether he knew the state line in the waters where the oyster grounds were located, and what, if he knew, was recognized by the community generally as the dividing line.—*Disharoon v. Waters*, 114 Md. 466, 80 Atl. 46.

(b) Title to land cannot be proved by rumor or by the opinions of persons living in the vicinity, and there is no error in the court's refusal to allow a witness to be asked "who was personally considered or reputed to be the owner of the land."—*Johnson v. Turner*, 74 Md. xiv, memorandum case, 22 Atl. 1103; full report.

(c) Possessions of ancient date, of which there can be no living witnesses, and of which no written evidence can be presumed to exist, may be proved by hearsay, and other evidence, which would not be admissible to prove modern facts.—*Casey v. Inloes*, 1 Gill 430, 39 Am. Dec. 658. [Cited and annotated in 18 L. R. A. 781, on what title or interest will support ejectment.]

(d) The plaintiff in ejectment declared for certain tracts or parcels of land, called "A.," "B.," and "C.," being the dwelling plantation of W. Defense was taken on warrant, and not guilty pleaded. Held, that general reputation was inadmissible to prove that the dwelling plantation of W. consisted of the three tracts of land mentioned in the declaration.—*Medley v. Williams*, 7 G. & J. 61.

(e) Evidence that it was not generally known in a place where a certain partnership was carried on that P. was a partner is admissible, when the inquiry is whether plaintiff knew that defendant was a partner in order to show his liability for the claim sued on.—*Bernard v. Torrance*, 5 G. & J. 383.

(f) Parol evidence is admissible to prove that a tract of land has acquired a name by reputation different from its patent name.—*Rench v. Beltzhoover*, 3 H. & J. 469.

(g) A. made a resurvey of a tract of land called "C," under the name of "Tract D," and made a deed of such land so resurveyed,

by the name of "Tract D," to B. In ejectment the plaintiff, claiming title under the deed to B., contended that A. should be presumed to have had a title in fee simple to the original tract. Held, that the defendant might offer evidence, in order to rebut this presumption, that it was the general reputation that A. entered under the authority of his mother, under some contract, and not under any other title.—*Helms's Lessee v. Howard*, 2 H. & McH. 57.

## X. DOCUMENTARY EVIDENCE.

### Cross-References.

Admission by failure to deny or object to written statement, see ante, § 220.

As constituting hearsay evidence, see ante, § 318.

Evidence admissible by reason of admission of similar evidence of adverse party, see ante, § 155.

Evidence wrongfully obtained, see ante, § 154.

Negative testimony, see ante, § 147.

Self-serving declaration, see ante, § 271.

Statements in writing as admissions, see ante, § 215.

Writings as best evidence, see ante, §§ 157-187.

Writings submitted for comparison, see ante, §§ 197, 198.

Admissibility on cross-examination of writing used on direct examination, see "Witnesses," § 272.

Affidavits, see "Affidavits," § 18.

As item of costs, see "Costs," §§ 180-182.

Certificate of protest of bill or note, see "Bills and Notes," § 410.

Court records in general, see "Courts," § 117.

Cross-examination of witnesses as to writings, see "Witnesses," § 271.

Depositions, see "Depositions," §§ 88-96.

Diligence in procuring as affecting right to continuance, see "Continuance," § 26.

Effect of absence of internal revenue stamps, see "Internal Revenue," § 34.

Effect of affixing revenue stamp during trial, see "Internal Revenue," § 85.

Effect of alteration of instrument, see "Alteration of Instruments," § 24.

Effect of stipulation as to documentary evidence, see "Stipulations," § 14.

Effect of tax deeds as evidence, see "Taxation," §§ 788, 789.

Evidence of death, see "Death," § 3.

Manner of introducing documentary evidence, see "Criminal Law," § 663; "Trial," § 39.

Opinions of courts as evidence of the law, see "Courts," § 108.

Presumptions on appeal or writ of error, see "Appeal and Error," § 926.

Privileged communications, see "Witnesses," §§ 184-223.

Receipt as evidence of payment, see "Payment," § 70.  
 Record for purpose of review, see "Appeal and Error," § 524.  
 Report of referee as evidence, see "Reference," § 99.  
 Review of rulings as dependent on presentation of objection in lower court, see "Appeal and Error," § 204.  
 Right of jury to take documentary evidence to jury room, see "Trial," § 307.  
 Rules of court as to admissibility, see "Courts," § 80.  
 Testimony from writings, see "Witnesses," § 258.  
 Use by witness of writings, maps, or diagrams to explain testimony, see "Witnesses," § 252.  
 Use of writings to refresh memory of witness, see "Witnesses," §§ 254-257.  
 Will and record of probate, see "Wills," § 438.

*In particular actions or proceedings.*

Admissibility of books, papers, and reports and evidence relating thereto in actions for breach of contract, see "Contracts," § 349.  
 Admissibility of sheriff's sale book in action for dower in land sold under execution, see "Dower," § 79.  
 Admissibility of will or copy thereof in proceedings for probate or actions relating to wills or probate, see "Wills," § 298.  
 Criminal prosecutions, see "Criminal Law," §§ 429-447.  
 For compensation of broker, see "Brokers," § 85.  
 Impeachment of witness by production of record of conviction of crime, see "Witnesses," § 359.  
 On insurance policies, see "Insurance," §§ 650, 651.  
 On writ of entry, see "Entry, Writ of," § 21.  
 Proof of loss under insurance policy, see "Insurance," § 544.  
 Prosecution of principals in first and second degrees, see "Criminal Law," § 78.  
 To establish boundaries, see "Boundaries," § 36.  
 To quiet title, see "Quieting Title," § 44.  
 Trespass to try title, see "Trespass to Try Title," § 40.

**(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.**

*Cross-References.*

Best and secondary evidence, see ante, §§ 158, 162, 163, 178.  
 Conclusiveness and effect, see post, § 383.  
 Production of records, see post, § 366.  
 Relevancy of evidence in general to show identity of persons and things, see ante, § 102.  
 In criminal prosecutions, see "Criminal Law," § 429.  
 Use by witness to refresh memory, see "Witnesses," § 255.

**§ 325. Public records, documents, and publications in general.**

**§ 326. State papers.**

*Cross-References.*

Certified copies, see post, § 345.  
 Production in evidence, see post, § 366.

**§§ 327-331. Laws.**

*Cross-References.*

Authentication, see post, § 366.  
 Judicial notice, see ante, §§ 28-37.  
 Statutes not published under authority of state, see post, § 362.  
 Transcripts or certified copies of records as evidence, see post, § 344.  
 Admissibility of ordinance in action against gas company for failure to supply gas to private consumer, see "Gas," § 13.

(a) A book in two volumes, published in 1860, entitled, "The Revised Statutes of the State of Ohio," and upon the title page of which appeared the following words in printing: "Published for the State of Ohio and distributed to its officers under the Act of the General Assembly, passed March 16th, 1860," is strictly within Code, art. 37, § 47, which provides "that public or private statutes of any state may be read in evidence from any printed volume purporting to contain the statutes of the said state," and is therefore admissible in evidence to show the statute law of the state of Ohio.—*Harryman v. Roberts*, 52 Md. 64. (See Code 1911, art. 5, § 53.) [Cited and annotated in 5 L. R. A. (N. S.) 956, 974, on admissibility of copies of records of other states.]

(b) The statute law of another state can only be proved in the courts of Maryland by an authenticated copy of the law, or from a printed volume purporting to contain the laws of such state.—*Zimmerman v. Helser*, 32 Md. 274. (See Code 1911, art. 35, § 53.) [Cited and annotated in 25 L. R. A. 450, 451, 455, 458, on oral proof of foreign laws.]

**§ 332. Judicial acts and records.**

*Cross-References.*

Conclusiveness and effect, see post, § 383.  
 Judicial notice, see ante, § 43.  
 Parol or extrinsic evidence to contradict or vary, see post, § 386.  
 Production in evidence, see post, § 366.  
 Transcripts or certified copies, see post, § 340.



Effect of probate on admissibility of will or proofs, or of record or exemplified copy thereof, see "Wills," § 433.

Relevancy and materiality in trespass to try title, see "Trespass to Try Title," § 40.

Report of referee as evidence, see "Reference," § 99.

Use of exhibits on cross-examination of witness, see "Witnesses," § 269.

(a) Where, in a suit by a widow against her husband's estate to recover advances claimed to have been made by her to her husband in his lifetime with which he purchased certain real estate under a contract to convey a portion thereof to her which he failed to do, certified copies of the proceedings in settlement of an estate through which plaintiff obtained the money which she claimed to have so advanced to her husband were relevant.—*Cross v. Iler*, 103 Md. 592, 64 Atl. 33.

(b) A compromise of an equity suit was effected by which a tenant agreed to abandon his claim for compensation for services rendered, and to pay trustees holding title to the premises certain rent in arrear if they would surrender their claim to certain insurance, which they did. The tenant's check for the rent, however, was refused, whereupon his attorney C., guaranteed payment of the rent. The tenant then delivered a check for the rent to C., but immediately stopped payment thereof and withdrew the insurance from a bank and absconded. C. having been compelled to pay the rent, suit was brought by the trustees' grantee to recover the same from the tenant for the use of C. Held, that the record in the equity suit was admissible for the purpose of establishing C.'s interest in the controversy.—*Philbin v. Thurn*, 103 Md. 342, 63 Atl. 571.

(c) Docket entries required by law, showing that there is a judgment, are admissible in connection with a copy of the judgment.—*Shipley v. Fox*, 69 Md. 572, 16 Atl. 275.

(d) Letters of administration, not authenticated by the seal of the Orphans' Court, which granted them, are inoperative, and not admissible as evidence.—*Tuck v. Boone*, 8 Gill 187.

(e) A guardian's account, passed by the Orphans' Court, is prima facie evidence to prove that at the date of such account the wards, in whose favor it was stated, were

minors, and that the accountant was their guardian, and as such owed them the amount therein stated to be due them.—*Richards v. Swan*, 7 Gill 366.

### § 333. Official records and reports.

#### Cross-References.

Conclusiveness and effect, see post, § 383.

Parol or extrinsic evidence to contradict or vary, see post, § 387.

Transcripts or certified copies, see post, § 341.

Unofficial records, see post, § 351.

(a) In an action to recover damages for injury to the plaintiff's milldam by the erection of a wall upon an adjoining road by the county commissioners, a report made by a committee appointed by the commissioners to examine the wall, with reference to its effect upon the plaintiff's dam, is not admissible in evidence for the plaintiff. It is a mere opinion, unsupported by oath.—*Tyson v. Baltimore County Com'rs*, 28 Md. 510.

(b) Notes or memoranda of a surveyor who is dead, indorsed on his certificate of survey, are, on proof of his handwriting, competent evidence to show the original running of the land to which they relate, but not to elongate or shorten, or in any manner to affect, the position of the land as described in the grant.—*Snavely v. McPherson*, 5 H. & J. 150.

### § 334. Official certificates.

#### Cross-References.

Certificates of fact or result of record, see post, § 345.

Conclusiveness and effect, see post, § 383.

Of officers of land office, see post, § 335.

Parol or extrinsic evidence to contradict or vary, see post, § 387.

Transcripts or certified copies of record of certificate, see post, § 341.

Affecting credibility as witness, see "Witnesses," § 331½.

Of oath of subscribing witnesses to will, see "Wills," § 294.

(a) Where the Governor has been authorized by law to administer the oath of office to certain officers, he may certify the fact of administering such oath, and his certificate under the court seal of the state is evidence of such fact.—*Harwood v. Marshall*, 9 Md. 83.

(b) The recital, in an escheat warrant, that the last owner of the land is dead without heirs, is not prima facie evidence of that fact.—*Goodwin v. Caton*, 4 Md. Ch. 160.

### § 335. Grants and patents for land, and proceedings in land office.

#### Cross-References.

Conclusiveness and effect, see post, § 383.  
Transcripts or certified copies, see post, § 342.

Relevancy and materiality in trespass to try title, see "Trespass to Try Title," § 40.

(a) In trespass for carrying away timber from plaintiff's land, where the issue raised is as to the boundary line of plaintiff's tract, a certificate of resurvey, not under the seal of the land office, though purporting to be made under a warrant from that office, is not admissible to contradict a witness; a certified copy under the seal of the land office being the best evidence.—*Crawford v. Berry*, 11 G. & J. 310.

(b) Where the certificate of a land commission to the commissioners for a survey did not show the specific notices required by act 1723, c. 8, but only mentioned that the notices directed by the act had been given, it was inadmissible in evidence.—*Gittings v. Hall*, 1 H. & J. 14, 2 Am. Dec. 502. (See Code, art. 15, § 7; art. 35, §§ 32, 33.)

### § 336. Records of conveyances and other private writings.

(a) When a deed is required by law to be recorded in a particular court, the record book containing such deed is sufficient evidence thereof on the trial of a cause in that court.—*Morrill v. Gelston*, 34 Md. 413.

### § 337. Municipal records.

#### Cross-References.

Authentication, see post, § 366.

Transcripts or certified copies, see post, § 344.

Certificate or record of cause of death as privileged communication, see "Witnesses," § 211.

In suit by city to enforce contract regulating charges for gas, see "Gas," § 14.

### (B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

#### Cross-References.

Best or secondary evidence, see ante, §§ 173, 186.

Corporate records and proceedings, see post, § 352.

Production of exemplifications or official copies, see post, § 366.

As items of costs, see "Costs," § 181.

In criminal prosecutions, see "Criminal Law," § 430.

### § 338. Necessity and admissibility in general.

(a) Upon the trial of an issue of nul tiel record in the same court where the alleged record is kept, it is not necessary to produce a formal record of the alleged proceedings, and it is sufficient to have the docket entries and original entries laid before the court for its inspection.—*Lerian v. Rohr*, 66 Md. 95, 5 Atl. 867.

(b) Where, by an agreement of the counsel in a suit on an injunction bond, the original papers in the injunction case were to be offered subject to exception in place of the exemplification of the record in that case, the petition for taking proof in the injunction case was admissible in evidence, as constituting a part of the record.—*Hopkins v. State*, 53 Md. 502.

(c) The proper method of proving in any other court the proceedings and judgment of one of the five courts of Baltimore is by the production of a transcript thereof under seal, duly certified. The original dockets and entries are not admissible.—*Goldsmith v. Kilbourn*, 46 Md. 289.

(d) The summons, returns, pleadings, and all other proceedings in a cause, constitute the record, and are admissible, upon a plea of nul tiel record, to prove what has been done during the progress of the cause.—*State v. Logan*, 33 Md. 1.

(e) An exemplification of the return of the surveyor to a warrant of resurvey dated 1707, with depositions of witnesses, and inquisition of a jury called under the warrant of resurvey, executed on the 4th of March, 1706-7, finding the beginning of a tract of land, with its courses and distances, and other boundaries, recorded among the records of Baltimore county, and certified under the seal of that county court to be a true copy, is not evidence, because there existed at the date of those proceedings no law which authorized such proceedings to be recorded.—*Wilson v. Inloes*, 6 Gill 121.

### § 339. Statutory provisions.

#### Cross-Reference.

See ante, § 338.

### § 340. Judicial records and proceedings.

### § 341. Official documents, records, and proceedings in general.

(a) A bond to dissolve an attachment being provided for by law, and becoming a part of the record, a certified copy of the record of it is admissible, under Rev. Code 1878, art. 70, §§ 57, 58, making certified copies of records evidence.—*Shipley v. Fox*, 69 Md. 572, 16 Atl. 275. (See Code 1911, art. 35, §§ 64, 66, 67.)

(b) Under Rev. Code 1878, art. 70, § 36, providing that a copy of a writ lodged for safe-keeping in any office or court, agreeably to the laws of the state or county, if properly certified, is admissible in evidence, a certified copy from the navy department, under the hand of the secretary and the seal of the department, is admissible.—*Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384. (See Code 1911, art. 35, § 42.) [Cited and annotated in 5 L. R. A. (N. S.) 165, on report by executive or administrative officer as privileged.]

(c) Examined copies of the contents of the assessors' books of the several counties may be received in evidence. It would be attended with infinite inconvenience, and would defeat one of the great purposes for which these books are made, if their contents could not be proved except by the production of the books themselves.—*Hughes v. Jones*, 2 Md. Ch. 178.

(d) Copies of original leases granted by the agents of the proprietary of Maryland, remaining in the auditor's office, with the affidavit of the auditor general, stating that they were true copies taken from the originals, made before a justice of the peace, and duly certified by the clerk of the county court, were held competent evidence.—*Bradford v. McComas*, 3 H. & J. 444.

(e) A copy of the qualification of A. as one of the commissioners to preserve confiscated British property, purporting to have been made before B., a justice of the peace, certified by the auditor general as a true copy taken from the original filed in his office, and a copy taken from the proceedings of the said commissioners, stating that A., appointed a commissioner, etc., produced a certificate of his qualification, etc., certified as above, with proof by a witness that he

had examined that part which purports to be a qualification of A.; that it is a true copy of the original, in the handwriting of A.; that the name of B., signed thereto, was in the handwriting of the said B.; and that the other copy was a true copy from the journal of proceedings of the commissioners, etc.,—was admitted to be read in evidence, and was not to be rejected on the ground that the appointment could only be shown by the records of the council by whom made.—*Hutchings v. Talbot*, 3 H. & J. 378.

### § 342. Records and proceedings in land office.

(a) A certified copy of the rent roll, extracted from the debt books of the lord proprietary, under the hand and seal of the register of the land office, having relation to the possession of the tract of land claimed in an action of ejectment, is competent evidence for the defendant in all cases of controverted possession, or when possession is relied on as evidence for the presumption of a grant.—*Casey v. Inloes*, 1 Gill 430, 39 Am. Dec. 658.

(b) Copies of records in the land office, certified by the register of the land office, under his seal of office, to the effect that they had been carefully compared with the original record books from which they were respectively taken, and that they agreed therewith, are sufficiently authenticated to be received in evidence—*Lee v. Hoyer's Lessee*, 1 Gill 188.

(c) Papers purporting to be copies of certificates of surveys of two tracts of land, not certified by the register, under the seal of the land office, and without date, were held not admissible in evidence in an action of ejectment.—*Cockey v. Smith*, 3 H. & J. 20.

(d) An attested copy of a certificate of resurvey, lodged in the land office of Maryland, was held good evidence in ejectment.—*Thornton v. Edwards*, 1 H. & McH. 158.

### § 343. Records of conveyances and other private writings.

(a) A certified copy of a paper required by law to be recorded is prima facie genuine and admissible in evidence, the original being lost.—*Classen v. Classen*, 57 Md. 510.

(b) A certified copy of a deed is admissible in evidence, although the record itself is within reach and might be produced.—*Preston v. Evans*, 56 Md. 476.

(c) A copy of a lost will, although certified by the register and admitted to probate, is inadmissible as evidence of title to land, if it does not appear from the certificate or probate that the will was legally attested, and the proper attestation is not proved.—*Hale v. Monroe*, 28 Md. 98. [Cited and annotated in 38 L. R. A. 446, on evidence to establish lost or destroyed wills.]

(d) An office copy of a deed of assignment of personalty is not evidence, because, if there was a delivery, it is not required to be recorded. The deed as well as the delivery must be proved, to support the assignment.—*Berry v. Matthews*, 13 Md. 537.

(e) To render a certified copy of the record of an instrument admissible in evidence, the registry of the original must have been authorized.—*Cheney v. Watkins*, 1 H. & J. 527, 2 Am. Dec. 530; *Connolly v. Bowie*, 6 H. & J. 141; *Coale v. Harrington*, 7 H. & J. 147; *Burgess v. Lloyd*, 7 Md. 178.

(f) Where a statute required deeds of real estate to be acknowledged before a magistrate and recorded, but did not expressly require the acknowledgment to be recorded, it was held that a certified copy from the registry of a deed not acknowledged was not admissible in evidence.—*Budd v. Brooke*, 3 Gill 198, 43 Am. Dec. 321.

(g) A release to an administrator and his sureties may be legally recorded in the Orphans' Court of the county where letters of administration were granted, and a copy certified by the register of wills of the same county is competent evidence.—*Mitchell v. Mitchell*, 1 Gill 66.

(h) The copy of an account of a defendant, passed against a deceased person, certified by the register of wills under his seal of office, is not evidence against him to establish the facts set out upon the face of such account; the law not authorizing such vouchers to be recorded, and they not being left in the custody of the register.—*Miles v. Knott*, 12 G. & J. 442.

(i) In replevin for a slave, where the plaintiff derived his title under a will, a copy certified by the register of wills, under his

seal, is competent evidence.—*Raborg v. Hammond*, 2 H. & G. 42.

(j) Copies of the records of deeds, certified by the recorder, are admissible in evidence without accounting for the absence of the originals.—*Hurn v. Soper*, 6 H. & J. 276. [Cited and annotated in 19 L. R. A. (N. S.) 439, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

(k) Where there was proof of the loss of an original deed of mortgage of land and slaves, dated in 1763, the inspeximus was permitted to be read as legal evidence, although the deed was not recorded in the manner prescribed by law, so far as respects the slaves in dispute.—*Dorsey v. Gasaway*, 2 H. & J. 402, 3 Am. Dec. 557.

(l) Where possession had accompanied land, agreeably to an ancient deed, which needed no enrollment, the inspeximus of the deed was held admissible in evidence.—*Hall v. Gittings*, 2 H. & J. 380.

(m) Where a deed has not been recorded within the time prescribed by law, a copy of it was held inadmissible in evidence.—*Carroll v. Norwood*, 1 H. & J. 167.

(n) A copy of a deed not enrolled in time, made by a clerk of court under seal of office, is entitled to no more weight or credit than a copy taken by a private person.—*Carroll v. Norwood*, 1 H. & J. 167.

(o) Copies of recorded deeds are not admissible in evidence without first accounting for the absence of the originals.—*Gittings v. Hall*, 1 H. & J. 14, 2 Am. Dec. 502.

(p) A copy of a deed enrolled, with an indorsement of the certificate of the witnesses that the grantor signed, sealed, and delivered the same, and also that livery was made, accompanied by possession of the land, was allowed to be read in evidence.—*Carroll v. Llewellyn*, 1 H. & McH. 162.

#### § 344. Municipal records.

#### § 345. Requisites of exemplification or certificate.

##### Cross-References.

See ante, § 342; post, §§ 346-348.

Transcript of accounts of federal officer, see "United States," § 51.

(a) A copy of a judgment authenticated by the words, "True copy, test," followed by the signature of the clerk, with the seal

of his office attached, constitutes sufficient authentication of a short copy of a judgment to meet the requirements of the Code of 1860, and permit of its introduction in evidence.—*Mayfield v. Kilgour*, 31 Md. 240. (See Code 1911, art. 35, §§ 64, 66, 67.)

(b) The register of wills is authorized and bound to record administration accounts proved and passed, and a copy under his official seal is competent evidence.—*Mitchell v. Mitchell*, 1 Gill 66.

(c) A clerk has no authority to certify a fact under the seal of the court. His duty is to grant exemplifications.—*Hammond v. Norris*, 2 H. & J. 130.

(d) A copy certified by an officer who is not competent by law to authenticate such copy is not legal evidence.—*Schnertzell v. Young*, 3 H. & McH. 502. [Cited and annotated in 5 L. R. A. (N. S.) 957, on admissibility of copies of records of other states.]

#### §§ 346-348. Acts, records, and judicial proceedings of other states.

##### Cross-References.

See ante, § 345; post, §§ 349, 382.

(a) The record of a judgment had in a foreign court was certified by the clerk under the act of Congress; his certificate stating "the above to be a true transcript," except the *præcipe*, declaration, and verdict. After admission of this record, part of the record to which the papers in evidence referred was introduced, being certified merely by the clerk. *Held*, that neither that part of the record certified under the act of Congress, nor those portions certified by the clerk, nor the two taken together, were admissible, for Code 1904, art. 35, § 40, provides that an exemplification of the record under the hands of the keeper of the same and the seal of the court where such record shall be filed shall be evidence to prove any debt of record made or entered in any other state; while § 64 of that article provides that short copies of judgments or decrees rendered by any court of record in the state shall be admissible in any other court, and thus an exemplification of the record must contain all material parts of the record, and a mere certificate of the clerk as a portion thereof is not an exemplification.—*Mundy*

*v. Jacques*, 116 Md. 11, 81 Atl. 289. (See Code 1911, art. 35, § 40.)

(b) A paper purporting to be a copy of an assignment for the benefit of creditors, without seal or attesting witness, and not purporting to have been executed before any officer of the law, certified by a person purporting to be clerk of a probate court in another state, as a copy "of a deed of assignment" filed in that court, is not admissible in evidence, in the absence of some evidence that, by the law of such other state, such a paper is operative and effective as a deed, that such deed is required to be recorded or filed in that court, and that a copy is made evidence of its execution.—*De Riesthal v. Walton*, 66 Md. 470, 8 Atl. 462. [Cited and annotated in 5 L. R. A. (N. S.) 977, on admissibility of copies of records of other states.]

(c) Under Code 1860, art. 93, § 327, providing for the proper authentication of wills made in other states, before they can be admitted in evidence, a copy of a will made in another state is not admissible where the register only certifies that such will is "filed for record."—*Beatty v. Mason*, 30 Md. 409. (See Code 1911, art. 93, § 354.)

(d) The copy of a will from the records of another state is not admissible to prove title to land.—*Beatty v. Mason*, 30 Md. 409.

(e) In an action upon the decree of a court of another state, the defendant pleaded nul tiel record. The record offered was duly authenticated according to the provisions of Act Cong. 1790, c. 11, and was certified by the clerk to be a true transcript of the record and proceedings in the cause, with all things touching the same, as fully as they existed among the records of his office. *Held*, that, where it appeared upon the face of the record that the matters in controversy were submitted to the judicial action of the court, such record was sufficient, although it appeared by inference therefrom that some of the original papers were not transcribed, and although it did not appear that the decree was signed by the judge or clerk of the court.—*McCormick v. Deaver*, 22 Md. 187. (See U. S. Comp. Stat. 1913, § 1519.)

(f) The transcript of a will and the proceedings thereon in a county court of Vir-

ginia are "records and judicial proceedings" of a court, within the meaning of the Act of Congress of 1790, relating to the authentication of public records; and, though the certificate of the clerk omitted to state that the presiding justice was duly commissioned and qualified, it was held to be a substantial compliance with the law.—*Case v. McGee*, 8 Md. 9. (See U. S. Comp. Stat. 1913, § 1519.) [Cited and annotated in 5 L. R. A. (N. S.) 971, 973, on admissibility of copies of records of other states.]

(g) A bill of sale was executed by A. to B., both of W. county, in the District of Columbia, on the 26th of December, 1804, for sundry slaves to secure the payment of a debt due to C., and was acknowledged on the same day before two justices of the peace of that county, and recorded on the 10th of January, 1805, in the record of the county. Held, that a copy thereof, certified under the seal of the court by the clerk of the Circuit Court of said district for said county, with the certificate of the chief judge of said court, that the attestation was in due form, and also a certificate by said clerk, under seal of the court, that the said chief judge was duly commissioned and qualified, was legal evidence.—*Bruce v. Smith*, 3 H. & J. 499.

#### § 349. Acts, records, and judicial proceedings of foreign countries.

##### Cross-Reference.

Production in evidence, see post, § 366.

(a) The proceedings of the court of a French island were held sufficiently authenticated to be received in evidence, it being proved by a witness skilled in the French laws and in the proceedings of the French tribunals that it was authenticated in the manner used and authorized in the territories and tribunals of France; the signature of the chief judge of the said court being proved, and the seal affixed thereto being proved to be similar to that used at the same time as the colonial seal of another French island.—*Owings v. Nicholson*, 4 H. & J. 66.

(b) A copy of a will executed in Philadelphia, and transmitted to the island of Martinique by the testator, certified by a notary public of that island, and returned under a

commission issued to take testimony, is sufficiently authenticated by having the certificate of the chief colonial officer as to the signature of the notary, and may be read in evidence as the will of the deceased.—*De Sobry v. De Laistre*, 2 H. & J. 191, 3 Am. Dec. 535. [Cited and annotated in 25 L. R. A. 450, 451, 460, on oral proof of foreign laws.]

#### (C) PRIVATE WRITINGS AND PUBLICATIONS.

##### Cross-References.

As res gestæ, see ante, § 121.

Best and secondary evidence as to facts or transactions described in or evidenced thereby, see ante, § 158.

Parol evidence as to fact of making or existence of writing, see ante, § 159.

Secondary evidence of contents, see ante, §§ 164-170.

In criminal prosecutions, see "Criminal Law," §§ 432-439.

On issue of limitations, see "Limitation of Actions," § 196.

#### § 350. Unofficial writings in general.

(a) A voluntary affidavit (as the protest of a master of a vessel) ranks with hearsay evidence, and is not receivable where better evidence can be had.—*Patterson v. Maryland Ins. Co.*, 3 H. & J. 71, 5 Am. Dec. 419.

#### § 351. Unofficial records.

##### Cross-References.

Negative evidence, see ante, § 147.

Use by witness to refresh memory, see "Witnesses," § 255.

(a) Entries in the baptismal register of a church, made by the clergyman in the regular discharge of his clerical duties, are admissible in evidence after his death, though there is no law requiring such records to be kept.—*Weaver v. Leiman*, 52 Md. 708. [Cited and annotated in 41 L. R. A. 451, 456, on entries in family Bible or other religious book as evidence.]

(b) In an action of ejectment brought by the lessee of the vestry of a parish, the plaintiff, in order to prove title to the lands in question, offered to read in evidence certain entries in a book purporting to be, and proved by a witness who was formerly rector of the vestry to be, handed down to him as the vestry book of the parish. Held, that the evidence was admissible.—*Martin v. Gunby*, 2 H. & J. 248.

### § 352. Corporate records and proceedings.

#### Cross-References.

Conclusiveness and effect, see post, § 383.  
Negative testimony, see ante, § 147.

Parol or extrinsic evidence to contradict or vary, see post, § 389.

Production in evidence, see post, §§ 370, 373.

Secondary evidence, see ante, § 164.

(a) The books of a corporation are inadmissible to establish a right in its favor against third persons.—*Brown v. State*, 64 Md. 199, 1 Atl. 54.

(b) Entries made in a corporate book in which accounts of shares of stock are entered in the handwriting of the president are admissible to show the issuance of corporate stock.—*Weber v. Fickey*, 47 Md. 196.

(c) A treasurer of a corporation having fraudulently overissued stock, the directors at a meeting received a report of the finance committee setting out the extent of such overissuance, in which report was no mention of one of the certificates. Held, that, in an action on the certificates, the record of the proceedings at such meeting, from the record book, was admissible; plaintiff having previously introduced, without objection, the record of meetings of stockholders and directors of the company held prior to such meeting.—*Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

(d) In an action by a creditor of a manufacturing corporation against a stockholder to enforce his individual liability for a debt contracted by the company, the books of the corporation relating to its private transactions are not admissible.—*Hager v. Cleveland*, 36 Md. 476. [Cited and annotated in 53 L. R. A. 537, on use of books of account as evidence on issues between other parties.]

### § 353. Conveyances, contracts, and other instruments.

#### Cross-References.

Best and secondary evidence, see ante, §§ 159, 165, 174, 178, 183, 184.

Conclusiveness and effect, see post, § 383.

Parol or extrinsic evidence to contradict or vary, see post, §§ 390-393, 395-409.

Preliminary evidence for authentication, see post, §§ 372-375.

Records of conveyances and other private writings, see ante, § 336.

Transcripts or certified copies, see ante, § 343.

Altered instruments, see "Alteration of Instruments," § 24.

Bills, notes, or checks as evidence of payment, see "Payment," § 70.

Relevancy and materiality in trespass to try title, see "Trespass to Try Title," § 40.

(a) In trespass by an assignee of a lease, an assignment of the lease, reciting that for a consideration the lessee assigned the lease to the assignee at the terms mentioned in the lease, etc., was sufficient to render it admissible in evidence.—*Stanton v. Lapp*, 113 Md. 324, 77 Atl. 672.

(b) As between persons not parties to a deed, the recitals therein are not admissible to show for what the property was sold.—*Lake Roland El. Ry. Co. v. Frick*, 86 Md. 259, 37 Atl. 650.

(c) For the purpose of showing the execution of a written contract for services, in pursuance of which plaintiff seeks to recover, the writing itself is admissible, though containing nothing binding plaintiff.—*Equitable Endowment Ass'n v. Fisher*, 71 Md. 430, 18 Atl. 808.

(d) Plaintiff in trespass gave in evidence a survey and location of lands in B. county held by A. at his death, which included the locus in quo, and offered in evidence A.'s will, containing a power of sale of all his lands in B. county. Held, that an objection to the will on the ground that it "was not located upon the plats" should not be sustained.—*Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 530.

(e) A paper containing an agreement which both parties meant to sign and seal, but which was signed and sealed by one only, is admissible in connection with the plaintiff's testimony, to show that both parties had treated the written contracts as containing the terms of the agreement, and had so recognized and acted upon it.—*Western Maryland R. Co. v. Orendorff*, 37 Md. 328.

(f) In an action to recover for services rendered, plaintiff relied on a letter written by defendant as the contract between them, but the letter upon its face showed that a written contract was contemplated. Defendant offered to show by parol that after the writing of the letter he prepared and read to plaintiff a written contract, which plain-

tiff assented to as embodying the agreement between them, but it was never signed. *Held*, that the unsigned written agreement was admissible in evidence.—*Allen v. Sowerby*, 37 Md. 410.

(g) Under act 1831, c. 304, declaring that possession by the grantee, his heirs or assigns, with notice to a subsequent purchaser of his claim, shall give effect to an unrecorded deed, the admissibility in evidence of such unrecorded deed depends on the sufficiency of the evidence offered to satisfy the requirements of the act as to notice and possession.—*Bryan's Lessee v. Harvey*, 18 Md. 113. (See Code, art. 21, § 20.) [Cited and annotated in 13 L. R. A. (N. S.) 73, 112, on possession of land as notice of title.]

(h) A deed of land executed in 1735, to be competent evidence should appear to have been recorded according to the provisions of act 1715.—*Mundell v. Hugh*, 2 G. & J. 193.

(i) Where the renunciation of a will sought to be introduced was obliterated, and no evidence appeared to show that it was done by accident or fraud, its condition is prima facie evidence that it had been canceled, and it was not admissible in evidence.—*Handy v. State*, 7 H. & J. 42. [Cited and annotated in 35 L. R. A. 329, 346, on necessity for calling subscribing witnesses to prove attested instruments.]

(j) In ejectment for recovering land devised by a will, the will was admitted in evidence, although the Orphans' Court had refused to admit it to probate, on the ground that it had been impliedly revoked, and the court of chancery had affirmed their decree.—*Massey v. Massey*, 4 H. & J. 141.

(k) In ejectment to recover land devised by a will, it appeared that the testator had made such will in May, 1804, and afterwards had two children,—one in January, 1805, and the other in June, 1807. In July, 1804, he acquired by purchase an additional tract, of which he died seised. *Held*, notwithstanding, that the will was in force, and as such admissible in evidence.—*Massey v. Massey*, 4 H. & J. 141.

(l) A paper signed by defendant as a submission of a controversy to arbitration is competent evidence on behalf of plaintiff suing to enforce the award, though defendant's letters on the subject of the reference

are not also introduced.—*Walsh v. Gilmor*, 3 H. & J. 383, 6 Am. Dec. 503.

(m) A deed for 86 acres of land, the same being a part of a tract, without courses or distances, but referring to another deed to ascertain the same, is not legal evidence of title, or to support the location thereof on the plots, without producing the deed to which it refers.—*Hammond v. Norris*, 2 H. & J. 130.

### § 354. Books of account.

#### Cross-References.

- Admissions by failure to dispute entries or accounts, see ante, § 220.
- As hearsay evidence, see ante, § 318.
- Best and secondary evidence, see ante, §§ 158, 166, 174, 177, 178.
- Books of corporation in general, see ante, § 352.
- Conclusiveness and effect, see post, § 383.
- Preliminary evidence for authentication, see post, § 376.
- Private books of officers, see ante, § 333.
- Private memoranda and statements in general, see post, § 355.
- Res gestæ, see ante, § 123.
- As evidence of application of payment, see "Payment," § 71.
- Use by witness to refresh memory, see "Witnesses," § 255.

#### Annotation.

- Admissibility of entries in diary.—51 L. R. A. (N. S.) 813, note.
- Admissibility of memoranda on check stubs.—42 L. R. A. (N. S.) 727, note.
- Admissibility, upon testimony of book-keeper, of entries in a party's books of account, based upon oral or written statements by others.—36 L. R. A. (N. S.) 899, note.
- Admissibility of account books in evidence in case of money loaned or payments made by party whose books are offered.—2 L. R. A. (N. S.) 401, note.
- Admissibility in evidence of books of account containing entries transferred from memoranda.—52 L. R. A. 577, note.
- General rules as to admissibility.—52 L. R. A. 833 note.
- Admissibility, as between third parties, of entries against interest made by deceased persons in books of account.—2 B. R. C. 670, note.

(a) In an action upon notes which were given in payment for machinery purchased by plaintiff for defendants, where there was an open, running account between the parties, the entries in plaintiff's books were not binding on defendants, unless it be shown that they assented thereto.—*Robinson v. Silver*, 120 Md. 41, 87 Atl. 699.



(b) Entries by defendant in his books were incompetent to show payments by him on plaintiff's account.—*Wilmer v. Placide*, 119 Md. 49, 86 Atl. 43.

(c) Entries in plaintiff firm's books, made by one of the firm who was out of the state at the time of the trial, were inadmissible to show a sale of property to defendant and delivery by shipment to a third party at defendant's direction.—*Deland Min. & Mill. Co. v. Hanna*, 112 Md. 528, 76 Atl. 850.

(d) A statement from books, though correct according to them, is inadmissible where a foundation for admission of the books is not laid.—*Richardson v. Anderson*, 109 Md. 641, 72 Atl. 485.

(e) A statement from books of account made by defendant, who kept them, with evidence that defendant stated to plaintiff that it was correct, is admissible against defendant as his admission.—*Richardson v. Anderson*, 109 Md. 641, 72 Atl. 485.

(f) Where the entries in a ledger were not shown to be original entries, and the witness testifying with respect to the ledger did not make the entries, nor see them made, and expressly disclaimed any knowledge or recollection that enabled him to speak of their correctness, but suggested how they might be erroneous, the ledger was not evidence of the facts indicated by the entries.—*Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184.

(g) Books of account of a party to the transactions recorded therein are not admissible, as independent evidence, to charge the other party, in an action against the estate of the party keeping the books.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650. [Cited and annotated in 2 L. R. A. (N. S.) 403, on account books as evidence in case of loans or payments by owner.]

(h) In an action for money loaned, money had and received, money due plaintiff on account stated, and, as alleged in a special count, for money due on a written contract between plaintiff and defendant in reference to the management of a certain business, defendant pleaded never indebted, payment, set-off, and an account in bar. Defendant proved that the business under the original contract had been greatly enlarged by parol agreements, so as to include hotel-keeping and other business, the incurring of heavy

expense, the remittance of the net cash to plaintiff, the charge in plaintiff's account of the articles furnished to carry on the business, the payment of a portion of the expenses from sale of goods and a portion out of defendant's funds, and that it was all done by the authority of plaintiff. Held, that it was error, after defendant had testified that he kept an account of the expenses of the business, to exclude the book of original entries in defendant's handwriting.—*Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524. [Cited and annotated in 52 L. R. A. 557, 591, on party's books of account as evidence in own favor.]

(i) In an action for libel in charging plaintiff with selling condemned and diseased meat, plaintiff's books of original entries, made by his bookkeeper, contemporaneously with the transactions, and known by such bookkeeper to be accurate, are admissible in evidence to contradict a witness as to certain sales by plaintiff and the prices received.—*Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266. [Cited and annotated in 44 L. R. A. (N. S.) 352, 354, 355, on measure of damages for reflection on merchant's integrity or responsibility; in 52 L. R. A. 610, on party's books of account as evidence in own favor; in 48 L. R. A. (N. S.) 1217, on disparaging quality of goods sold or manufactured; in 52 L. R. A. 717, on what provable by books of account.]

(j) Notes in the memorandum book of a broker authorized to purchase stocks for B. are competent evidence of such purchase.—*Hutzler v. Lord*, 64 Md. 534, 3 Atl. 891. [Cited and annotated in 53 L. R. A. 527, 542, on use of books of account as evidence on issues between other parties.]

(k) W. & Co., co-partners in business, formed a partnership with G., by the terms of which the latter was to carry on certain business in his own name, for the joint benefit of W. & Co. and himself. It was contemplated that regular books should be kept of the business conducted by G., but this was not done; all G.'s transactions being entered only in the private books of W. & Co. Held, that these books were not admissible in evidence in a suit for an account by G. against W. & Co.—*Wheatley v. Wheeler*, 34 Md. 62.

[Cited and annotated in 52 L. R. A. 846, on partnership books of account as evidence.]

(l) Where a person has made entries in a book as they are read off to him by another, from memorandum books kept by the latter, within whose knowledge alone are the correctness of the charges in the memorandum books, such entries are inadmissible in evidence.—*Thomas v. Price*, 30 Md. 483. [Cited and annotated in 52 L. R. A. 595, on party's books of account as evidence in own favor.]

(m) The fact that a person who made entries in a ledger was not a clerk in the store, but was employed merely to post the books of the party offering them in evidence, cannot exempt such evidence from the operation of the general rule which permits entries made by a person against his interest to be offered in evidence.—*Ward v. Leitch*, 30 Md. 326. [Cited and annotated in 52 L. R. A. 557, on party's books of account as evidence in own favor.]

(n) In an action against an executor for goods sold and delivered to his testator, entries in the ledger and daybook of the plaintiff, in the handwriting of the testator, and made by him while employed by plaintiff to post up his books, though he was not a regular clerk, are admissible as declarations or admissions made by testator against his own interest.—*Ward v. Leitch*, 30 Md. 326. [Cited and annotated, see supra.]

(o) In an action to recover from a bank a certain sum of gold deposited, an entry in the bank book of plaintiff as follows: "1861, Dec. 30th. Cash (coin) \$3,000,"—is admissible in evidence for the purpose of verifying the testimony of a witness, and of showing the nature of the particular entry.—*Chesapeake Bank v. Swain*, 29 Md. 483. [Cited and annotated in 52 L. R. A. 603, on party's books of account as evidence in own favor.]

(p) In an action upon a contract made by an agent in his own name, entries in his daybook are admissible to prove that the contract was made in behalf of the plaintiff.—*Oelrichs v. Ford*, 21 Md. 489. [Cited and annotated in 53 L. R. A. 522, on use of books of account as evidence on issues between other parties; in 28 L. R. A. (N. S.) 229, on

right in action by undisclosed principal to defenses available in action by agent.]

(q) Entries made by a clerk, and which would be admissible if he were dead, are equally admissible where he is a foreigner, of a roving disposition, and supposed to be in Australia, as it would be practically impossible to send out a commission, with the book of entries annexed, to make his deposition.—*Reynolds v. Manning*, 15 Md. 510. [Cited and annotated in 52 L. R. A. 565, on party's books of account as evidence in own favor.]

(r) A book, in the handwriting of plaintiff, apparently containing a statement of the account between plaintiff and defendant, being produced in pursuance of a notice served on the defendant by the plaintiff, is admissible evidence for the defendant.—*Carroll v. Ridgaway*, 8 Md. 328.

(s) In a suit to recover money lost at play to the defendant by plaintiff's clerk, a collection book kept by the clerk, and offered by plaintiff to prove that he did not enter therein certain sums of money which he had collected for the plaintiff, was held to be irrelevant evidence.—*Corner v. Pendleton*, 8 Md. 337. [Cited and annotated in 52 L. R. A. 720, on what provable by books of account.]

(t) An entry of goods bargained for was made upon a blotter, and offered in evidence to be connected with the bill of parcels copied therefrom, upon the receipt of a letter from the vendee, ordering the same goods. Held, to be competent evidence, if the bill of parcels is afterwards produced, or a proper notification for its production given.—*Atwell v. Miller*, 6 Md. 10, 61 Am. Dec. 294. [Cited and annotated in 52 L. R. A. 558, on party's books of account as evidence in own favor.]

(u) An exhibit consisting of an isolated paper bearing pencil marks, unexplained by any testimony, was not admissible as evidence of credits for payment in an action for an accounting.—*Jones v. Jones*, 4 Gill 87.

(v) Where plaintiff, in replevin for slaves, claimed them on the ground that while he was attending them as a physician, during the time they were owned by defendant's decedent, he was told that, if he would cure them, he might have them for his medical bill, and that he thereafter made no charge

for services rendered to them, the plaintiff's bill for medical services which he had rendered to the decedent during the period in controversy was admissible, though it contained charges for medicine furnished to a negro child not named, as the fact whether such child was one of those in controversy was for the jury.—*Mudd v. Turton*, 4 Gill 233.

### § 355. Private memoranda and statements in general.

#### *Cross-References.*

See ante, § 354.  
 Best and secondary evidence, see ante, §§ 158, 167, 174, 186.  
 Evidence admissible by reason of similar evidence of adverse party, see ante, § 155.  
 Parol or extrinsic evidence to contradict or vary, see post, § 410.  
 Preliminary evidence for authentication, see post, § 377.  
 Private memoranda of officers, see ante, § 333.  
 Use by witness to refresh memory, see "Witnesses," § 255.

#### *Annotation.*

Scope and effect of statutes making competent entries and memoranda of deceased person.—44 L. R. A. (N. S.) 28, note.

### § 356. Statements prepared for use at trial.

#### *Cross-Reference.*

Use by witness to refresh memory, see "Witnesses," § 255.

### § 357. Letters, telegrams, and other correspondence.

#### *Cross-References.*

Admissibility of evidence of witness that he had seen letter addressed to party, see ante, § 148.  
 As admissions, see ante, §§ 215, 241, 242, 244.  
 As res gestæ, see ante, §§ 119, 121-123.  
 Best and secondary evidence, see ante, §§ 158, 168, 172, 178, 183, 185.  
 Contradicting or varying written contracts, see post, § 397.  
 Declarations in letters by persons in possession or control of property, see ante, § 273.  
 Evidence admissible by reason of admission of similar evidence of adverse party, see ante, § 155.  
 Evidence that letter was stamped before being mailed, see ante, § 111.  
 Exclusion as res inter alios acta, see ante, § 130.  
 Hearsay evidence, see ante, § 318.  
 Letters wrongfully obtained, see ante, § 154.

Negative testimony, see ante, § 147.

Official correspondence, see ante, § 335.

Preliminary evidence for authentication, see post, § 378.

Presumptions as to mailing and delivery of letters, see ante, § 71.

Presumptions as to sending and delivery of telegrams, see ante, § 72.

Relevancy of evidence of statements and conduct of parties, see ante, § 110.

Self-serving declarations, see ante, § 271.

Admissibility of letters and telegrams or evidence as to contents thereof in actions for breach of contract, see "Contracts," § 349.

Admissibility of letters to prove agency or authority, see "Principal and Agent," §§ 20, 120.

Evidence to contradict witness, see "Witnesses," § 379.

In action for breach of marriage contract, see "Breach of Marriage Promise," § 22.

Letter between attorney and client as evidence of value of stock, see "Witnesses," § 201.

Relevancy to show knowledge in action for delay in rafting logs, see "Logs and Logging," § 15.

Use by witness to refresh memory, see "Witnesses," § 255.

#### *Annotation.*

Admissibility of insurance agent's letters as to policies and risks.—37 L. R. A. (N. S.) 1169, note.

Admissibility of telegram on behalf of person receiving it in reply to another.—44 L. R. A. 438, note.

Admissibility of letters as proof of partnership.—20 L. R. A. 598, note.

(a) Letters containing a denial of liability by the company on the contract of life insurance sued on were admissible in evidence.—*Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. 809.

(b) Plaintiffs, to secure payment for a boat purchased of defendants, assigned to defendants a reversionary interest in an estate, and agreed that, in case of default, defendants might sell such reversion, and apply the proceeds to the payment of the debt and any other expenses, the balance to be paid to plaintiffs. Default was made in payment, and on the death of the life tenant of the reversion the executor refused to acknowledge the reversionary interest of either party, and defendants instituted legal proceedings for its collection, in the progress of which defendants' attorney wrote a letter to plaintiffs' attorney, "that, if defendants' claim proved to be less than the legacy, he would so draw the order that any balance would be payable to plaintiffs." Plaintiffs sued for such balance, and defendants coun-

terclaimed for attorney's fees incurred in collecting the reversion. *Held*, that the letter was not admissible in evidence against defendants, as it was not relevant to the issue.—*Lyon v. Hires*, 91 Md. 411, 46 Atl. 985.

(c) In an action against the maker of a promissory note to recover the amount thereof, the defense was that the note was made for accommodation and without consideration. The defendant offered evidence of this by the person to whom the note was given, and also that it was delivered by the witness to the plaintiff to be discounted for their co-partnership use. Letters from the plaintiff to the witness were also offered in evidence to establish the co-partnership between them, and objected to by the plaintiff, because the notes to which they referred were not produced. *Held*, that though the letters might not of themselves be sufficient to establish the fact of a partnership, they were admissible to corroborate and sustain the testimony before offered, and that the production of the notes was not necessary to constitute the letters evidence of the fact intended to be proved by them.—*Hardesty v. Harris*, 19 Md. 317.

(d) An antenuptial agreement between the parents of an intended husband and wife may be proven by letters between the parties, provided they sufficiently furnish the terms of the agreement, and contain, not only an express promise, but the nature and extent of it.—*Stoddert v. Tuck*, 5 Md. 18. [Cited and annotated in 7 L. R. A. (N. S.) 734, on specific performance of third person's agreement to provide for parties to contemplated marriage.]

(e) A letter written by the plaintiff is not admissible in evidence, when offered by him, to show that it was written, or that it contained a certain bill of exchange.—*Whiteford v. Burckmyer*, 1 Gill 127.

### § 358. Maps, plats, and diagrams.

#### Cross-References.

Ancient documents, see post, § 372.

Best and secondary evidence, see ante, §§ 161, 183.

Conclusiveness and effect, see post, § 383. Matters showing relevancy, see ante, § 115.

Preliminary evidence for authentication, see post, § 379.

Production in evidence, see post, § 366.

In boundary proceedings, see "Boundaries," § 36.

Use to explain testimony, see "Witnesses," § 252.

(a) In a suit for personal injury caused by an automobile, it was not improper to receive in evidence at plaintiff's instance a plat showing surroundings of the place of accident, where the case was tried in another county, where defendant's counsel requested that the plat show particular objects, where it did not appear that any material changes on the street were made after the accident, and where the surveyor who made the plat explained it.—*Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326.

(b) A location by way of amendment to a plat is not admissible, in the absence of evidence that it was correctly made.—*Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166.

(c) On a motion to quash proceedings for opening a street in the city of Baltimore, where the ordinance designated a map as the guide for opening the street, the admissibility of the map as evidence is not affected by the fact that it is recorded in Baltimore county instead of Baltimore city.—*Burk v. City of Baltimore*, 77 Md. 469, 26 Atl. 868.

(d) Plats of land, having been authenticated by the signature of the surveyor, and filed under the orders of the court, must be treated as evidence, and have weight accordingly.—*Chisholm v. Perry*, 4 Md. Ch. 31.

### § 359. Photographs and other pictures.

#### Cross-References.

As secondary evidence, see ante, § 186.

Conclusiveness and effect, see post, § 383.

Preliminary evidence for authentication, see post, § 380.

Illustration of testimony of witnesses, see "Witnesses," § 252.

Of testator on issue of testamentary capacity, see "Wills," § 53.

#### Annotation.

Use of photographs as evidence.—35 L. R. A. 802; 51 L. R. A. (N. S.) 842, notes. Effect and conclusiveness of photographs introduced in evidence.—15 L. R. A. (N. S.) 1162, note.

Use of photographs of documents as evidence.—35 L. R. A. 811, note.

(a) The admission in evidence of photographs held not ground for reversal, though there had been some change in the subject before they were taken.—*Maryland Electric*

*Rys. Co. v. Beasley*, 117 Md. 270, 83 Atl. 157. [Cited and annotated in 51 L. R. A. (N. S.) 846, on photographs as evidence.]

(b) Photographs, shown by extrinsic evidence to be correct representations, are admissible to explain and apply the evidence.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [Cited and annotated in 51 L. R. A. (N. S.) 846, 849, on photographs as evidence; in 32 L. R. A. (N. S.) 1094, 1118, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(c) Where evidence showed photographs were correct representations, and there was nothing to show changes in conditions since a prior time, they were properly received to show conditions existing at such time.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [Cited and annotated, see supra.]

(d) In an action against a railroad company for the death of a traveler at a railroad crossing, photographs of the scene of the accident taken nearly three years after its occurrence were inadmissible where it was not shown that the locus in quo was in the same condition when photographed as at the time of the accident.—*Columbia & P. D. R. Co. v. State*, 105 Md. 34, 65 Atl. 625. [Cited and annotated in 51 L. R. A. (N. S.) 845, on photographs as evidence.]

(e) In a suit to recover for injuries sustained upon defendant's car, plaintiff offered in evidence a photograph of another car, which he proposed to show was precisely similar to the car in question. Held, that the evidence was inadmissible.—*People's Pass. Ry. Co. v. Green*, 56 Md. 84. [Cited and annotated in 35 L. R. A. 814, on photographs as evidence.]

### § 360. Books and other printed publications.

#### Cross-References.

Conclusiveness and effect, see post, § 383.  
Preliminary evidence for authentication, see post, § 381.

Use by witness to refresh memory, see "Witnesses," § 255.

### § 361.— In general.

### § 362.— Statutes, law reports, and legal text-books.

(a) Reports of adjudged cases are not evidence of what is the law of the state or country in which they are pronounced. The written law of foreign countries should be proved by the law itself, as written, and the common or customary or unwritten law by witnesses acquainted with the law.—*Gardner v. Lewis*, 7 Gill 377. [Cited and annotated in 25 L. R. A. 450, 451, 452, 460, on oral proof of foreign laws.]

### § 363.— Scientific and technical works.

#### Annotation.

Scientific books and treatises as evidence.—40 L. R. A. 553, note.

(a) An almanac is admissible to show at what hour the moon rose on a particular night.—*Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414. [Cited and annotated in 40 L. R. A. 560, on scientific books and treatises as evidence.]

### § 364.— Mortality tables and tables of expectancy of life.

#### Cross-References.

Judicial notice thereof, see ante, § 12.

Preliminary evidence for authenticity, see post, § 381.

Admissibility in general of evidence of expectancy of life of beneficiary of person wrongfully killed, see "Death," §§ 65, 71.

Relevancy of evidence as to expectancy of life of person injured, see "Damages," § 167.

#### Annotation.

Admissibility of mortality tables as evidence.—40 L. R. A. 553, note.

### § 365.— Annuity tables.

#### (D) PRODUCTION, AUTHENTICATION, AND EFFECT.

#### Cross-References.

Competency of parties or persons interested to testify as to written instruments to which person deceased or incompetent was party, see "Witnesses," §§ 164, 165.

In criminal prosecutions, see "Criminal Law," §§ 440-446.

Proceedings for discovery, see "Discovery," §§ 12, 23.

Production and inspection before trial, see "Discovery," §§ 80-108.

Production of bond, note, or other obligation secured by mortgage, in action to foreclose, see "Mortgages," § 464.

Production of documents on examination of bankrupt or others in bankruptcy proceedings, see "Bankruptcy," § 238.

**§ 366. Public documents, records, exemplifications, or official copies.**

*Cross-Reference.*

To prove issuance and service of subpoena, see "Witnesses," § 22.

*Annotation.*

Admissibility in a criminal prosecution of a judgment rendered in a civil action.—26 L. R. A. (N. S.) 461, note.

Admissibility of record, or copy of record, of deed, to prove deed under which party offering it claims.—19 L. R. A. (N. S.) 438, note.

Admissibility of copies of records of other states.—5 L. R. A. (N. S.) 938, note.

(a) Code Pub. Loc. Laws, art. 17, §§ 116-116G, as amended by act 1890, c. 137, applicable to Prince George's county, provide that the treasurer shall sell property for taxes, after publication, and report to the equity side of the Circuit Court, showing to whom and at what price the lands were sold, the amount of tax, interest, penalties, surplus, etc., and that the general notice of sale when published shall have the effect of a summons to appear at a certain date, to show cause why such sale should not be confirmed; and, where no cause is shown, the court shall ratify and confirm "each and every unopposed sale." The treasurer's report for a certain year showed that he had embodied the reports of all the tax sales for the year in one book, but had retained its custody, though nominally filing the book as an exhibit in the proceedings in the Circuit Court. Several years afterwards, at the time of the trial, there appeared memoranda on many of the statements, such as "Redeemed," "Settled," "Deed," etc. Held, that the book was not admissible as evidence of the title of a purchaser at the tax sale, on account of the alterations.—*Young v. Ward*, 88 Md. 413, 41 Atl. 925.

(b) A certified copy of an instrument required by law to be recorded proves itself, as prima facie evidence of all circumstances necessary to give it validity.—*Warner v. Hardy*, 6 Md. 525. [Cited and annotated in 19 L. R. A. (N. S.) 438, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

(c) A paper purporting to be a treasurer's certificate to an account against the collector of state taxes authenticates itself,

and, to be admissible in evidence, it need not be first shown to be the treasurer's certificate.—*Milburn v. State*, 1 Md. 1.

(d) Where an act of the Legislature directs that the certificate of a public officer shall be evidence, a paper produced and signed with his name will be prima facie evidence, unless the name is proved not to have been signed by him.—*Prather v. Johnson*, 3 H. & J. 487.

(e) The proceedings in an action of ejectment, wherein the verdict and judgment were for land, as located on the plots returned in the case, having no plot or a copy annexed thereto, were held to be a part only of the record, and not sufficient evidence, though properly authenticated.—*Orndorff v. Mumma*, 3 H. & J. 70.

**§ 367. Examined copies of records.**

**§ 368. Compelling production by adverse party.**

*Cross-References.*

Notice to produce primary evidence, see ante, § 185.

Compelling production by witness, see "Witnesses," § 16.

Dismissal for failure to produce, see "Dismissal and Nonsuit," § 53.

In proceeding before interstate commerce commission, see "Commerce," § 87.

Privileged communication, see "Witnesses," § 204.

Privilege of witness as to production, see "Witnesses," § 298.

Production and inspection of writings referred to in pleadings, see "Pleading," § 309.

(a) Where during the trial plaintiff gave notice to defendants to produce their books, and defendants' bookkeeper was asked to refer to the books and state what entries were contained therein relative to purchases during certain months, it was not error to refuse to allow the witness to examine the books for the purpose of answering the question, there being no proof that the books contained any fact material to plaintiff's case, since Code 1888, art. 75, § 95, declares that, whenever it appears to the court that the production of any document is necessary, the court may order its production.—*Cooney v. Haz*, 92 Md. 134, 48 Atl. 58. (See Code 1911, art. 75, § 100.)

(b) Where certain writings, which, under ordinary circumstances, the defendant would

have been bound to deliver up at the trial, have been previously tendered to the plaintiff and refused, and it appears that defendant is prevented from delivering them up by reason of the interference of the plaintiff, and that the latter will not be injured by their nonproduction, the defendant may be excused from producing them.—*Seldner v. Smith*, 40 Md. 602.

(c) Papers produced on notice do not become evidence for the producer, unless the party calling for them inspects them.—*Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661. [Cited and annotated in 33 L. R. A. (N. S.) 553, 554, on effect of calling for and inspecting document to make it competent.]

(d) No precise rule can be laid down as to the time and place of the service of notice to produce papers, except that it must be such as to enable the party, under the known circumstances of the case, to comply with the call.—*Glenn v. Rogers*, 3 Md. 312.

(e) A party is not entitled to the production of private books in which he has no interest. Therefore, in an application for an order to produce books, the particular books must be specified if possible, and cannot be granted on request for production of books in general.—*Ringgold v. Jones*, 1 Bland 88, note.

(f) Under act 1798, c. 84, in order to produce books, papers, and documents in the possession of the adverse party, they could not be obtained without the applicant's oath of the truth of the allegations in the petition.—*Williams v. Hall*, 1 Bland 193, note (i). (See Code, art. 16, § 25.)

(g) Where, in an action of trover for a slave, the defendant, by his examination of a witness in chief, proved that the witness, as constable, had sold the slave to him, it was held that the plaintiff might, by cross-examination of the same witness, give parol evidence of the contents of the process on which the witness so sold the slave, since plaintiff, having had no reason to expect its being referred to and relied on by defendant, could not be expected to have taken the requisite steps to prove its contents without producing it, or account for its nonproduction.—*Hume v. Pumphrey*, 4 Gill 181.

(h) A notice, entitled in another cause, to produce books in evidence, merely filed in the present cause, without proof of service, raises no inference against the party to whom the notice is addressed.—*Allender v. Vestry of Trinity Church*, 3 Gill 166. [Cited and annotated in 52 L. R. A. 600, on party's books of account as evidence in own favor.]

### § 369. Preliminary evidence for authentication.

#### Cross-References.

Public documents, etc., see ante, § 366.  
Admissibility of note under pleadings without proof of execution, see "Bills and Notes," § 489.  
Evidence preliminary to introduction in evidence of notes sued on, see "Bills and Notes," § 502.  
Execution of assignment, see "Assignments," § 136.  
Libelous article in newspaper, see "Libel and Slander," § 103.  
Receipt as evidence of payment affecting surety's right to contribution, see "Principal and Surety," § 200.

### § 370.—Necessity in general.

(a) A requisition on a carrier for cars for the transportation of goods cannot, without the requisite preliminary proof of its authenticity, be admitted in evidence.—*Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co.*, 104 Md. 693, 65 Atl. 425.

(b) A deed offered in evidence, coupled with evidence identifying the signature of the Circuit Court clerk to the indorsement therein, showing the recording thereof, is not admissible for the purposes for which a certified copy is admissible, but the signature of the grantor, the acknowledging officer, and his official capacity must also be proven.—*Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427. [Cited and annotated in 63 L. R. A. 937, 943, on competency of expert witnesses for comparison of handwriting; in 63 L. R. A. 964, on competency of witnesses to handwriting; in 64 L. R. A. 303, 313, 315, on limitations of evidence to handwriting; in 65 L. R. A. 151, on procedure in proof of handwriting.]

(c) Where plaintiff has performed services for defendant in pursuance of a written contract, to recover therefor he must first prove execution of such contract.—*Equitable Endowment Ass'n v. Fisher*, 71 Md. 430, 18 Atl. 808.

(d) In an action in a state court to recover damages for breach of a charter party, the plaintiff offered in evidence a charter party which had been produced and used by the defendant, in a cause pending in a United States court, as the true and genuine charter party between the parties. *Held*, that the paper was admissible, the use made thereof by the defendant being an admission of its authenticity.—*Crichton v. Smith*, 34 Md. 42.

(e) It is immaterial whether the parties in both suits were the same or not. The paper was not competent evidence from any privity of parties, but from the admission of the defendant, by its production and use, that it is the very agreement which he entered into with the plaintiff.—*Crichton v. Smith*, 34 Md. 42.

(f) The certificate of a justice of the peace of the execution and acknowledgment of a power of attorney is not evidence per se of the facts certified.—*Eichelberger v. Sifford*, 27 Md. 320. [Cited and annotated in 35 L. R. A. 321, 322, 341, 350, on necessity for calling subscribing witnesses to prove attested instruments.]

(g) Official copies of instruments made evidence by statute are prima facie evidence of all that is necessary to authorize their registration, when it appears that they have been duly recorded.—*McCauley v. State*, 21 Md. 556.

(h) An original deed, conveying an estate in lands for above seven years, was *held* inadmissible in evidence, there being no proof offered of the handwriting of the officer who indorsed upon it the certificate of its enrollment.—*Gwynn v. Jones*, 2 G. & J. 173.

(i) A writing purported to be an original bill of sale, to have been signed and sealed by the vendor, and to have been duly acknowledged by him before a justice of the peace, had an indorsement thereon, proved to be in the handwriting of a person accustomed to write in the clerk's office of the county, stating that it had been duly recorded in the land record of the county. *Held*, that it was sufficient evidence.—*Ayres v. Grimes*, 3 H. & J. 95.

(j) Where a deed of conveyance has been duly executed, acknowledged, and recorded, that is sufficient evidence of a power of at-

torney recited and set forth in the deed as part of the deed.—*Davidson v. Beatty*, 3 H. & McH. 594.

(k) In ejectment, a deed of lease and re-lease offered by plaintiff, bearing date the 1st and 2d of May, 1759, acknowledged on the 2d day of May, and recorded on the 7th day of May, 1759, are admissible without proof of execution.—*Brown v. Lynch*, 1 H. & McH. 218.

§ 371.—Writings collateral to issues.

§ 372.—Ancient documents.

*Cross-References.*

Conclusiveness of recitals, see post, § 383.

Proof of genuineness of tax certificate as affected by age, see ante, § 366.

Presumption as to probate of ancient will, see "Wills," § 418.

Presumption of grant from long possession of property, see "Adverse Possession," § 104.

Weight of evidence of death, see "Death," § 4.

(a) A plat having an ancient appearance, but bearing on its face no indication of who made it or whence it came, or whether it is an original or a copy, is inadmissible in evidence, where the witness offering it merely testified that he had received it from a former surveyor of the county, but did not know who made it, or the circumstances under which it was made, or where the surveyor got it, or whether it was correct when made, or in whose custody it had been since then.—*Carter v. Maryland & P. R. Co.*, 112 Md. 599, 77 Atl. 301.

(b) Where receipts have been in the possession of a party and his representatives for more than 30 years, and relate to transactions established in accordance with the receipts by general and collateral proof, the signatures need not be proved.—*Allender v. Vestry of Trinity Church*, 3 Gill 166.

(c) Where a will introduced in evidence was made 144 years before, it was *held* that the jury, from the length of time elapsed, ought to presume that it was duly executed and proved.—*Hall v. Gittings*, 2 H. & J. 112.

(d) Ancient deeds of lease and release, not necessary to be recorded, may be read in evidence.—*Owings v. Norwood*, 2 H. & J. 96.

(e) An ancient deed, found in the proper custody, is admissible in evidence, when supported by proof of corresponding possession.—*Carroll v. Norwood*, 1 H. & J. 167.



(f) Ancient bonds of conveyance were admitted in evidence on proof of the handwriting of the witnesses.—*Carroll v. Norwood*, 1 H. & J. 167.

(g) The record of an ancient deed, which did not appear to have been signed by the grantor, but which was acknowledged by him, was admitted in evidence.—*Carroll v. Norwood*, 1 H. & J. 167.

(h) An attested copy of an ancient deed was not admitted in evidence, it not having the words "this indenture," and no money consideration being expressed therein.—*Gittings v. Hall*, 1 H. & J. 14, 2 Am. Dec. 502.

(i) In ejectment a bond of conveyance was admitted in evidence by the defendant without proof of its execution, he and those under whom he claimed having been in possession for more than 47 years.—*Hoddy v. Harryman*, 3 H. & McH. 581. [Cited and annotated in 35 L. R. A. 341, on necessity for calling subscribing witnesses to prove attested instruments.]

### § 373.—Form and sufficiency in general.

#### Cross-References.

See ante, § 370; post, § 374.

Acknowledgment as affecting admissibility of instrument, see "Acknowledgment," § 54.

#### Annotation.

Proof of copies of genuine handwriting.—64 L. R. A. 314, note.

(a) In an action on a bond preliminary evidence of execution, including the sealing, held sufficient to entitle it to admission in evidence.—*Line v. Line*, 119 Md. 403, 86 Atl. 1032.

(b) Where the handwriting of a party who signs a paper is proved, the contents are also thereby established until the contrary appears. The execution and delivery import that the instrument is truly dated.—*Glenn v. Grover*, 3 Md. 212. [Cited and annotated in 20 L. R. A. 111, on parol evidence as to consideration of deed.]

(c) Where defendant denied the execution of a deed, but admitted that the subsequent exhibits were office copies, as they purported to be, such copies were admissible, as being at least prima facie evidence of everything necessary to the validity of the instrument.—*Cole v. O'Neill*, 3 Md. Ch. 174.

[Cited and annotated in 19 L. R. A. (N. S.) 438, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

### § 374.—Attesting witnesses.

#### Annotation.

Proof of signature by mark when attesting witnesses thereto are dead or cannot remember the transaction.—44 L. R. A. 142, note.

Necessity of calling subscribing witnesses to prove attested instruments.—35 L. R. A. 321, note.

(a) Where a person executed a power of attorney by making his mark, which was attested by two witnesses, and acknowledged the same before a justice of the peace, the testimony of the justice or of one of the subscribing witnesses is requisite to prove the identity of the principal and the execution of the instrument.—*Eichelberger v. Sifford*, 27 Md. 320. [Cited and annotated, see supra, § 370.]

(b) Where the subscribing witnesses to an agreement upon which an action is brought have become disqualified by interest since its execution, testimony as to the handwriting of such witnesses is competent to prove the due execution of such agreement.—*Keefe v. Zimmerman*, 22 Md. 274. [Cited and annotated in 35 L. R. A. 336, on necessity for calling subscribing witnesses to prove attested instruments.]

(c) Where the subscribing witness is incompetent, secondary evidence of execution is admissible.—*Keefe v. Zimmerman*, 22 Md. 274. [Cited and annotated, see supra.]

(d) The fact that a subscribing witness to a deed had gone to sea, and had not been heard from for four years, though diligent inquiry had been made, is sufficient to let in secondary evidence of his handwriting; but a temporary absence from the state is not.—*Gaither v. Martin*, 3 Md. 146. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

(e) The testimony of an attesting witness to an instrument that the maker thereof took her seat at the table; that he did not see her write her name; that he did not know whether at the time of signing his name as witness she had signed her name;

that he could not say that it was her handwriting; that the instrument was not, to his knowledge, ever read to or by her,—is not sufficient proof of execution.—*Edelen v. Gough*, 5 Gill 103, 106. [Cited and annotated in 35 L. R. A. 325, on necessity for calling subscribing witnesses to prove attested instruments.]

(f) Where a subscribing witness resides in another state, proof of his handwriting is sufficient.—*Dorsey v. Smith*, 7 H. & J. 345. [Cited and annotated in 35 L. R. A. 326, on necessity for calling subscribing witnesses to prove attested instruments.]

(g) The execution of a written instrument must be proved by the subscribing witnesses, if they, or either of them, can be had.—*Handy v. State*, 7 H. & J. 42. [Cited and annotated in 35 L. R. A. 329, 346, on necessity for calling subscribing witnesses to prove attested instruments.]

(h) Where the name of a witness was subscribed by another without his knowledge or assent, the party is allowed to prove it, and the instrument is treated like one not subscribed.—*Handy v. State*, 7 H. & J. 42. [Cited and annotated, see supra.]

(i) The subscribing witness to a bill obligatory proved his act of attestation, but had no recollection of having seen the defendant sign, seal, and deliver the bill, but that from seeing his handwriting as a witness to the bill, and from his having lived with the plaintiff as a clerk at the time of its execution, and from being in the habit of attesting such instruments for plaintiff, he believed defendant had signed, sealed, and delivered it. *Held*, that the testimony was sufficient to prove the due execution of the bill.—*Miller v. Honey*, 4 H. & J. 241.

(j) Proof of the handwriting of the subscribing witness to an instrument is sufficient proof of its execution.—*Parker's Ex'rs v. Fassitt's Ex'rs*, 1 H. & J. 337. [Cited and annotated in 35 L. R. A. 326, 329, on necessity for calling subscribing witnesses to prove attested instruments.]

(k) A written authority given by the master of a wrecked vessel to save and take care of all property which comes out of the vessel, which instrument was witnessed by a person since deceased, is admissible in evidence on the proof of the handwriting of

the subscribing witness.—*Parker's Ex'rs v. Fassitt's Ex'rs*, 1 H. & J. 337. [Cited and annotated, see supra.]

### § 375.—Handwriting.

#### Cross-Reference.

See ante, § 374.

(a) In an action by a subcontractor against a contractor for materials furnished in the erection of a building, original daily reports made by superintendents of defendant in the course of their duty and delivered to the defendant are admissible in evidence, where the superintendents are out of the jurisdiction, on proof being made of their handwriting.—*Stewart v. American Bridge Co.*, 108 Md. 200, 69 Atl. 708.

(b) Where a subscribing witness resides in another state, proof of his handwriting is sufficient.—*Dorsey v. Smith*, 7 H. & J. 345. [Cited and annotated, see supra, § 374.]

(c) A written authority given by the master of a wrecked vessel to save and take care of all property which comes out of the vessel, which instrument was witnessed by a person since deceased, is admissible in evidence on the proof of the handwriting of the subscribing witness.—*Parker's Ex'rs v. Fassitt's Ex'rs*, 1 H. & J. 337. [Cited and annotated, see supra, § 374.]

### § 376.—Books of account.

#### Annotation.

Authentication of books of account and entries as affecting admissibility in evidence.—52 L. R. A. 590, note.

(a) In a suit by a bank depositor for a balance claimed to be due, the bank offered an individual ledger showing the account of the plaintiff's deposit, the account of the deposit slips, and the whole account, deposit entries and debit charges, which it contended was not correct, in so far as plaintiff's checks were shown, and which by its own evidence showed that checks to a large amount were not entered until some time after the clerk who kept such record had left its employ, and that checks found loose in the bank were afterward entered, though not in due course of business or contemporaneously with the transaction. *Held*, that there was too much indicating uncertainty and unreliability in the ledger account to permit its admission as evidence

per se.—*Marine Bank of Crisfield v. Stirling*, 115 Md. 90, 80 Atl. 736.

(b) Entries made by a clerk, who had no interest at the time to state an untruth, and in the regular course of business, are admissible on proof of his handwriting, after his death or in case of his absence from the state.—*Sims v. American Ice Co.*, 109 Md. 68, 71 Atl. 522.

(c) A book of accounts in the handwriting of a deceased person, showing regular weekly payments, but not showing on its face that it is an account with the person sought to be charged therewith, is inadmissible in the absence of other evidence connecting the account with the person sought to be charged.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650. [Cited and annotated in 2 L. R. A. (N. S.) 403, on account books as evidence in case of loans or payments by owner.]

(d) On proof that the person who made the entries in an open account was outside the state, proof of his handwriting was admissible as prima facie evidence of the truth of the entries.—*Heiskell v. Rollins*, 82 Md. 14, 33 Atl. 263. [Cited and annotated in 52 L. R. A. 565, on party's books of account as evidence in own favor.]

(e) In an action by a depositor against a bank to recover money paid out on alleged fraudulent checks drawn in the depositor's name, the bank offered in evidence a memorandum made by the plaintiff at the time during which he claimed the forged checks had been issued, in order to show how his account stood at that time. Held, that plaintiff, in order to show that the memorandum was in fact incorrect, could not offer his check book in evidence, it not appearing that the memorandum was made exclusively from the check book.—*Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

(f) It seems that a witness may sometimes be allowed to testify that he has no recollection, but believes that a memorandum contains a correct statement; but this cannot be done where the memorandum is made five months after the transaction, at the request of one of the parties.—*Spring Garden Mut. Ins. Co. v. Evans*, 15 Md. 54, 74 Am. Dec. 555.

(g) In an action for goods sold and delivered, a clerk of the plaintiff may give

evidence of the delivery of goods, by referring to entries in the plaintiff's books made by such clerk, testifying to his belief of their truth at the time of making them, and proving generally the dealings of the defendant with the plaintiff for such articles as those charged by the clerks; but he cannot establish such delivery by reference to entries made by the plaintiff or other clerks, of which he has no knowledge other than that arising from the course of business of the plaintiff's store.—*Owings v. Low*, 5 G. & J. 134. [Cited and annotated in 52 L. R. A. 557, 594, on party's books of account as evidence in own favor.]

(h) In an action for goods sold and delivered, evidence is admissible that charges for goods in the daybook of plaintiff's testator were partly in the handwriting of a deceased clerk.—*King v. Maddux*, 7 H. & J. 467. [Cited and annotated in 52 L. R. A. 565, 600, on party's books of account as evidence in own favor.]

(i) Under act July 1729, c. 20, § 9, which directs that where a creditor shall swear that he has not received any part of the money charged as due by an account, or taken security therefor, such account shall be received as evidence in any court, an account which stated that the estate of the creditors had not received any security for the debt was not admissible in evidence.—*Smoot's Adm'r v. Bunbury's Ex'r*, 1 H. & J. 136. (See Code, art. 35, § 49.) [Cited and annotated in 52 L. R. A. 558, 559, on party's books of account as evidence in own favor.]

(j) Proof of "probates" of an account contained in a book of accounts purporting to have been made before justices of the peace was not admissible, without other evidence that the persons before whom they were made were justices.—*Gordon v. Hickman*, 4 H. & McH. 217. [Cited and annotated in 52 L. R. A. 558, on party's books of account as evidence in own favor.]

#### § 377.—Memoranda and statements.

(a) In an action for injuries to a servant, plaintiff sought to introduce in evidence records of a certain hospital to show that he was treated there for his injuries on certain days. It did not appear when the entries were made, nor by whom, and though they were supposed to have been made by a

certain physician, his evidence was not produced. He was not shown to have been on duty at the hospital on the days mentioned, and it was not proved that the entries were in his handwriting. *Held*, that it was proper to exclude the records because of the absence of a proper foundation.—*State v. Trimble*, 104 Md. 317, 64 Atl. 1026.

(b) On an issue whether a merchant had made fraudulent statements to a commercial agency in order to obtain goods, a witness testified that the merchant told witness that his condition was all right, and the same as on a certain previous occasion when witness had examined the merchant's books, which statement witness reported, and the statement was given out by his commercial agency. *Held*, that such report was sufficiently authenticated to be admissible in evidence.—*Courtney v. William Knabe & Co. Mfg. Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

### § 378.—Letters, telegrams, and other correspondence.

#### *Cross-Reference.*

Evidence that letter was stamped before being mailed, see ante, § 111.

#### *Annotation.*

Necessity of proof of genuineness of reply letter.—17 L. R. A. (N. S.) 229, note.

(a) The rule permitting a letter to be admitted in evidence against a party where there is no other proof of the handwriting, except the fact that in due course it had been received in reply to a letter which had been addressed to the same party, is inappropriate to a dispatch received in reply to a communication by telegraph.—*Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. [*Cited and annotated* in 44 L. R. A. 438, on admissibility of reply telegram on behalf of addressee.]

### § 379.—Maps, plats, and diagrams.

(a) Lots as indicated in a certain plat prepared by a surveyor were sold to the person under whom plaintiff claimed, who gave a plat of the land including the lots to witness, who was his clerk, and while the plat was in the witness' possession a third party made a copy of it. The third party testified that it was a true copy, and the surveyor testified

that he had seen the plat while it was in witness' possession, and that he believed it was in accordance with the survey made by him, and that he believed the copy was true. *Held*, that it was admissible in evidence, it having been shown that the original was lost.—*Carroll v. Smith*, 4 H. & J. 128.

### § 380.—Photographs and other pictures.

(a) A photograph of a railroad crossing over a stream as it existed before the erection of an embankment was improperly admitted, where the party offering it testified that he had gotten it from a neighbor, but did not know by whom, or from what position, or how many years ago, it had been taken, but that it represented the conditions before the embankment according to his way of looking at them.—*Western Maryland R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267. [*Cited and annotated* in 51 L. R. A. (N. S.) 845, on photographs as evidence.]

(b) A photograph need not be verified by the photographer's oath, but foundation for it may be laid by any one testifying to its correctness as a representation.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [*Cited and annotated* in 51 L. R. A. (N. S.) 946, 849, on photographs as evidence; in 32 L. R. A. (N. S.) 1094, 1118, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(c) In an action for assault and battery, alleged to have been committed on plaintiff by defendant, the superintendent of an institution in which plaintiff was confined, there was no error in sustaining an objection to the introduction of a photograph taken of plaintiff on the day of the assault, there being no proof of its correctness.—*Martin v. Moore*, 99 Md. 41, 57 Atl. 671. [*Cited and annotated* in 51 L. R. A. (N. S.) 844, on photographs as evidence.]

(d) In an action to recover damages caused by building into and upon the wall of plaintiff's house, an objection to photographs of the premises offered by one of the parties, on the ground that they are not shown to be accurate, is untenable, where the experience of the photographer is sufficiently

shown, and both parties have photographs in evidence, whose accuracy the jury can determine from the testimony.—*Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96.

**§ 381.—Books and other printed publications.**

**§ 382. Determination of question of admissibility.**

*Annotation.*

Effect of calling for and inspecting document to make it competent.—33 L. R. A. (N. S.) 552, note.

(a) Whenever a paper proposed to be given in evidence differs from the statement of its contents made in its offer, the paper itself must enable the court to judge whether it be admissible.—*Keedy v. Newcomer*, 1 Md. 241.

(b) The court is to decide what is proper evidence of foreign laws, and must construe them, and judge of their applicability to the question before them.—*De Sobry v. De Laistre*, 2 H. & J. 191, 3 Am. Dec. 535. [Cited and annotated in 25 L. R. A. 450, 451, 460, on oral proof of foreign laws.]

**§ 383. Conclusiveness and effect.**

*Cross-References.*

See ante, § 334.

Of record of assignment of patent, see "Patents," § 201.

Of tax deeds, see "Taxation," §§ 788, 789.

Recitals in deeds, see "Deeds," § 96.

*Annotation.*

Constitutionality of statute making bill of lading conclusive proof of receipt of property.—22 L. R. A. (N. S.) 821, note.

Conclusiveness of photographs introduced in evidence.—15 L. R. A. (N. S.) 1162, note.

Books as evidence between other parties.—53 L. R. A. 513, note.

Judgment against officer as conclusive evidence against surety on official bond.—52 L. R. A. 176, 185, 187, note.

A party's books of account as evidence to his own favor.—52 L. R. A. 546, note.

What is provable by books of accounts.—52 L. R. A. 689, notes.

(a) Where a paper is called for by one party, produced by the other party, and inspected by the party calling for it, it thereby becomes evidence for both parties.—*The Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38.

(b) In a claim against an attorney for an alleged indebtedness to the estate of his de-

ceased client, certain old papers were introduced, which showed prima facie an indebtedness to the estate. On the other hand, an account covering the same period, in the same handwriting, and which showed no indebtedness, was introduced; and the sworn answer of the attorney, filed before his death, denied any such indebtedness. *Held*, that, in view of the danger of relying on ancient documents, the claim would not be allowed on such conflicting evidence.—*Hadaway v. Hynson*, 89 Md. 305, 43 Atl. 806.

(c) The charging a party with goods which he has obtained, on the books of the seller, is not conclusive evidence that credit was given to such party, but only a strong circumstance to be submitted with all the other evidence in the cause to the jury.—*Myer v. Graffin*, 31 Md. 350, 100 Am. Dec. 66. [Cited and annotated in 53 L. R. A. 538, on use of books of account as evidence on issues between other parties.]

(d) Where, in an action to recover from a bank a certain sum in gold deposited, plaintiff offers in evidence the entry in his bank book, as follows: "1861, Dec. 30th. Cash (coin) \$3,000,"—for the purpose of verifying the testimony of a witness, and of showing the nature of the particular entry, he is not bound to put in evidence all the other entries in the book.—*Chesapeake Bank v. Swain*, 29 Md. 483. [Cited and annotated in 52 L. R. A. 608, on party's books of account as evidence in own favor.]

(e) If a debtor defendant, seeking to discharge himself from the claims preferred against him, relies on the entries on the credit side of the account rendered or exhibited by his creditor, he thereby admits in evidence against him the entries on the debit side of the account.—*Lee v. Tinges*, 7 Md. 215. [Cited and annotated in 52 L. R. A. 593, 600, on party's books of account as evidence in own favor.]

(f) A defendant who relies upon entries on the credit side of the complainant's books thereby admits in evidence the entries upon the debit side.—*Allender v. Vestry of Trinity Church*, 3 Gill 166. [Cited and annotated in 52 L. R. A. 600, on party's books of account as evidence in own favor.]

(g) Where the plaintiff has in his possession the paper on which the suit was

brought, signed by the defendant, this is evidence from which the jury may find that the paper contains the agreement of the parties, and that it was delivered.—*Benson v. Boteler*, 2 Gill 74.

(h) The report of a trustee appointed by the court of chancery, made under oath, stating that he had sold a tract of land "free and clear of all right and title of dower of M., widow of the deceased tenant in fee, she having conveyed, for a valuable consideration, all her interest in the premises to C., who consented to the sale as stated," together with the instrument of assignment of M. to C. of her right of dower, is sufficient prima facie evidence to enable C. to sustain a claim by petition for a less sum than the value of M.'s dower paid to her by him, to be paid out of the proceeds of the land sold, then in the court for distribution.—*Maccubbin v. Cromwell*, 2 H. & G. 443.

(i) Defendant in an action for goods sold and delivered cannot claim an entry in the daybook of plaintiff's testator as evidence of a credit, without all the entries of debits going to the jury as evidence.—*King v. Maddux*, 7 H. & J. 467. [Cited and annotated in 52 L. R. A. 565, 600, on party's books of account as evidence in own favor.]

(j) The debiting of the party obtaining goods sold, in the seller's books, is not conclusive evidence that the credit was given to him.—*Elder v. Warfield*, 7 H. & J. 391.

(k) Where an agreement had been admitted in evidence without objection, a subsequent agreement indorsed on the same paper is admissible in evidence to explain the first.—*Clarke v. Ray*, 1 H. & J. 318.

## XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

### Cross-References.

As secondary evidence, see ante, §§ 157-187.

Weight and sufficiency of parol evidence to change writing, see post, § 596.

As to award of arbitrators, see "Arbitration and Award," §§ 88, 89.

Conclusiveness of record on certiorari to review justice's judgment, see "Justices of the Peace," § 205.

Evidence of custom or usage, see "Customs and Usages," §§ 10-17.

Evidence relating to filing record on appeal from justice's court, see "Justices of the Peace," § 164.

Evidence to show authority of agent, see "Principal and Agent," § 120.

Existence and contents of lost will, see "Wills," § 293.

Extrinsic circumstances affecting construction of deed, see "Deeds," § 100.

Extrinsic evidence as to jurisdictional facts on collateral attack on judgment, see "Judgment," § 499.

In suits to reform instruments, see "Reformation of Instruments," § 44.

Of matters avoiding bar by limitation, see "Limitation of Actions," § 196.

Parol evidence of continuity of adverse possession, see "Adverse Possession," § 57.

Parol evidence on certiorari to review justice's judgment, see "Justices of the Peace," § 208.

Parol evidence to connect writings constituting memoranda to satisfy statute of frauds, see "Frauds, Statute of," § 118.

Parol evidence to establish title as within statute of frauds, see "Frauds, Statute of," § 56.

Proof of conviction of witness for crime for purpose of impeachment, see "Witnesses," § 359.

Review of rulings as dependent on presentation of objection in lower court, see "Appeal and Error," § 204.

Testamentary character of conveyance of property, see "Wills," § 93.

To establish trust, see "Trusts," §§ 43, 88, 109.

To show deed or bill of sale, absolute on its face, a mortgage, see "Chattel Mortgages," § 38; "Mortgages," § 37.

## (A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

### Cross-References.

Construction or application of language of written instrument, see post, §§ 448-463.

Evidence invalidating instrument, see post, §§ 428-437.

Nature and purpose of evidence, see post, §§ 413-427.

Prior or contemporaneous collateral agreements, see post, §§ 441, 442, 444.

Separate or subsequent oral agreements affecting writings, see post, §§ 439-445.

Showing discharge or performance of obligation, see post, §§ 464-469.

Instruments required by statute of frauds to be in writing, see "Frauds, Statute of," § 158.

## § 384. Grounds for exclusion of extrinsic evidence.

### Annotation.

General rule that parol evidence not admissible to vary, add to, or alter a written contract.—6 L. R. A. 38; 17 L. R. A. 270, notes.

### § 385. Writings excluding extrinsic evidence in general.

(a) Where a contract is reduced to writing, in the form of correspondence between the contracting parties, oral evidence is inadmissible to vary the terms of the contract.—*Delamater v. Chappell*, 48 Md. 244.

### § 386. Judicial records and proceedings.

#### Cross-References.

Date of instrument, see post, § 414.

Evidence of prior and contemporaneous agreements relating thereto, see post, § 441.

Invalidating written instruments, see post, §§ 428-437.

Matters not included in writing or for which it does not provide, see post, § 417.

Parol or extrinsic evidence to identify subject-matter of writing, see post, § 460.

Supplying defects in documentary evidence, see ante, § 366.

Writings collateral to issue, see post, § 425.

Conclusiveness of record on appeal and contradiction thereof, see "Appeal and Error," §§ 662-670.

Evidence of judgment as estoppel or defense, see "Judgment," §§ 951-957.

Evidence to aid return, see "Process," § 147.

Evidence to impeach or contradict return, certificate or affidavit of service of process, see "Process," § 148.

Return of attachment, see "Attachment," § 328.

Return of execution, see "Execution," §§ 343, 344.

Return of landlord's attachment, see "Landlord and Tenant," § 229.

To rebut presumption that judgment was on the merits, see "Judgment," § 951.

(a) Where a short copy of a judgment in favor of a third person is found filed with other judgments in a suit for the enforcement of some special right against the debtor, such as the foreclosure of a mortgage or the enforcement of a vendor's lien, and nothing appears to show that such third person has by any proper means made himself a party to the proceeding, parol evidence is admissible to show that the copy of the judgment was filed without proper authority.—*Thomas v. Farmers' Bank*, 46 Md. 43.

(b) Parol evidence to show the abatement of a suit is inadmissible to contradict docket entries offered by the same party.—*Burgess v. Lloyd*, 7 Md. 178.

(c) Where the sentence of a court of ad-

miralty condemning a vessel recited that at the date of the decree the port which the vessel attempted to enter was blockaded, evidence that at the time of her capture the port was not blockaded is inadmissible in an action on a policy to recover for a total loss arising from the condemnation.—*Maryland Ins. Co v. Bathurst*, 5 G. & J. 159.

(d) In an action on a trustee's bond given in pursuance of a decree of a court of equity, evidence will not be permitted to go to the jury, the necessary effect of which is to reverse the decree of the court.—*Butler v. State*, 5 G. & J. 511.

### § 387. Official records and documents.

#### Cross-References.

Date of instrument, see post, § 414.

Invalidating written instrument, see post, §§ 428-437.

Matters not included in writing or for which it does not provide, see post, § 417.

To construe and apply language of instrument, see post, § 450.

Writings collateral to issues, see post, § 425.

Conclusiveness of legislative journals and enrolled bills, see "Statutes," §§ 285, 286.

Extrinsic evidence as to enactment of statutes, see "Statutes," § 284.

(a) Extrinsic evidence is not admissible to show that the provisions of an act of the Legislature are different from those set out in the published volume of laws, when the printed act is an exact transcript of the authenticated copy, which has been duly recorded in the proper office, as required by the Constitution.—*City of Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161. [Cited and annotated in 23 L. R. A. 341, 40 L. R. A. (N. S.) 25, 26, 31, 32, on conclusiveness of enrolled bill.]

(b) Where, in an action of trespass quare clausum, a warrant of resurvey was ordered, and a plat of the land was executed, and, with the explanations thereof, was offered in evidence, setting forth only that the letter "A," on the plat, showed where defendant had timber cut, and was the trespass complained of by plaintiff, plaintiff could not, at the trial, prove by the surveyor that certain stars, at other and distant places on the plat, not mentioned in the explanations, represented the stumps of trees which defendant had once admitted to the surveyor,

previously to the survey, to have been cut by him.—*Funk v. Hughes*, 5 Gill 315.

(c) Parol evidence is not admitted to prove that a tract of land included in a certificate of survey never was actually surveyed by the surveyor.—*Hammond v. Norris*, 2 H. & J. 130.

(d) Parol evidence is inadmissible to prove that a surveyor never actually ran or surveyed the land included in the certificate of survey returned by him until after a grant had issued thereon.—*Webb v. Beard*, 1 H. & J. 349.

(e) Plaintiff read in evidence a certificate of survey, made for and in the name of a certain person, for the land in question. Defendant then offered parol evidence to prove that such person was a deputy surveyor at the time of such survey, and that he never surveyed the land for which such certificate was returned, and whereon a patent had been granted. Held, that the evidence was inadmissible.—*Hammond v. Sheredine*, 4 H. & McH. 420.

### § 388. Unofficial records.

### § 389. Corporate records and proceedings.

#### Cross-References.

Matters not included in writing or for which it does not provide, see post, § 417.

Variance of record of incorporation as affecting liability of stockholders, see "Banks and Banking," § 47.

### § 390. Deeds.

#### Cross-References.

Identification of subject-matter where ambiguity exists, see post, § 460.

Showing intent of parties where ambiguity exists, see post, § 461.

Merger of contract of sale in deed, see "Deeds," § 94.

Showing absolute deed a mortgage, see "Mortgages," § 37.

(a) An unrecorded agreement between the vendor of a house and the owner of an adjoining house, purporting to grant the common use of an alley between the two houses, which was not made a part of, or referred to in, the deed on the same date conveying the house sold, could not be considered in construing the deed, or in determining the rights of the vendee and the owner of the adjoining house.—*Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404.

(b) Parol evidence is inadmissible to add to, vary, or change the terms of a deed not attacked on the ground of fraud or mistake.—*Howard v. Rogers*, 4 H. & J. 278; *Clagett v. Hall*, 9 G. & J. 80. [Cited and annotated in 20 L. R. A. 114, on parol evidence as to consideration of deed; in 39 L. R. A. (N. S.) 907, on grantee's oral promise to grantor as giving rise to constructive trust.] *Cole v. Albers*, 1 Gill 412; *Woollen v. Hillen*, 9 Gill 185, 52 Am. Dec. 690; *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; *Hertle v. McDonald*, 2 Md. Ch. 128; *In re Young's Estate*, 3 Md. Ch. 461. [Cited and annotated in 20 L. R. A. 112, on parol evidence as to consideration of deed.] *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339; *Snowden v. Pitcher*, 45 Md. 260.

(c) Parol evidence was not admissible to show that where the word "degrees" was mentioned in a deed, the word "perches" should be substituted, as the effect would not be to explain, but to change, the language of the deed.—*Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486.

(d) When a party has, by deed, conveyed all his farm for a specified sum of money, which has been paid him, he cannot set up an antecedent or accompanying parol contract contradicting the deed, both as to price and quantity.—*Bladen v. Wells*, 30 Md. 577. [Cited and annotated in 68 L. R. A. 930, on recital of money consideration in deed as contractual.]

(e) Where land has been conveyed to two as tenants in common, and the interest of one has been sold to a third party on a judgment against him prior to the date of the deed, the other tenant cannot set up, against the title of such third person, that the interest conveyed to the co-tenant, and sold on execution, was intended to be only in the nature of a mortgage to secure money lent by him in part payment for the land.—*Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339.

(f) A. covenanted to convey to B. "three hundred and twenty acres of unimproved land in Clarke county, Missouri, being the same land which was purchased from government by C. and D., and by said C. and D. sold to said A." Held, that parol evidence was inadmissible to show that the land in-



tended to be embraced in the covenant was land conveyed to A. by C. alone or D. alone, for the covenant was not silent or ambiguous on the subject.—*Marshall v. Haney*, 4 Md. 498, 59 Am. Dec. 92.

(g) Where a conveyance describes the premises as bounding on a certain river, the court should exclude evidence outside of the grant to prove that the line referred to does not bound on such river.—*Dorsey v. Hammond*, 1 H. & J. 190. [Cited and annotated in 42 L. R. A. 511, on effect of bounding grant on river or tidewater.]

(h) Where the description in a deed is made by course and distance, without reference to any monument, parol evidence is not admissible to vary the course and distance given.—*Hamilton v. Cawood*, 3 H. & McH. 437, 1 Am. Dec. 378.

(i) A grantor was seised of a tract of land called "A," and afterwards had it resurveyed, and patented under the name of "Tract B," and conveyed it by that name, giving a special description by course and distance. Held, that though the two tracts were reputed to be the same, parol evidence was inadmissible to prove that any part of the original tract passed by the deed which was not included in the lines in the deed.—*Helms v. Howard*, 2 H. & McH. 57.

(j) Parol evidence is inadmissible to prove that land patented under a common warrant of survey was cultivated land.—*Spalding v. Reeder*, 1 H. & McH. 187.

### § 391. Bills of sale.

#### Cross-Reference.

Showing absolute bill of sale a mortgage, see "Chattel Mortgages," § 38.

(a) Intention in making bill of sale cannot be shown by parol.—*Ecker v. McAllister*, 45 Md. 290. [Cited and annotated in 23 L. R. A. (N. S.) 376, 386, 396, on right of one to testify as to his intent.]

(b) Parol evidence is inadmissible to add a warranty to a contract to sell a steam engine, "all complete, and all be left in good order," for a certain sum.—*Rice v. Forsyth*, 41 Md. 389.

(c) Parol evidence of a sale will not be admitted to vary the memorandum of the sale made at the time by the agent of both parties.—*Stoddert v. Vestry of Port Tobacco Parish*, 2 G. & J. 227.

### § 392. Assignments.

#### Cross-References.

Effect of writing as to persons not parties or privies, see post, § 424.

Matters not included in writing, see post, § 417.

(a) Where one conveyed certain property in trust, to be sold, and out of the proceeds to pay releasing creditors, and the surplus, if any, to the grantor, parol evidence is inadmissible to prove that he intended and believed he was executing an assignment of all his property to his creditors, non-releasing as well as releasing, before any surplus should inure to his benefit, and that the omission of a clause from the deed to that effect was by the inadvertence of the scrivener, and that the trustees were of the same belief.—*Farrow v. Hayes*, 51 Md. 498.

### § 393. Leases.

(a) The landlord, at the tenant's request, placed a hydraulic elevator in the leased building, and the lease was changed so as to provide for an increased rent. Held, that parol evidence was inadmissible to show that the tenant also agreed to pay for the water used in operating the elevator.—*Williams v. Kent*, 67 Md. 350, 10 Atl. 228.

(b) Where the lessor and lessee enter into a written agreement for the rent of property for a sum specified, parol evidence is not admissible for the purpose of increasing or diminishing the sum so agreed on.—*Williams v. Kent*, 67 Md. 350, 10 Atl. 228.

### § 394. Charter parties.

### § 395. Mortgages.

#### Cross-References.

Bond of defeasance, see post, § 401.

Incomplete instrument, see post, § 411.

(a) Parol evidence is not admissible to vary the terms of a mortgage, and a mortgage, regular in form, properly executed, and duly recorded, will not be held, upon parol evidence, to be a deed.—*Fowler v. Pendleton*, 121 Md. 297, 88 Atl. 124.

(b) In an action by an assignee of a mortgage, evidence of a parol agreement between the mortgagor and mortgagee, made at the time of the execution of the mortgage, to the effect that the mortgagee would pay another outstanding mortgage, or else allow the mortgagor, in making payment, to reserve a sum sufficient to satisfy such outstanding

mortgage, was inadmissible, because it varied and contradicted a written contract evidenced by the mortgage.—*Timms v. Shannon*, 19 Md. 296, 81 Am. Dec. 632. [Cited and annotated in 31 L. R. A. (N. S.) 237, on admissibility of parol evidence as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money.]

(c) Where a mortgage was given to secure notes, and the parties made notes which on their face were not within its terms, they cannot show by parol, in order to bring such notes within the security, that they were antedated.—*Ohio Life Ins. & Trust Co. v. Winn*, 4 Md. Ch. 253.

### § 396. Pledges.

#### Cross-References.

Parol evidence to show pledge, see "Pledges," § 16.

Showing absolute assignment of certificate of stock to be for security merely, see "Corporations," § 123.

### § 397. Contracts in general.

#### Annotation.

Right of agent to show that a contract signed by him apparently as obligor was not to be delivered until words indicating representative capacity had been added to his signature.—*L. R. A.* 1915A, 590, note.

Parol evidence to vary contract between heir and ancestor relating to expectancy.—32 L. R. A. 597, note.

(a) Where parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject-matter, varying, modifying, or contradicting the written agreement, is inadmissible.—*Franklin v. Long*, 7 G. & J. 407; *Hardesty v. Jones*, 10 G. & J. 404, 32 Am. Dec. 180; *Harwood v. Jones*, Id.; *Bullett v. Worthington*, 3 Md. Ch. 99, affirmed in *Worthington v. Bullitt*, 6 Md. 172; *Dixon v. Clayville*, 44 Md. 573. [Cited and annotated in 28 L. R. A. (N. S.) 803, on relief from mistake of law as to effect of instrument.] *Wooldridge v. Royer*, 69 Md. 113, 14 Atl. 681; *Badart v. Foulon*, 80 Md. 579, 31 Atl. 513.

(b) Parol evidence is not admissible to show that a written contract does not contain the entire agreement of the parties.—

*Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547, 5 Atl. 253.

(c) Where defendant made a contract with a wholesale coal company, from which he was in the habit of purchasing coal for retail, by which he loaned \$2,000 to the company, for which they executed their note, and agreed to deliver to defendant, as required for his retail purposes, 500 tons of coal as security, and at the foot of the bill for the coal was added a memorandum providing that if the note was paid at maturity the bill should be void, parol evidence is not admissible to modify such memorandum in an action by creditors of the coal company to recover coal taken by defendant in violation of it.—*Reeder v. Machen*, 57 Md. 56.

(d) Where a contract is reduced to writing, in the form of correspondence between the contracting parties, oral evidence is inadmissible to vary the terms of the contract.—*Delamater v. Chappell*, 48 Md. 244.

(e) The written contract embodied in the subscription for stock of a corporation cannot be varied by parol evidence of prior or contemporaneous transactions or agreements of the parties. The writing speaks for itself, and all prior oral agreements are merged therein.—*Scarlett v. Academy of Music*, 46 Md. 132.

(f) In the absence of mistake or fraud, parol evidence is not admissible to vary or add to the terms of a written contract.—*Wesley v. Thomas*, 6 H. & J. 24; *Watkins v. Stockett*, 6 H. & J. 435. [Cited and annotated in 28 L. R. A. (N. S.) 876, 921, 922, on relief from mistake of law as to effect of instrument.] *King v. Clogg*, 40 Md. 341.

(g) Where plaintiff, by reason of a mathematical miscalculation, agreed to, and did, pay a greater sum for certain property than he had intended, parol evidence is inadmissible to show what the real amount was intended to be, and to recover the excess.—*Boyce v. Wilson*, 32 Md. 122.

(h) Where a contract is susceptible of a sensible construction, parol evidence is inadmissible to explain or determine its construction in the absence of mistake or fraud.—*Young v. Frost*, 5 Gill 287.

(i) In an action to recover installments due on a subscription contract by which defendants, with others, agreed to pay for cer-

tain shares in plaintiff's steamboat, evidence that, at a meeting of subscribers, at which plaintiff was present, it was determined not to pay the subscription, because of plaintiff's failure to comply with the subscription agreement, was inadmissible to show non-performance by plaintiff, as it was an attempt to vary a written contract by a parol agreement.—*Sothoron v. Weems*, 3 G. & J. 435.

### § 398. Contracts of employment.

### § 399. Contracts for buildings and other works.

### § 400. Contracts of sale or exchange.

#### Cross-References.

Exclusion of implied by express warranty, see "Sales," § 267.

Oral contract of sale, see "Sales," § 57.

(a) Where a written contract is for the sale and delivery of "my packing of sugar corn," evidence of a prior parol agreement that the corn was to be like a certain sample, adds to the contract, and is inadmissible.—*Thompson v. Gortner*, 73 Md. 474, 21 Atl. 371. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract; in 19 L. R. A. (N. S.) 1191, on right to show parol warranty in connection with contract of sale of personalty.]

(b) In an action by the vendee on a written contract to convey a certain piece of land "containing about 65 acres," for breach of such contract, parol evidence is inadmissible to prove a sale of 65 acres, or the vendor's representations that there were at least 65 acres.—*Baltimore Perm't Bldg. & Land Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract; in 16 L. R. A. (N. S.) 771, on damages for breach of contract to convey realty.]

(c) Parol evidence as to the circumstances attending the sale of lands is admissible to show that time was not of the essence of the contract, which contained a recital: "Balance of purchase money to be paid within thirty days from date, said S. [vendor] giving said T. [purchaser] proper title."—*Scarlett v. Stein*, 40 Md. 512.

(d) Where, prior to the sale of a one-half interest in land by trustees to defendant,

they exhibited to him a plat showing that the land contained 716 acres, which in fact contained but 500 acres, and the contract was for one-half of the "Over the Creek Farm," for \$6,300, parol evidence is not admissible on part of the trustees to show that the land conveyed was to contain 350 acres, "more or less."—*Kent v. Carcaud*, 17 Md. 291.

(e) A parol agreement, under which there has been partial performance, is not, when reduced to writing, so merged that it cannot be resorted to to show acts done or rights acquired under it. The merger takes effect only so far as to exclude evidence of variance between the two contracts.—*Mills v. Matthews*, 7 Md. 315. [Cited and annotated in 23 L. R. A. (N. S.) 606, on power of lessee or vendee to subject owner's interest to mechanic's liens.]

(f) Though a parol agreement to convey land be valid by reason of its having been partly executed, it continues, nevertheless, executory in its character, and as such, if reduced to writing, the original contract becomes merged in the written one.—*Worthington v. Bullitt*, 6 Md. 172, affirming *Bullitt v. Worthington*, 3 Md. Ch. 99.

(g) A bill of parcels being considered evidence of a contract, and a sufficient memorandum in writing to take the case out of the statute of frauds, parol evidence cannot be received substantially to change it.—*Batturs v. Sellers*, 6 H. & J. 249.

### § 401. Bonds.

#### Cross-Reference.

Evidence as to nature of consideration, see post, § 419.

(a) In an action on a bond, merging a prior parol agreement relating to the same subject-matter, parol evidence is inadmissible to vary its terms and conditions.—*Bullitt v. Worthington*, 3 Md. Ch. 99, affirmed in *Worthington v. Bullitt*, 6 Md. 172.

### § 402. Bills and notes.

#### Cross-Reference.

Conclusiveness of recitals, see ante, § 383.

(a) In an action on a note, by the terms of which it was "agreed that the fertilizer which is the consideration of this note is bought without any guaranty on the part of the importers or their agents as to results

from its use," the admission of evidence—that plaintiff's agent, when he sold to defendant, and before the note was signed, said that he would "warrant it to produce as good crops as any other manipulated fertilizer that can be bought on the market for the same price, and, if it does not do so, you need not pay for the same," and that with this understanding defendant purchased the fertilizer, which proved to be not as represented—is error, as all preliminary negotiations were merged in the final written contract.—*Wooldridge v. Royer*, 69 Md. 113, 14 Atl. 681.

(b) Where a note is payable one year after the death of the maker's mother, then living, with 6 per cent. interest, nothing being therein specified as to the time when such interest should be paid, parol evidence is inadmissible to show that at the time the note was executed it was the understanding and agreement between the payee and the maker that the latter should pay the interest annually.—*Dance v. Dance*, 56 Md. 433.

(c) Where L. drew a draft on defendant, payable to plaintiff when plaintiff had completed a contract for certain material and labor furnished L., which draft defendant accepted, parol evidence is not admissible on the part of defendant to show that, according to the contract between L. and plaintiff, there was nothing due plaintiff.—*Hunting v. Emmart*, 55 Md. 265.

(d) In an action on a note, parol evidence is inadmissible to show that it was given as a part of the purchase price of oil lands, and that the payee agreed to take a certain amount of stock in a company to be formed by the purchasers, and credit the price thereof on the note.—*Penniman v. Winner*, 54 Md. 127. [Cited and annotated in 31 L. R. A. (N. S.) 238, on admissibility of parol evidence as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money.]

(e) In an action on a negotiable note after maturity by the indorsee against the maker, it is not competent for the latter to show by parol evidence an agreement between himself and the payee to the effect that the note was not to be negotiated.—*McSherry v. Brooks*, 46 Md. 103. [Cited and annotated

in 43 L. R. A. 462, on contemporaneous agreements and their breach as defense to note.]

#### § 403. Indorsements and transfers of bills or notes.

(a) The character of the undertaking of a party not a payee of a note, whose name appears on the back thereof, may be shown by parol.—*Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304; *Owings v. Baker*, 54 Md. 82, 39 Am. Rep. 353.

(b) Where a note was assigned by a written assignment, letters written six months before the assignment, and expressing the purpose of the assignor, could not operate to alter or qualify the assignment as afterwards actually made.—*Dixon v. Clayville*, 44 Md. 573. [Cited and annotated, see supra, § 397.]

(c) Where one indorses his name in blank on the back of a note before delivery, he is liable as a joint maker; and parol evidence is inadmissible to show that he signed as indorser merely, unless it appears that the payee knew and consented to such arrangement.—*Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411. (But see Code, art. 13, § 82.) [Cited and annotated in 18 L. R. A. 33, 36, on liability of indorser before delivery; in 18 L. R. A. (N. S.) 532, on release of indorser of note by failure to enforce liability of maker.]

#### § 404. Contracts of guaranty and suretyship.

##### Cross-References.

Indemnity bonds, see ante, § 401.

Prior and contemporaneous collateral agreements, see post, §§ 441, 442, 444.

##### Annotation.

Parol evidence as to whether guaranty was a continuing one.—39 L. R. A. (N. S.) 740, note.

(a) An imperfect description of a note in a guaranty thereof cannot be helped out by parol.—*Ordeman v. Lawson*, 49 Md. 135. [Cited and annotated in 28 L. R. A. (N. S.) 876, 877, on relief from mistake of law as to effect of instrument.]

#### § 405. Contracts of insurance.

##### Cross-References.

As to payment of premiums, see post, § 469.

As to time for payment of premiums, see post, § 422.

Receipt of premium, see post, § 408.

Evidence as to whether agency is for insurer or insured, see "Insurance," § 99.

(a) Parol evidence is inadmissible to contradict the terms of a written policy of insurance.—*Williams v. New York Life Ins. Co.*, 122 Md. 141, 89 Atl. 97.

(b) Parol evidence is inadmissible to confirm the terms of a written insurance policy where no ambiguity is alleged.—*Williams v. New York Life Ins. Co.*, 122 Md. 141, 89 Atl. 97.

(c) Evidence was not admissible to show that a fire policy was intended to cover property different from that plainly described therein.—*Citizens Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 116 Md. 422, 82 Atl. 372.

(d) A policy of insurance issued and accepted fixes the rights and duties of the parties, and each may insist on the performance thereof, and it may not be altered by parol.—*Crook v. New York Life Ins. Co.*, 112 Md. 268, 75 Atl. 388.

(e) A written policy of insurance, containing a written memorandum of a special agreement thereon, which is clear and unambiguous, cannot be explained by parol evidence.—*Mutual Life Ins. Co. v. Murray*, 111 Md. 600, 75 Atl. 348.

(f) Testimony of a witness as to the construction of the contract of life insurance sued on was properly excluded.—*Prudential Ins. Co. v. Devoe*, 98 Md. 584, 56 Atl. 809.

(g) Where a policy of insurance stated that the company insured plaintiffs against loss or damage "on merchandise, their own" or held by them in trust, or in which they had an interest or liability, parol evidence was inadmissible to show that the policy does not cover "merchandise, their own," as stated, but was intended to cover merchandise only under certain trusts, as the terms of the contract were plain and unambiguous.—*Hough v. People's Fire Ins. Co.*, 36 Md. 398. [Cited and annotated in 16 L. R. A. (N. S.) 1182, on parol-evidence rule as to varying or contradicting written contracts, as affected by doctrine of waiver or estoppel of insurer.]

## § 406. Contracts for storage.

### Cross-References.

Identification of parties, see post, § 459.  
Subsequent agreements, see post, § 445.

## § 407. Contracts of carriage.

### Cross-References.

Subsequent agreements, see post, § 445.  
Writing incomplete on its face, see post, § 411.

## § 408. Receipts.

### Cross-References.

Acknowledgment of payment in deed, see post, § 419.  
Contradiction of receipt by evidence of fraud or mistake, see post, §§ 433, 434.

### Annotation.

Parol evidence as to warehouse receipts.—19 L. R. A. 304, note.

(a) A receipt by an administrator of money in settlement of liability for the death of the intestate and for the release of all claims is a contract within the rule excluding parol evidence to contradict or vary the terms of a written contract.—*Dronenburg v. Harris*, 108 Md. 597, 71 Atl. 81.

(b) A receipt in full is a complete bar to an action, in the absence of evidence of fraud, mistake or nonpayment.—*Viridin v. Stockbridge*, 74 Md. 481, 22 Atl. 70.

(c) Where the proof is clear and unmistakable that a receipt for \$2,350 was given for payment of \$850, made at its date, and in lieu of another receipt for \$1,500 previously paid credit will be allowed only for the sum of \$850 as of that date.—*Hellwig v. Benzinger*, 74 Md. xiii, memorandum case, 22 Atl. 265, full report.

(d) A statement of payments, with a memorandum annexed acknowledging receipt of the sums mentioned in the statement, on account of a certain specified claim, was held to be competent, but not conclusive, evidence upon the question of application of payments; the statement having been made with reference to a compromise and being manifestly erroneous in some respects.—*Calvert v. Carter*, 18 Md. 73.

(e) A receipt, being a mere acknowledgment of payment, is subject to parol explanation or contradiction.—*Robinett v. Wilson*, 8 Gill 179; *Shepherd v. Bevin*, 9 Gill 32.

(f) In an action on an account, where defendant produced plaintiff's receipt, reciting

that a certain note had been received in part payment, it is not competent for defendant to vary the terms of the receipt by parol proof.—*Phelan v. Crosby*, 2 Gill 462.

(g) Where book debts were assigned in payment of a debt and a receipt given, the receipt will not bar the plaintiff in an action for the debt, and preclude evidence of the receipt having been obtained on a false representation.—*Trisler v. Williamson*, 4 H. & McH. 219, 1 Am. Dec. 396.

(h) A receipt for the purchase money, indorsed on the back of a deed of bargain and sale is not conclusive evidence of its payment.—*O'Neale v. Lodge*, 3 H. & McH. 433, 1 Am. Dec. 377. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed.]

#### § 409. Releases.

(a) W. mortgaged certain real estate to N. to secure the payment of \$2,500. Subsequently he confessed a judgment in favor of A. Afterwards W., with his wife, executed a deed of the land to L., and on the following day N. executed a release to W., reciting payment of the mortgage debt, and some days afterwards L. executed a mortgage for \$4,000 to N. Held, that the release was not susceptible of parol explanation in order to connect the released mortgage with that subsequently executed by L. to N. of the same property, so as to give it precedence over the judgment of A. in the distribution of the proceeds of the mortgaged property.—*Neidig v. Whiteford*, 29 Md. 178.

(b) Where the release of a mortgage recites that the mortgagor has fully paid and satisfied the debt to the mortgagees, parol evidence is inadmissible to explain such deed of release.—*Woollen v. Hillen*, 9 Gill 185, 52 Am. Dec. 690.

#### § 410. Memoranda not constituting contract or disposition of property.

##### Cross-Reference.

Writing covering whole transaction as affecting collateral agreements, see post, § 442.

(a) Where, in an action for the contract price of certain lumber, plaintiffs introduced a letter from them to defendant stating that plaintiffs begged "to confirm sale"

to defendant of the lumber in question, and a letter from defendant to plaintiffs confirming the order given one of the plaintiffs' agents, the letters showed on their face that they did not constitute a contract, and hence oral evidence was admissible to show the terms of the contract.—*Courtney v. William Knabe & Co. Mfg. Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

(b) An account stated is not conclusive on the parties thereto, but may be modified by other evidence.—*Barger v. Collins*, 7 H. & J. 213, 219.

#### § 411. Writing incomplete on its face.

(a) Where a guaranty written on a note bears no date, parol evidence is admissible to show that it was made at the time of the execution of the note.—*Ordeman v. Lawson*, 49 Md. 135.

(b) When a written contract for the sale of real estate is silent as to the mode in which payment is to be made, parol testimony is admissible to show how and in what payment was to be made, that being an independent collateral fact.—*Paul v. Owings*, 32 Md. 402.

(c) Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is admissible to show such additional stipulations as are not inconsistent with the writing.—*Creamer v. Stephenson*, 15 Md. 211. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(d) Parol evidence is admissible to show that the purchaser at a chancery sale knew of the incumbrance for ground rent on the premises, though no mention of rent in arrear was made in the advertisement of sale.—*Farmers & Planters Bank v. Martin*, 3 Md. Ch. 224.

(e) Where the number of acres in the tract sold was not ascertained at the time of sale, but it was agreed to estimate the quantity at 300 acres, and that any excess should be paid for at a fixed price, the vendor executed a bond for conveyance, and the vendee gave his bond for the purchase money, parol evidence was admissible to establish the contract in relation to the excess, where the vendee's bond was silent with regard to the contract of sale, and was merely an obliga-

tion for the payment of money.—*Hall v. Maccubbin*, 6 G. & J. 107.

(f) To an action of debt defendant pleaded, by way of set-off, a claim for various articles sold and delivered. At the trial he proved a lease of land to plaintiff, in consideration of plaintiff's paying defendant a certain annual sum for life and all claims and demands existing against defendant at the date of the lease. He also proved an appraisal, at the request of parties, of various articles of personal property, which the appraisers certified plaintiff was to take as his property at the valuation; that such articles were delivered to plaintiff at the valuation; and that the lease, appraisal, and delivery were made at the same time. Plaintiff then proposed to prove a verbal agreement between him and defendant that the value of this property should be applied by plaintiff to the payment of the outstanding debts of defendant. *Held*, that, as the appraisers' certificate did not show in what manner the property valued was to be paid for, parol evidence was admissible to ascertain that fact.—*McCreary v. McCreary*, 5 G. & J. 147. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(g). On petition of a slave for his freedom, where the owner introduced a certificate of a tax collector that the former had given oath before him, the owner may prove by the testimony of the tax collector, that, when he made such oath, he proved satisfactorily to the collector that the petitioning slave had been an inhabitant of another state three years prior to his importation into Maryland, which statement was omitted from the certificate.—*Harry v. Lyles*, 4 H. & McH. 215.

#### § 412. Writing showing alteration.

(a) A. drew a bill of exchange on B., which was indorsed by defendant in blank, and negotiated with D., who indorsed it specially to plaintiff. On presentation, acceptance was refused, after which it was returned by plaintiff to D., who erased his special indorsement, and returned the bill to plaintiff, who sued defendant on his indorsement. *Held*, that parol evidence was admissible to show why and under what circumstances the

erasure was made.—*Burckmyer v. Whiteford*, 6 Gill 1.

#### § 413. Evidence extrinsic to writing in general.

(a) Where in assumpsit for services, plaintiff offers, as constituting the contract, a letter by defendant which does not purport to be the final contract between them, defendant may show by parol that after writing the letter he prepared and read to plaintiff a contract embracing the agreement between them, which plaintiff assented to as correct, but refused to sign because he would not bind himself in writing.—*Allen v. Sow-erby*, 37 Md. 410.

(b) Where it is admitted in a statement of the case for trial in an action on a contract that plaintiff's agent made representations which induced the signing of the contract by defendant, plaintiff cannot object to the consideration of such representations by the court on the ground that, if defendant were compelled to prove them, he would have to resort to parol evidence.—*Swatara Railroad Co. v. Brune*, 6 Gill 41.

#### § 414. Date of instrument.

(a) A mistake in the date of a letter may be established and corrected by parol proof.—*Stockham v. Stockham*, 32 Md. 196.

(b) The antedating of notes is not of itself fraudulent, and parol evidence cannot be received to show that notes which do not correspond with the security were antedated with intent to bring them within it.—*Ohio Life Ins. & Trust Co. v. Winn*, 4 Md. Ch. 253.

#### § 415. Sustaining validity of instrument.

##### Cross-Reference.

Evidence invalidating instrument, see post, §§ 428-437.

(a) A member of a firm borrowed money of a bank, and assigned money coming to the firm under a contract with a city to the bank. *Held*, that parol evidence that the money was loaned for partnership purposes on the faith of the assignment was admissible on a question as to the validity of the assignment, though said member of the firm did not use the loan for firm purposes.—*Harris v. City of Baltimore*, 73 Md. 22, 17 Atl. 1046.

(b) In a suit to enforce performance of a contract of insurance, the policy requiring the risk to be entered on the books, which was not done, parol evidence was admissible to show the method of dealing in respect to the risks entered in the open policy and book.—*Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109. [Cited and annotated in 22 L. R. A. 771, on validity of oral insurance contract; in 28 L. R. A. (N. S.) 814, 919, on relief from mistake of law as to effect of instrument.]

(c) In a suit against an insurance company, evidence was offered that the policy was filled up, by a mistake of the clerk, for \$5,000 on stock instead of \$2,500 on stock and \$2,500 on the building. Held, that the evidence was admissible, being only offered to prove a distinct collateral fact.—*Planters Mut. Ins. Co. v. Deford*, 38 Md. 382. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(d) Parol testimony is admissible to ascertain and correct erroneous entries on the docket.—*Clammer v. State*, 9 Gill 279.

(e) Where plaintiff advanced money to defendants as a loan on a contract in which by mistake the word "dollars" was omitted, parol evidence is not admissible in an action at law to supply such omission, and hence plaintiff is entitled to have the instrument reformed in equity.—*Newcomer v. Kline*, 11 G. & J. 457, 37 Am. Dec. 74. [Cited and annotated in 28 L. R. A. (N. S.) 830, 912, on relief from mistake of law as to effect of instrument.]

#### § 416. Connection of contemporaneous writings.

(a) A contract by which N. agreed to advance money to W., to engage in the canning business and to purchase supplies therefore, W. to repay him, and to give bond for performance of his part of the agreement, may be shown by parol to be the agreement referred to in a bond of even date, reciting that W. is to engage in the canning business, and that N. has agreed to advance certain money to him in connection therewith, and pay for certain goods to be used therein, and conditioned to be void if W. repay to N. said advances and the money expended in such purchases.—*Nelson v. Willey*, 97 Md. 373, 55 Atl. 527.

(b) Parol evidence tending to show that a guaranty referred to a certain contract, and thereby to make out a consideration for the guaranty is inadmissible.—*Deutsch v. Bond*, 46 Md. 164.

#### § 417. Matters not included in writing or for which it does not provide.

##### Cross-References.

Completeness of writing as affecting admissibility of prior and contemporaneous agreements, see post, § 442.

Writing incomplete on its face, see ante, § 411.

(a) A purchaser of mortgaged premises assuming the mortgage may show that the conveyance was accepted on the mortgagor's agreeing orally to pay certain back interest due the mortgagee, since it merely explained what the agreement left in obscurity.—*Eareckson v. Rogers*, 112 Md. 160, 75 Atl. 513.

(b) Where a guaranty written on a note bears no date, parol evidence is admissible to show that it was made at the time of the execution of the note.—*Ordeman v. Lawson*, 49 Md. 135. [Cited and annotated in 28 L. R. A. (N. S.) 876, 877, on relief from mistake of law as to effect of instrument.]

(c) When a written contract for the sale of real estate is silent as to the mode in which payment is to be made, parol testimony is admissible to show how and in what payment was to be made, that being an independent collateral fact.—*Paul v. Owings*, 32 Md. 402.

(d) Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is admissible to show such additional stipulations as are not inconsistent with the writing.—*Creamer v. Stephenson*, 15 Md. 211. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(e) Parol evidence is admissible to show that the purchaser at a chancery sale knew of the incumbrance for ground rent on the premises, though no mention of rent in arrear was made in the advertisement of sale.—*Farmers & Planters Bank v. Martin*, 3 Md. Ch. 224.

(f) Where the number of acres in the tract sold was not ascertained at the time of sale,



but it was agreed to estimate the quantity at 300 acres, and that any excess should be paid for at a fixed price, the vendor executed a bond for conveyance, and the vendee gave his bond for the purchase money, parol evidence was admissible to establish the contract in relation to the excess, where the vendee's bond was silent with regard to the contract of sale, and was merely an obligation for the payment of money.—*Hall v. Maccubbin*, 6 G. & J. 107.

(g) To an action of debt defendant pleaded, by way of set-off, a claim for various articles sold and delivered. At the trial he proved a lease of land to plaintiff, in consideration of plaintiff's paying defendant a certain annual sum for life and all claims and demands existing against defendant at the date of the lease. He also proved an appraisalment, at the request of parties, of various articles of personal property, which the appraisers certified plaintiff was to take as his property at the valuation; that such articles were delivered to plaintiff at the valuation; and that the lease, appraisalment, and delivery were made at the same time. Plaintiff then proposed to prove a verbal agreement between him and defendant that the value of this property should be applied by plaintiff to the payment of the outstanding debts of defendant. *Held*, that, as the appraisers' certificate did not show in what manner the property valued was to be paid for, parol evidence was admissible to ascertain that fact.—*McCreary v. McCreary*, 5 G. & J. 147. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(h) On petition of a slave for his freedom, where the owner introduced a certificate of a tax collector that the former had given oath before him, the owner may prove by the testimony of the tax collector that, when he made such oath, he proved satisfactorily to the collector that the petitioning slave had been an inhabitant of another state three years prior to his importation into Maryland, which statement was omitted from the certificate.—*Harry v. Lyles*, 4 H. & McH. 215.

#### § 418. Parties to instrument or obligation.

##### Cross-Reference.

Identification of parties, see post, § 459.

(a) Where there is no allegation of fraud, surprise, or mistake, either of law or fact, parol evidence is inadmissible to contradict the terms of a trust deed as to the cestui que trust therein named.—*American Nat. Bank v. Harlan*, 89 Md. 675, 43 Atl. 756.

(b) In an action against a corporation on a contract for royalty for the use of a patent issued to plaintiff, parol evidence is inadmissible to show that the patent was issued to him for the joint benefit of himself and his brother, who was a stockholder in defendant corporation, and that, up to the time of bringing the suit, by verbal understanding, one-half of the royalty had been paid to plaintiff, and one-half to his brother.—*Zihlman v. Cumberland Glass Co.*, 74 Md. 303, 22 Atl. 271.

(c) In an action on a contract executed in a firm name by one partner, where the authority of the partner to so bind the firm is in question, parol evidence is admissible to show such authority, or a subsequent ratification by the partnership.—*Herzog v. Sawyer*, 61 Md. 344.

(d) Parol evidence is admissible to show that the principal debtor on the face of a mortgage made by husband and wife on the wife's land was in fact the husband, and not the wife, and that therefore, on a foreclosure, the husband should be allowed to set off a debt due him from the mortgagee.—*Spencer v. Almoney*, 56 Md. 551.

(e) D. & Co. applied to an insurance company for a policy on a tannery, stating in the application that the insurance proposed was in addition to a sum insured in other companies. The policy was issued, and, in an action thereon to recover for a loss by fire, it appeared that at the time of the application there was no insurance on the property in the name of D. & Co., but that there was an insurance in the name of D. & A., trustees, etc. *Held*, that parol testimony was admissible to determine whether the interest of D. & Co., or that of D. & A., was the subject-matter referred to in the application.—*Planters Mut. Ins. Co. v. Deford*,

38 Md. 382. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.] *Frederick Co. Mut. Fire Ins. Co. v. Deford*, 38 Md. 404.

(f) When one contracts in writing for the purchase of goods on credit, and the contract shows on its face that the purchaser contracted as agent for a third party, whose name is disclosed in the contract, parol evidence is not admissible to show that the credit was given to the agent personally.—*McClernan v. Hall*, 33 Md. 293.

(g) Though there is nothing, either in the body of an instrument, or attached to the signature, to indicate that it was intended to be anything other than the personal obligation of the party signing it, parol evidence is admissible to show that the maker or obligor was acting in the matter as agent merely.—*Oelrichs v. Ford*, 21 Md. 489. [Cited and annotated in 53 L. R. A. 522, on use of books of account as evidence on issues between other parties.]

(h) Where the plaintiff deposited merchandise with a firm, taking a receipt therefor in the firm name, and afterwards sold the merchandise, and surrendered the receipt to the firm, and, received for the merchandise the individual note of one of the firm, on the sale, such note is not evidence as to who were the parties vendor and vendee, or such evidence as could not be added to, contradicted, or varied by parol evidence.—*Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599. [Cited and annotated in 20 L. R. A. 599, on proof against one person of declarations by another to show partnership; in 52 L. R. A. 841, on partnership books of account as evidence.]

(i) A corporate agent purchased land, and took a bond for conveyance in his own name, and gave therefor a note signed in his own name, and in such name as agent for the corporation. Held, that, in a suit against the corporation on the note, parol evidence was inadmissible to contradict the bond by showing that the corporation was the real purchaser of the land.—*Savage Mfg. Co. v. Worthington*, 1 Gill 284.

(j) In assumpsit for work done and materials furnished, where plaintiff gave in evidence a written settlement acknowledging a balance due by defendant, it is admis-

sible for defendant to show that the items in the settlement are partnership claims due plaintiff and another.—*Barger v. Collins*, 7 H. & J. 213.

#### § 419. Nature of consideration.

##### Cross-References.

See ante, § 385.

Contemporaneous oral agreement to secure future advances, see post, § 441.

Evidence of consideration for purpose of construing contract, see post, § 460.

Evidence to show want or failure of consideration, see post, § 432.

Recitals in deeds as evidence, see ante, § 353.

Showing illegality, see post, § 437.

Writing not stating consideration, see ante, § 417.

##### Annotation.

Admissibility of parol evidence as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money.—31 L. R. A. (N. S.) 235, note.

Parol evidence as to the consideration of a deed.—20 L. R. A. 101; 25 L. R. A. (N. S.) 1194, notes.

(a) Evidence that the price stated in contract of conditional sale was not the full price, but only the balance due after the application of certain part payments, held not to violate parol-evidence rule.—*Dinsmore v. Maag-Wahmann Co.*, 122 Md. 177, 89 Atl. 399.

(b) Parol evidence held inadmissible to show that the consideration of a bond to secure the payment of the price which a corporation agrees to pay for its own stock was in reality a loan.—*Schaun v. Brandt*, 116 Md. 560, 82 Atl. 551.

(c) A deed from a father to his daughter in consideration of love and affection cannot be supported against a claimant under previous contract of sale from the father by evidence of a different and valuable consideration.—*Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938. [Cited and annotated in 25 L. R. A. (N. S.) 1207, on parol evidence as to consideration of deeds.]

(d) As between the parties to a negotiable promissory note, although the note itself is prima facie evidence of consideration, the question of consideration is always open, and it may be shown by parol that there was no sufficient consideration, or that the consideration had failed, or that the paper had been given for an accommodation merely.

—*Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322.

(e) Plaintiff signed a deed for a house and lot, stated therein to be for a money consideration, to defendant, and afterwards filed a bill in equity to have the deed set aside on the ground of fraud and imposition in obtaining it. Proof was offered that no money consideration was paid, but that there was a parol agreement between the parties that defendant was to board and lodge plaintiff in the house, and pay all taxes and other expenses on the property. *Held*, that it was incompetent for plaintiff to prove another consideration than that stated in the deed.—*Thompson v. Corrie*, 57 Md. 197. [Cited and annotated in 20 L. R. A. 102, 104, on parol evidence as to consideration of deed; in 68 L. R. A. 926, on recital of money consideration in deed as contractual.]

(f) In a proceeding by a mortgagee to foreclose a mortgage on realty, which the mortgagor had sold to a third party under a deed making no mention of the mortgage, parol evidence was admissible to show that the payment of the mortgage constituted a part of the consideration of the deed.—*Mahoney v. Mackubin*, 54 Md. 268.

(g) Where a guardian purchases land at the request of his ward for a recited consideration of \$1,200, and conveys it to his ward for a recited consideration of \$1,700, he may show, when sued by the ward for fraud, that the excess involved other matters of account between him and his ward; the nature of the consideration in both deeds being open to inquiry, so long as that proved was of the same kind as that recited, and differed only in amount.—*Smith v. Davis*, 49 Md. 470.

(h) Under the circumstances of the case, *held*, that the consideration of the agreement could not be shown to be different from that expressed.—*Boyce v. Wilson*, 32 Md. 122.

(i) In an action by defendant's sisters on his promise to pay each of them \$1,000 in consideration of their forbearance from contesting their father's will, which was in defendant's favor, evidence tending to show the value of testator's estate, or to show the validity of the will was inadmissible.—*Hartle v. Stahl*, 27 Md. 157. [Cited and anno-

tated in 13 L. R. A. (N. S.) 485, on validity of contract not to contest probate.]

(j) Parol evidence is admissible to prove some other consideration than that which is expressed in the instrument, if it be consistent with that which is expressed, and does not alter the effect of the instrument.—*Cunningham v. Dwyer*, 23 Md. 219.

(k) Where a deed executed by a debtor to his mother for the consideration, therein named, of five dollars, was assailed on the ground of fraud on creditors, parol testimony showing the actual amount received by the grantor in advances of money which he had agreed to secure by deed would not have the effect to change the legal character *prima facie* impressed by law on the deed.—*Cunningham v. Dwyer*, 23 Md. 219.

(l) The clause in a deed acknowledging payment of the consideration is mere *prima facie* evidence, and may be controlled and rebutted by parol evidence.—*O'Neale v. Lodge*, 3 H. & McH. 433, 1 Am. Dec. 377. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed.] *Higdon v. Thomas*, 1 H. & G. 138. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed.] *Wolfe v. Hauver*, 1 Gill 84. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed; in 21 L. R. A. 425, on right to impeach one's own witness; in 68 L. R. A. 927, on recital of money consideration in deed as contractual.] *Woollen v. Hillen*, 9 Gill 185, 52 Am. Dec. 690; *Lingan v. Henderson*, 1 Bland 236; *Spalding v. Brent*, 3 Md. Ch. 411. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed; in 68 L. R. A. 926, on recital of money consideration in deed as contractual.] *Carr v. Hobb's Adm'r*, 11 Md. 285. [Cited and annotated in 68 L. R. A. 926, on recital of money consideration in deed as contractual.] *Bratt v. Bratt*, 21 Md. 578. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed.] Compare *Dixon v. Swiggett*, 1 H. & J. 252. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed.]

(m) Parol proof is inadmissible to show a valuable consideration for a deed expressed on its face to be for love and affection, in

order to sustain it against creditors.—*Elinger v. Crowl*, 17 Md. 361. [Cited and annotated in 20 L. R. A. 111, on parol evidence as to consideration of deed.]

(n) A deed from a father to his daughter in consideration of natural love and affection cannot be supported, against an attack by the father's creditors, by showing that the land conveyed was purchased and paid for with the daughter's money.—*Baxter v. Sewell*, 3 Md. 334, affirming *Sewell v. Baxter*, 2 Md. Ch. 447. [Cited and annotated in 20 L. R. A. 109, 110, 25 L. R. A. (N. S.) 1207, on parol evidence as to consideration of deed.]

(o) Where a deed was executed on a money consideration of \$144, which was paid to the grantor, this constitutes it a deed of bargain and sale, and it may be supported by showing that it was caused to be made by the grantor in satisfaction of a debt due from him of an amount equivalent to the value of the property conveyed; this being a consideration ejusdem generis with that stated in the deed.—*Anderson v. Tydings*, 3 Md. Ch. 167.

(p) Where deeds are impeached for fraud, and it is shown by the admissions of the answers that the considerations on which they profess to have been executed were not paid in manner and form, as declared on their face, the party claiming under them will not be permitted to prove another consideration in their support.—*Glenn v. Randall*, 2 Md. Ch. 220.

(q) When a deed is rendered inoperative and void by disproving the consideration expressed in it, evidence of a different consideration will not be received to support it.—*Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392. [Cited and annotated in 20 L. R. A. 102, 106, on parol evidence as to consideration of deed; in 24 L. R. A. (N. S.) 415, on parol evidence to show true nature of transaction where recited consideration of deed shown not paid.]

(r) In assumpsit to recover the purchase money for land sold, the acknowledgment in the deed that the amount has been received may be rebutted by evidence that a note was given for a part of the purchase money, which was afterwards given up to the vendee on his giving an order on a third party

for the amount, and that the drawee of the order refused to pay it, and the question of payment in such case is one of fact for the jury.—*Morgan v. Bitzenberger*, 3 Gill 350. [Cited and annotated in 68 L. R. A. 927, on recital of money consideration in deed as contractual.]

(s) Where the consideration stated in a mortgage is a sum of money in hand paid, and it is given to secure that sum, evidence is admissible to show a part of the sum paid, and that it was to secure advances made and to be made to that extent, since such evidence does not affect the nature of the deed; it still being founded on a money consideration.—*Cole v. Albers*, 1 Gill 412.

(t) Where a deed purports to have been made for a money consideration, it cannot be shown that money did not constitute the consideration, since this would have the effect of changing the character of the deed.—*Cole v. Albers*, 1 Gill 412.

(u) A. had an attachment pending against B., who assigned the attached property to C., A. agreeing to pay C. the surplus of the proceeds of sale of the property over a certain sum. Held, that the assignment was admissible, as tending to show a consideration.—*Keefer v. Mattingly*, 1 Gill 182.

(v) Where a judgment is confessed on a note professing to have been given for value received, and the creditors of the party confessing attempt to impeach the judgment by showing that the note was not given for value, but is fictitious, it is competent for those who have taken the judgment to show what was in fact the consideration for which the note was given.—*Harris v. Alcock*, 10 G. & J. 226, 32 Am. Dec. 158.

(w) Where an action is instituted by an executor on a single bill payable to "A., executor of B.," such action is in the executor's own right, and one to which a debt due from him may be pleaded and proved as a set-off, and he cannot go into evidence of the consideration of the bill, to show that it was given for a debt due B., in order to exclude the set-off as due in another right.—*Turner v. Plowden*, 2 G. & J. 455.

(x) Marriage cannot be given in evidence as a consideration of a deed expressed to be made for a money consideration.—*Betts v. Union Bank*, 1 H. & G. 175, 18 Am. Dec. 283.

[Cited and annotated in 20 L. R. A. 110, on parol evidence as to consideration of deed.]

(y) Parol evidence is inadmissible to prove that a deed which sets out a money consideration was not given for one, and was therefore inoperative as a deed of bargain and sale.—*Hurn v. Soper*, 6 H. & J. 276. [Cited and annotated in 20 L. R. A. 108, on parol evidence as to consideration of deed; in 19 L. R. A. (N. S.) 439, on admissibility of record, or copy of record, to prove deed under which party offering it claims.]

(z) Parol evidence that notes were drawn to relieve other notes of the same amount, where the last-mentioned notes are not produced, and no legal account given of them, is not admissible.—*Wilmer v. Harris*, 5 H. & J. 1.

(aa) Parol evidence is admissible to prove that a debt secured by mortgage, expressed to be a specie debt, was Continental money.—*Worthington v. Bicknell*, 2 H. & J. 58.

(bb) In assumpsit on a promissory note, defendant was entitled to show that he had given the note to plaintiff on the latter depositing money with him for safe-keeping under an agreement that the specific money deposited was to be returned on demand.—*Harris v. Paddison*, 2 H. & McH. 252.

#### § 420. Existence of condition or contingency.

##### Cross-References.

Condition precedent to obligation under writing, see post, § 444.

Contradicting or varying condition in writing, see ante, § 405.

Impeaching record of a corporation by showing conditional signature of articles, see "Banks and Banking," § 47.

(a) In an action on a note, by the terms of which it was "agreed that the fertilizer which is the consideration of this note is bought without any guaranty on the part of the importers or their agents as to results from its use," the admission of evidence—that plaintiff's agent, when he sold to defendant, and before the note was signed, said that he would "warrant it to produce as good crops as any other manipulated fertilizer that can be bought on the market for the same price, and, if it does not do so, you need not pay for the same," and that with this understanding defendant purchased the fertilizer, which proved to be not

as represented—is error, as all preliminary negotiations were merged in the final written contract.—*Wooldridge v. Royer*, 69 Md. 113, 14 Atl. 681.

(b) Where a note is payable one year after the death of the maker's mother, then living, with 6 per cent. interest, nothing being therein specified as to the time when such interest should be paid, parol evidence is inadmissible to show that at the time the note was executed it was the understanding and agreement between the payee and the maker that the latter should pay the interest annually.—*Dance v. Dance*, 56 Md. 433.

(c) In an action on a stock subscription, parol evidence is inadmissible to affix a condition not warranted by the corporation law,—as here, that there was an understanding that payment might be made in land, instead of money.—*Baile v. Calvert College Educational Soc.*, 47 Md. 117.

(d) The maker of a note given in settlement of accounts between himself and his co-partner on a dissolution of the firm cannot, in an action against him on the note by an indorsee thereof, show by parol evidence an agreement between himself and his co-partner that the note was not to be paid until it should be ascertained whether certain partnership accounts, which, at the time of the settlement in which the note was given were considered doubtful, could be collected.—*McSherry v. Brooks*, 46 Md. 103. [Cited and annotated in 43 L. R. A. 462, on contemporaneous agreements and their breach as defense to note.]

(e) An agreement between an indorser and the makers of a note that it was not to be delivered as a note indorsed unless and until a bill of sale of a steamer was executed and delivered by her owners to the makers, and until a first lien was given thereon by the latter to the indorser, is not per se evidence in an action on the note by the holder against the indorser.—*Ricketts v. Pendleton*, 14 Md. 320. [Cited and annotated in 43 L. R. A. 482, on contemporaneous agreements and their breach as defense to note; in 18 L. R. A. (N. S.) 290, on parol evidence to show bill or note delivered upon condition.]

(f) Defendant may show by parol that a note on which he is sued as indorser was de-

livered as an escrow, or that it was delivered to plaintiff to be held on a condition to be performed before the interest of the holder could attach.—*Ricketts v. Pendleton*, 14 Md. 320. [Cited and annotated, see supra.]

#### § 421. Existence of custom or usage.

##### Cross-Reference.

See "Customs and Usages," §§ 14-17.

##### Annotation.

Extrinsic evidence of custom or usage as to time for delivery of goods where none is specified in written contract.—31 L. R. A. (N. S.) 619, note.

Admissibility of evidence of custom to create an exception to written contract.—3 L. R. A. (N. S.) 248, note.

(a) In an action against a baseball club for breach of a written contract of hiring, whereby plaintiff contracted with defendant "to play ball for the season of 1892 for \$3,000," evidence of a custom that all professional baseball clubs have the right, on 10 days' notice, to discharge a player who does not play satisfactorily, was inadmissible, since it would not only destroy the mutuality, but vary the terms, of the contract, which was for a definite term.—*Baltimore Baseball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 28 Atl. 279, 44 Am. St. Rep. 304, 22 L. R. A. 690. [Cited and annotated in 6 L. R. A. (N. S.) 96, on wrongfully discharged servant's action for damages.]

(b) In an action for breach of contract to sell plaintiffs "three cargoes" of phosphate, which was to be shipped in vessels selected by plaintiffs, evidence is admissible to show that the vessels usually employed in carrying phosphate were from 800 to 850 tons burden, since that element of the contract is not expressly supplied, and is evidently intended to be supplied by custom.—*Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 450.

(c) Evidence of a custom among stone masons whereby they are entitled to compensation, not only for the actual contents of a wall, but for all openings therein, and 50 per cent. additional for all such masonry built in a circle or curve, is admissible to determine the amount recoverable under an express contract.—*Patterson v. Crowther*, 70 Md. 124, 16 Atl. 531.

(d) Where plaintiff seeks to prove such a fixed custom by the ticket agent of a rail-

road company as will prevail over the published notices and time-tables of such company, of which the plaintiff is presumed to have knowledge, evidence by plaintiff and his witnesses, to the effect that they have individually assumed the custom to exist, and acted on it, though they have not tested it nor heard of it from others, is legally insufficient to establish it.—*Duling v. Philadelphia, W. & B. R. Co.*, 66 Md. 120, 6 Atl. 592.

(e) A custom or usage cannot be proved to explain terms or provisions in contracts or instruments when the meaning of such terms is unambiguous and free from doubt.—*Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186.

(f) The court must know, from a distinct statement by the party making the offer to prove existence of a usage, what the usage is, before evidence of its existence is admissible.—*Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186.

(g) In the absence of any express agreement on a time for delivery of goods sold, such time may be regulated and controlled by an established custom among merchants dealing in similar goods.—*Kriete v. Myer*, 61 Md. 558.

(h) Where goods were sold to a broker at a certain price "cash," evidence of an established custom to allow a discount on cash sales, and to allow brokerage when goods are sold to a broker personally, was admissible.—*Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

(i) Evidence of custom or usage is admissible to explain an ambiguous contract or instrument.—*Foley v. Mason*, 6 Md. 37; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

(j) In 1876, a charter party of a vessel then in a foreign port was entered into to carry a cargo of grain from Baltimore to Europe, wherein it was "agreed that the lay days for loading and discharging" should commence "not later than the 31st day of January, 1877." A Lloyd's inspection certificate was obtained, and the vessel tendered to the charterers January 31st, and they refused to accept her, claiming that the tender was too late, as, according to the custom of the port of Baltimore, masters

are required to give one day's notice before their lay days can commence. In an action against them to recover damages for the loss occasioned by such refusal, *held*, that proof of a uniform, well-known, and long-established usage in said port that the lay days of such vessel would commence on the day following the delivery of the inspection certificate and notice, and not before, and that no division of the lay day was recognized, was not inconsistent with the terms of the contract.—*Barker v. Borzone*, 48 Md. 474.

(k) A party to a contract is not bound by a usage of business in reference thereto, unless it is known to him, or is so general and well-established as to raise a presumption that he knew it.—*Foley v. Mason*, 6 Md. 37; *Barker v. Borzone*, 48 Md. 474.

(l) In an action by a bricklayer to recover a balance due him for laying the bricks in certain houses of the defendant, evidence offered by the plaintiff that he had measured the houses by a rule adopted by the trade in the city, which had been tested and found correct, and that, by the measurement so made, the buildings contained a certain number of bricks, was objected to on the ground that the bricks were of unequal size, and therefore a correct estimate could not be ascertained by such a rule. *Held*, that the evidence was admissible to show the number of bricks laid.—*Donohue v. Shedrick*, 46 Md. 226.

(m) Where a principal authorized his agent to make a contract for the shipment of oil at a particular place, on which the agent made advances, the principal must be taken to have contemplated the operation of an established, uniform custom, authorizing agents who have made advances on merchandise to call for return of a part thereof, or additional indemnity, in case of shrinkage or apprehension of loss.—*Kraft v. Fancher*, 44 Md. 204.

(n) Where a party claims under a uniform usage, he is under no obligation to prove that usage was known to the other party at the time the contract which was based on it was entered into, since knowledge is presumed.—*Lyon v. George*, 44 Md. 295.

(o) In the absence of evidence of a special contract, where services are rendered, and

a uniform usage is shown to exist in regard to such services, it will be presumed that they are rendered in accordance with the usage; and, in an action to recover for such services, evidence of the existence of the usage is admissible.—*Lyon v. George*, 44 Md. 295.

(p) Though custom or usage will not be admitted to contradict a stipulation in writing, it is admissible to add new terms, not expressed in or covered by the writing, where the usage or custom is so well known that the parties may be presumed to have contracted with reference thereto.—*Merchants Mut. Ins. Co. v. Wilson*, 2 Md. 217; *Foley v. Mason*, 6 Md. 37; *Kraft v. Fancher*, 44 Md. 204. Compare *Gibney v. Curtis*, 61 Md. 192.

(q) Where a certificate of railway stock is given as a pledge to secure a loan, and a power of attorney is indorsed thereon, authorizing the pledgee to have it transferred to his own name, evidence of a custom that brokers have no right to surrender pledged stock, but must retain it until default is made on the notes which it secures, is not admissible, since it would be varying the express terms of the agreement.—*Rich v. Boyce*, 39 Md. 314.

(r) Where a custom exists in reference to a particular trade or business, the contracts of parties engaged in the business are presumed to be made with reference to such custom, unless it is expressly excluded.—*Merchants Mut. Ins. Co. v. Wilson*, 2 Md. 217; *Appleman v. Fisher*, 34 Md. 540.

(s) Where gold coin was deposited with a bank as a special deposit, and a depositor's bank book contained an entry, "1861, Dec. 30, cash (coin) \$3,000," evidence of a well-known and uniform custom among banks in the city where the deposit was made that such deposit should be paid out in kind, and that the striking of balances subsequent to the entry did not change the character of the deposit, was admissible to explain an ambiguity in the entry.—*Chesapeake Bank v. Swain*, 29 Md. 483. [Cited and annotated in 21 L. R. A. 445, on banking customs; in 29 L. R. A. 523, on special obligations for payment in gold or silver.]

(t) Evidence that certain banks in a city in certain instances had contracted to re-

pay deposits of coin in kind when gold was at a premium, restricted to two or three banks not including defendant, is not sufficient to establish a usage to such effect binding on the defendant.—*Chesapeake Bank v. Swain*, 29 Md. 483. [Cited and annotated, see *supra*.]

(u) Where a lease of a gristmill contained no provision covering a sawmill, which was run by the same stream of water and was near the gristmill, parol evidence is inadmissible to show that it was a custom in the neighborhood to include a sawmill which was appurtenant to and used with a gristmill in a lease of the latter.—*Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

(v) Where a note was on its face payable "at People's Bank of B.," parol evidence is inadmissible to show a custom of the bank giving the note a different construction, on account of any peculiarity in the way of expressing the place of payment.—*People's Bank v. Keech*, 26 Md. 521, 90 Am. Dec. 118.

(w) In an action on a contract to receive, at a future day, a certain number of barrels of flour at a fixed price, evidence is not admissible to prove a custom that either party to such a contract "has a right to demand a margin to be put up, reasonably sufficient to secure the performance of the contract."—*Oelrichs v. Ford*, 21 Md. 489. [Cited and annotated in 53 L. R. A. 522, on use of books of account as evidence on issues between other parties.]

(x) In an action for damages for the difference in value between tobacco bought by sample and the samples by which it was sold, evidence showing a custom of dealers in Baltimore of buying and selling in bulk by samples prepared by the state inspector, without insuring exact correspondence in quality, is admissible to explain the legal effect of the warranty.—*Gunther v. Atwell*, 19 Md. 157.

(y) Where a new and unusual word is used in a contract, or where a word is used in a technical or peculiar sense, as applicable to any trade, or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it.—*Allegre v. Maryland Ins. Co.*, 2 G. & J. 136, 20 Am. Dec. 424; *Williams v. Woods*, 16 Md. 220.

(z) In a suit for wages, there being no special contract proved, it is proper for the plaintiff to show a custom in the business that persons, employed as he was, are not to be dismissed till the end of the season, and that the end of the season by the same custom is January 1st, or July 1st.—*Given v. Charron*, 15 Md. 502.

(aa) Evidence of custom or usage is inadmissible to control the terms of a special contract, where its subject-matter and terms are clear of doubt and obscurity.—*Foley v. Mason*, 6 Md. 37.

(bb) Evidence of a usage "to deliver merchandise sold for cash, without receiving the cash simultaneously with the delivery, and without the vendor's thereby waiving the right to the cash," supported by testimony that "it was then, and now is, the general usage among flour dealers in the city of Baltimore," and, by another witness, "that, in sales of flour for cash in the city of Baltimore, it is the general and constant usage," is too vague and unmeaning to warrant the court to submit any proposition to the jury based upon it.—*Foley v. Mason*, 6 Md. 37.

(cc) Evidence of isolated instances of a certain course of trade is not sufficient to establish a usage by which the rights of parties are to be measured and determined.—*Duvall v. Farmers Bank*, 9 G. & J. 31.

(dd) A general custom of a sheriff to require his deputies to deliver all process to him for indorsement of returns thereon was competent in an action by the sheriff on the official bond of one of the deputies on the issue of the truth or falsity of a return.—*Naylor v. Semmes*, 4 G. & J. 273.

(ee) A usage may be proved by parol evidence.—*Drake v. Hudson*, 7 H. & J. 399.

(ff) Where a policy provided that in case of loss the same should be paid in 90 days after "proof and adjustment thereof," evidence of a usage that, although the losses were claimed under a valued policy, the insurer was entitled to the production of a bill of lading and invoice of the cargo, was admissible, as explaining what was included in the term "proof of loss."—*Allegre v. Maryland Ins. Co.*, 6 H. & J. 408, 14 Am. Dec. 289.



§ 422. Existence or accrual of liability.

§ 423. Nature and extent of liability.

*Annotation.*

Admissibility of parol evidence to show to which indorsement qualifying words belong.—49 L. R. A. (N. S.) 789, note.

(a) Where a wife, as surety for her husband, joined him in a mortgage which stated that "the debt is a joint and several one," in an action praying leave to pay the debt and be subrogated to the rights of the mortgagee she may show that she was simply surety, though she could not do so to defeat the mortgage.—*Snook v. Munday*, 96 Md. 514, 54 Atl. 77.

(b) As between landlord and tenants, an agreement that "B. has rented his farm \* \* \* to the said T. and S." cannot be varied by parol to show that S. was merely surety for T.—*Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713.

(c) In an action against a husband and wife, on a note executed by the wife alone, and indorsed in blank by the husband, who is the payee, parol evidence that the instrument was made with the intent and understanding that it should be indorsed to plaintiff cannot be received for the purpose of showing that said note, after such indorsement, became in fact the joint obligation of both spouses, and was therefore binding on the wife.—*Harvard Pub. Co. of New York v. Benjamin*, 84 Md. 333, 35 Atl. 930, 57 Am. St. Rep. 402.

(d) Where the performance of a contract by another is guaranteed, parol evidence is admissible to prove the amount of the debt incurred or damage sustained.—*Heyman v. Dooley*, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257.

(e) In consideration of the right to sell the product, A. agreed in writing to "furnish" B. money to enable C. to can corn at a certain factory, and it was stipulated that B. should "be expected to invest no capital in the business." *Held*, admissible to show by parol that B. was to assume no responsibility, except to see that the money was used by C. for canning purposes; the circumstances of the parties showing that C. was involved, and his farm and factory had been foreclosed by B., and leased back to him to

enable him to make money to buy them again, and that, in order to protect A. in his advances from attachments by C.'s creditors, it was necessary to place the business out of his name.—*Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918.

(f) Where defendant indorsed a note in blank, in an action against her as maker parol evidence is admissible to show that it was the understanding of the parties at the time of the execution of the note that defendant signed as an indorser.—*Owings v. Baker*, 54 Md. 82.

(g) Where a bill of exchange is drawn upon a person in his individual capacity, and is accepted by him as treasurer of a corporation, and there is such ambiguity on the face of the paper as to raise the question whether he meant to bind himself personally, or acted only in an official capacity, parol evidence is admissible, in a suit against him by the payee, to prove the circumstances under which the bill was accepted; or, in other words, to prove the true nature of the transaction.—*Laflin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472.

(h) Evidence is inadmissible to show that a written contract purporting to be originally and equally binding on all the obligors, entered into for a consideration inuring to the benefit of all, was in fact only an original obligation as to the first obligors, and without consideration as to the rest.—*Criss v. English Ex'r.*, 26 Md. 553.

(i) Parol evidence is admissible in an action in equity to prove who is principal and who is surety on a bond or note.—*Brown v. Stewart*, 4 Md. Ch. 368. [Cited and annotated in 20 L. R. A. 713, on extrinsic evidence to show who is liable as maker of note.]

(j) Where A. and B. entered into a single bill, to borrow money on account of the vestry of a church, and each paid one-half of the amount, and A. brought an action against B. for contribution, on the ground that B. was the principal debtor, and A. only the surety, it was *held* that B. might prove, by parol evidence of the acts and conduct of both parties, that both A. and B. were members of the vestry.—*Chapman v. Davis*, 4 Gill 166.

**§ 424. Effect of writing as to persons not parties thereto or privies.**

(a) A. & Co., being indebted to a bank, gave to it, under a written agreement to that effect, their four single bills. C., D., and E., were sureties on one of the bills, and D. and E. on the other three. Certain collateral, enumerated in said agreement, was also pledged as security, with power to sell on default, and to apply the proceeds (as it was conceded) to the payment of any or all of said bills at the bank's discretion. *Held*, that C., not being a party to the written agreement, was entitled to show an oral agreement between himself and the bank by which he agreed to become surety on one of the notes only on the condition that the collateral should first be applied to the note on which he was liable, and that, on proof of such an agreement, equity would enjoin the bank from prosecuting a suit at law against C. for a greater sum than the balance remaining due after deducting the amount realized from the sale of the collateral.—*Fant v. Sprigg*, 50 Md. 551.

(b) Where L. executed a bill of sale, which was absolute on its face, to defendant, on property worth \$2,000, to secure the repayment of \$500, which was to operate as a mortgage, parol evidence is admissible to show the nature of the transaction, in an action for accounting against defendant by the trustee of L. in insolvency.—*Grove v. Rentch*, 26 Md. 367.

(c) Where plaintiff obtained a sheriff's deed to the undivided interest of a co-tenant in land, and brought an action against the other co-tenant for partition, parol evidence is inadmissible to show that the deed to the co-tenants was in fact a joint deed, and that the co-tenant whose part plaintiff claimed had never obtained any interest in the land.—*Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339.

(d) A party to a written instrument cannot, in a controversy with a stranger, impeach or contradict it by parol testimony.—*Alderson v. Ames*, 6 Md. 52.

**§ 425. Writings collateral to issues in general.**

(a) "General conditions" sent out by an architect to prospective bidders for the con-

struction of a building as a whole, which conditions set out obligations to be assumed by the builder to the owner, cannot be imported into a contract between the builder and a subcontractor to furnish materials for the building, where the contract provided that the subcontractor should be governed by approved plans and specifications, no mention being made of the "general conditions."—*Stewart v. American Bridge Co.*, 108 Md. 200, 69 Atl. 708.

(b) Where the plaintiff in garnishment proceeds to introduce a judgment in favor of the principal defendant against the garnishee, the latter may show that a third party is entitled to the money for which it was rendered.—*Groshon v. Thomas*, 20 Md. 234.

(c) Parol evidence is admissible to show the character of the property conveyed by deed collaterally introduced to support a controverted right to other property, where the construction of the deed is not involved.—*Parks v. Parks*, 19 Md. 323. [Cited and annotated in 20 L. R. A. 108, on parol evidence as to consideration of deed.]

(d) On the issue whether the estate of a decedent was indebted, testimony tending to show that a bill of sale executed by the decedent was intended as a mortgage, and that a subsequent bill of sale executed by the vendee in the former instrument was intended as a release of such mortgage, was admissible.—*Seighman v. Marshall*, 17 Md. 550.

(e) A verdict of a jury on the trial of issues framed on the caveat to a will, which imputed fraud to the executors in the procurement of the will, was pleaded to defeat a claim by the executors for costs and expenses incurred in resisting the caveat. *Held*, that the verdict, being collaterally introduced, was open to examination.—*Glass v. Ramsey*, 9 Gill 456.

**§ 426. Existence of relation created by writing.**

*Cross-References.*

Identification of parties, see post, § 459.  
Principal or surety, see ante, § 423.  
Relation of parties to negotiable paper, see ante, § 423.

**§ 427. Evidence for purpose other than varying rights or liabilities dependent upon terms of writing.**

*Cross-References.*

Separate or subsequent agreements, see post, § 439.

Showing estoppel or waiver, see post, § 467.

(a) In an action on a contract for assignment of a patent right, where defendant pleaded non est factum, and there was evidence that money paid and acts done by defendant were paid and performed under another contract, and evidence that, though the contract was signed by both parties, it had never been delivered, parol evidence as to conversations which took place before the signing of the contract was not objectionable, as varying its terms.—*Harrison v. Morton*, 83 Md. 456, 35 Atl. 99. [Cited and annotated in 53 L. R. A. 530, on use of books of account as evidence on issues between other parties.]

**(B) INVALIDATING WRITTEN INSTRUMENT.**

*Cross-References.*

Sustaining validity, see ante, §§ 415, 419.

To reform written instruments, see "Reformation of Instruments," § 44.

To show usury, see "Usury," § 115.

**§ 428. Grounds for admission of extrinsic evidence.**

(a) In an action for an alleged balance due for fertilizers sold under a written contract, parol evidence was admissible to show that such contract was not the real contract between the parties, and that it had been executed as a matter of form to enable plaintiffs to conceal a cut in price and terms.—*A. D. Birely & Sons v. Dodson*, 107 Md. 229, 68 Atl. 488.

**§ 429. Matters affecting validity in general.**

(a) In an action for failing to deliver goods sold to plaintiffs by defendants, plaintiffs testified that as soon as the purchase was made duplicate memorandums of sale were made and delivered to the parties, and that the memorandum contained all the terms of the verbal contract. Defendants testified that there were other conditions not included in the memorandum. *Held*, that the writ-

ings did not constitute the contract between the parties, but were merely the memorandum thereof, executed to comply with the statute of frauds, and therefore parol evidence was admissible to show that all its terms were not included in the writings, and that they were insufficient as a memorandum within the statute.—*Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407.

(b) Defendant made a verbal contract with plaintiff's agent to pay \$100 per month for 3 months for a certain amount of advertising space in one-third of the street cars in Baltimore, but signed a written contract, at the solicitation of the agent, to be used by plaintiff for advertising purposes, which specified that defendant was to pay \$300 per month, for 36 months, for a certain space in all the cars of Baltimore, and a clause "that no verbal conditions of the agent will be recognized," and that "every condition must be specified on the face of the contract." *Held*, that parol evidence was admissible, in an action for a breach of the written contract, to show that the parties never intended it to be a contract.—*Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61, 46 Atl. 513.

(c) On a motion to set aside a sale returned under a fi. fa., the court will examine into all the facts by parol or other proof, although such proof contradicts the record.—*Moreland v. Bowling*, 3 Gill 500.

**§ 430. Incapacity of parties.**

**§ 431. Insufficiency or irregularity of execution or delivery.**

(a) Const. art. 3, § 30, declares that "every bill, when passed by the General Assembly \* \* \* shall be presented to the Governor, who, if he approves it, shall sign the same. \* \* \* Every law shall be recorded in the office of the clerk of the Court of Appeals." On mandamus to compel the Governor to forward to the clerk of the court a statute alleged to have been passed and approved, it appeared that the bill in question was presented to the Governor and signed by him, and proof was then offered by the oral testimony of the Governor that he signed the bill by inadvertence, and under a misapprehension as to what he was signing, and that he immediately erased his name. *Held*, that

the testimony was admissible, as the best evidence of a want of approval, and it was not an offer of parol testimony to alter or modify the language of a law.—*Commissioners of Allegany County v. Warfield*, 100 Md. 516, 60 Atl. 599, 108 Am. St. Rep. 446. [Cited and annotated in 40 L. R. A. (N. S.) 33, on conclusiveness of enrolled bill.]

(b) The rule which excludes parol testimony to affect a written instrument is not infringed by the admission of such evidence to show that the instrument was void, or that it never had any legal existence or binding force, for want of due delivery and acceptance.—*Leppoc v. National Union Bank*, 32 Md. 136.

(c) Proof that an agreement offered in evidence against its signers was to be held in the nature of an escrow is admissible.—*Beall v. Poole*, 27 Md. 645.

#### § 432. Want or failure of consideration. Annotation.

Admissibility of parol evidence to show true nature of transaction where the recited consideration of a deed is shown not to have been paid.—24 L. R. A. (N. S.) 413, note.

(a) A negotiable note may be defeated by showing want of consideration when sued upon by the payee.—*Harper v. Davis*, 115 Md. 349, 80 Atl. 1012.

(b) As between the parties to a negotiable promissory note, although the note itself is prima facie evidence of consideration, the question of consideration is always open, and it may be shown by parol that there was no sufficient consideration, or that the consideration had failed, or that the paper had been given for an accommodation merely.—*Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322.

(c) In an action by the holder of a note against an indorser, no rights of a bona fide purchaser being in question, parol evidence is admissible to show a failure of consideration.—*Hamburger v. Miller*, 48 Md. 317.

(d) Where testator conveyed a tract of land to a third party for the expressed consideration of \$1,000, who reconveyed it to testator's wife for the same consideration, in an action by testator's executors to set aside such deeds the testimony of such third party is admissible as a part of the *res gestæ*, to show that there was no consideration in fact.—*Groff v. Rohrer*, 35 Md. 327.

(e) In an action on a note, between the original parties thereto, parol evidence is admissible to show a want or failure of consideration.—*Sumwalt v. Ridgely*, 20 Md. 108.

(f) A. had an attachment pending against B., who assigned the attached property to C., A. agreeing to pay C. the surplus of the proceeds of sale of the property over a certain sum. Held, that the assignment was admissible, as tending to show a consideration.—*Keefer v. Mattingly*, 1 Gill 182.

(g) In an action at law on a note, the failure of consideration cannot be inquired into or proved.—*Key v. Knott*, 9 G. & J. 342.

(h) In an action of debt on a bond for the purchase money of land sold and conveyed, parol evidence cannot be given by a witness that he was seised of any part of the land so sold, in order to rebut the claim and title of the vendor to any part of the land included in his deed to the vendee, or to show that the title to any part of the land so conveyed was not in the vendor at the time of the conveyance.—*Sharpe v. Gibson*, 1 H. & J. 447, 2 Am. Dec. 529.

#### § 433. Mistake.

##### Cross-Reference.

Showing mistake in date of written instruments, see ante, § 414.

##### Annotation.

May an extrinsic document not referred to in a memorandum of sale of real property be referred to in aid of a defective description in the memorandum or contract so as to satisfy the statute of frauds.—18 L. R. A. (N. S.) 616, note.

Parol evidence to correct misdescription of land in will.—6 L. R. A. (N. S.) 943, note.

Admissibility of parol evidence to show mistake in description of land devised.—16 L. R. A. 321, note.

(a) In a suit by a vendor for the specific performance of a contract of sale, parol evidence is admissible to show that the contract was induced by mistake.—*Ginther v. Townsend* 114 Md. 122, 78 Atl. 908.

(b) In a suit for the specific performance of a written agreement, defendant may by parol show that the writing does not express the real agreement, or that it was entered into through mistake as to the subject-matter or terms.—*McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647.

(c) In a suit for specific performance of a

written contract, defendant may by parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement was entered into through a mistake as to its subject-matter or terms.—*Somerville v. Coppage*, 101 Md. 519, 61 Atl. 318.

(d) Although an agent of a steamship company had signed bills acknowledging delivery of certain cotton, it was still competent for him to prove that the cotton had not in fact been delivered, and to explain the circumstances under which he had been induced to sign.—*Lazard v. Merchants' & Miners' Transp. Co.*, 78 Md. 1, 26 Atl. 897.

(e) A mortgagee holding two mortgages by different parties, one of which had originally been granted in his favor and the other assigned to him, received payment of the mortgage granted in his favor. By mistake he entered a release on the margin of the record against the assigned mortgage. *Held*, that the mistake could be proved by parol, and that the mortgagee was entitled to be restored, even against a subsequent mortgagee whose rights existed at the time of the release.—*Bond v. Dorsey*, 65 Md. 310, 4 Atl. 279. [Cited and annotated in 58 L. R. A. 791, on reinstatement of mortgage released or discharged by mistake; in 28 L. R. A. (N. S.) 825, on relief from mistake of law as to effect of instrument.]

(f) A mutual mistake in a written contract may be shown by parol.—*Popplein v. Foley*, 61 Md. 381. [Cited and annotated in 28 L. R. A. (N. S.) 827, 877, 878, on relief from mistake of law as to effect of instrument.]

(g) In an action on a collector's bond, defendant failed to plead, and judgment by default was entered against him. On the same day another entry of a further judgment was made on the docket, for the debt and damages; the damages to be released on payment of a specified amount. *Held*, that parol evidence was admissible to prove that the latter judgment was agreed to be final by confession, that in recording the last judgment it was intended to supersede the judgment by default and that its remaining on the docket was clerical error.—*Clammer v. State*, 9 Gill 279.

(h) Parol evidence is admissible to show mistake in a written contract.—*Young v. Frost*, 5 Gill 287.

#### § 434. Fraud.

(a) In a suit by a vendor for the specific performance of a contract of sale, parol evidence is admissible to show that the contract was induced by fraud, or misrepresentation.—*Ginther v. Townsend*, 114 Md. 122, 78 Atl. 908.

(b) While one signing a written order for goods on terms specified may not, by parol, vary the contract, he may show by parol that he was induced to sign the order by fraud, though the evidence contradicts some of the declarations embodied in the written order.—*Stouffer v. Alford*, 114 Md. 110, 78 Atl. 387.

(c) Where defendants in ejectment relied on a certain deed by husband and wife, the record of which they offered in evidence, and it appeared from the original deed, introduced by plaintiffs, that the certificate of acknowledgment contained no mention of a private examination of the wife, and that, connected with parol evidence proposed to be given by plaintiff, the existence of the instrument itself as the act of the wife would be disproved, and a gross fraud and forgery exposed, parol testimony was admissible to that end.—*Davis v. Hamblin*, 51 Md. 525. [Cited and annotated in 41 L. R. A. (N. S.) 1173, on impeachment of certificate of acknowledgment.]

(d) Where a mortgage is assailed for fraud, parol evidence is admissible to show the true character of the instrument, for what consideration it was given, and what purpose the parties to it intended it should subserve.—*Price v. Gover*, 40 Md. 102.

(e) Parol evidence is admissible to show that the execution of a contract was procured by fraud.—*Young v. Frost*, 5 Gill 287; *Farrell v. Bean*, 10 Md. 217. [Cited and annotated in 28 L. R. A. (N. S.) 779, 789, on relief from mistake of law as to effect of instrument.]

(f) Under act 1829, c. 51, authorizing the bona fide assignee of a chose in action to maintain suit thereon in his own name, it is competent for defendant to prove against the assignee that the account assigned was barred by the statute of limitations, and that

the assignment was made to render the assignor competent as a witness to prove a new promise by defendant removing the bar,—the written assignment reciting that it was made in consideration of natural love and affection for the assignor's children, in trust to the assignee to collect the account and apply the proceeds to the benefit of the children,—since an assignment for such purpose is fraudulent as to the debtor, and not bona fide, under the statute.—*Crawford v. Brooke*, 4 Gill 213. (See Code, art. 8, § 1.)

(g) Where debtors transferred property in trust for the benefit of creditors, who agreed to accept their respective proportions of the estate conveyed, and in consideration thereof released the debtors from all liability, in an action by one of the creditors against the debtors, it was held that it was not competent for the plaintiff to show, in order to avoid the release, that one of the defendants had represented to the witness, who was one of the creditors, that the creditors generally had consented to sign the release, and that he (the witness) had executed it under that impression, or that one of the creditors had refused to execute the release, and the defendants, in order to induce him to sign it, had secretly agreed to pay him, and did pay him, without the knowledge of the other creditors, an additional consideration. Such evidence does not establish any fraud.—*Smith v. Stone*, 4 G. & J. 310. [Cited and annotated in 50 L. R. A. (N. S.) 751, 752, on assignment for creditors: provision for release; in 27 L. R. A. 39, on effect of giving creditor secret advantage in composition.]

(h) Parol evidence is admissible to show fraud in obtaining a patent for public lands.—*Singery v. Attorney General*, 2 H. & J. 487.

#### § 435. Duress.

(a) In a suit to enforce a written contract under seal, evidence showing that the contract was obtained by duress was not objectionable as violating the rule that a seal imports consideration.—*Moore v. Putts*, 110 Md. 490, 73 Atl. 149.

#### § 436. Undue influence.

*Cross Reference.*

See ante, § 434.

#### § 437. Illegality.

*Cross-Reference.*

Showing usury, see "Usury," § 115.

§ 438. (Omitted from the classification used herein.)

#### (C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

*Cross-Reference.*

Agreements as to performance or enforcement, see post, § 465.

§ 439. Grounds for admission of oral evidence.

§ 440. Prior and contemporaneous collateral agreements.

*Cross-References.*

Agreements as to performance or enforcement, see post, § 465.

Merger in subsequent agreement, see "Contracts," § 245.

Oral agreements collateral to written contracts, see "Contracts," § 165.

§ 441.— In general.

*Annotation.*

Admissibility of extrinsic evidence to extend scope of mortgage clause.—34 L. R. A. (N. S.) 503, note.

Admissibility of evidence of conversation expressly referred to in written contract.—32 L. R. A. (N. S.) 383, note.

Admissibility of prior or collateral parol agreements to vary terms of written contract, generally.—17 L. R. A. 273, note.

(a) Whatever representations were made by an insurance agent as to certain figures relating to the policy held merged in the contract.—*Williams v. New York Life Ins. Co.*, 122 Md. 141, 89 Atl. 97.

(b) Parol testimony of statements antedating the giving of notes, that such notes need not be paid is not admissible.—*Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38.

(c) Negotiations and conversations leading up to a written contract are merged therein, and evidence of such conversations is inadmissible to contradict such contract.—*Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327; *James v. Same, Id.*; *Ætna Indemnity Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

(d) Where the contract for building a railroad provided that no claim for extra work should be allowed, unless done in pursuance of a written order from the engineer, evidence of a contemporaneous oral agreement that if any change was made, entailing extra work, it would be paid for, was properly re-

jected.—*Merritt v. Peninsular Const. Co.*, 91 Md. 453, 46 Atl. 1013.

(e) A contract for the sale of land is not admissible to contradict a deed given in execution thereof.—*Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322.

(f) Where parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject-matter, varying, modifying, or contradicting the written agreement, is inadmissible.—*Franklin v. Long*, 7 G. & J. 407; *Hardesty v. Jones*, 10 G. & J. 404, 32 Am. Dec. 180; *Harwood v. Jones*, Id.; *Bullett v. Worthington*, 3 Md. Ch. 99, affirmed in *Worthington v. Bullitt*, 6 Md. 172; *Dixon v. Clayville*, 44 Md. 573. [Cited and annotated in 28 L. R. A. (N. S.) 803, on relief from mistake of law as to effect of instrument.] *Wooldridge v. Royer*, 69 Md. 113, 14 Atl. 681; *Badart v. Foulon*, 80 Md. 579, 31 Atl. 513.

(g) Where a written contract is for the sale and delivery of "my packing of sugar corn," evidence of a prior parol agreement that the corn was to be like a certain sample, adds to the contract, and is inadmissible.—*Thompson v. Gortner*, 73 Md. 474, 21 Atl. 371. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract; in 19 L. R. A. (N. S.) 1191, on right to show parol warranty in connection with contract of sale of personalty.]

(h) In an action on a note, by the terms of which it was "agreed that the fertilizer which is the consideration of this note is bought without any guaranty on the part of the importers or their agents as to results from its use," the admission of evidence—that plaintiff's agent, when he sold to defendant, and before the note was signed, said that he would "warrant it to produce as good crops as any other manipulated fertilizer that can be bought on the market for the same price, and, if it does not do so, you need not pay for the same," and that with this understanding defendant purchased the fertilizer, which proved to be not as represented—is error, as all preliminary negotiations were merged in the final written contract.—*Wooldridge v. Royer*, 69 Md. 113, 14 Atl. 681.

(i) Where the lessor and lessee enter into a written agreement for the rent of property for a sum specified, parol evidence is not admissible for the purpose of increasing or diminishing the sum so agreed on.—*Williams v. Kent*, 67 Md. 350, 10 Atl. 228.

(j) The landlord, at the tenant's request, placed a hydraulic elevator in the leased building, and the lease was changed so as to provide for an increased rent. Held, that parol evidence was inadmissible to show that the tenant also agreed to pay for the water used in operating the elevator.—*Williams v. Kent*, 67 Md. 350, 10 Atl. 228.

(k) Parol evidence is not admissible to show that a written contract does not contain the entire agreement of the parties.—*Warren Glass Works Co. v. Keystone Coal Co.*, 65 Md. 547, 5 Atl. 253. [Cited and annotated in 14 L. R. A. 492, on implied warranty of quality in sales by description.]

(l) Parol evidence is admissible to show that property which partnership articles provided should be furnished for the use of the firm by one partner was to remain the individual property of the latter by virtue of an oral agreement to that effect.—*Walker v. Schindel*, 58 Md. 360. [Cited and annotated in 19 L. R. A. 442, on effect of agreement to prevent fixtures becoming part of realty.]

(m) Where defendant made a contract with a wholesale coal company, from which he was in the habit of purchasing coal for retail, by which he loaned \$2,000 to the company, for which they executed their note, and agreed to deliver to defendant, as required for his retail purposes, 500 tons of coal as security, and at the foot of the bill for the coal was added a memorandum providing that if the note was paid at maturity the bill should be void, parol evidence is not admissible to modify such memorandum in an action by creditors of the coal company to recover coal taken by defendant in violation of it.—*Reeder v. Machen*, 57 Md. 56.

(n) Where a note is payable one year after the death of the maker's mother, then living, with 6 per cent. interest, nothing being therein specified as to the time when such interest should be paid, parol evidence is inadmissible to show that at the time the note was executed it was the understanding and

agreement between the payee and the maker that the latter should pay the interest annually.—*Dance v. Dance*, 56 Md. 433.

(o) Where L. drew a draft on defendant, payable to plaintiff when plaintiff had completed a contract for certain material and labor furnished L., which draft defendant accepted, parol evidence is not admissible on the part of defendant to show that, according to the contract between L. and plaintiff, there was nothing due plaintiff.—*Hunting v. Emmart*, 55 Md. 265.

(p) In an action by the vendee on a written contract to convey a certain piece of land "containing about 65 acres," for breach of such contract, parol evidence is inadmissible to prove a sale of 65 acres, or the vendor's representations that there were at least 65 acres.—*Baltimore Perm't Bldg. & Land Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(q) In an action on a note, parol evidence is inadmissible to show that it was given as a part of the purchase price of oil lands, and that the payee agreed to take a certain amount of stock in a company to be formed by the purchasers, and credit the price thereof on the note.—*Penniman v. Winner*, 54 Md. 127. [Cited and annotated in 31 L. R. A. (N. S.) 238, on admissibility of parol evidence as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money.]

(r) The character of the undertaking of a party not a payee of a note, whose name appears on the back thereof, may be shown by parol.—*Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304; *Owings v. Baker*, 54 Md. 82, 39 Am. Rep. 353.

(s) An unrecorded agreement between the vendor of a house and the owner of an adjoining house, purporting to grant the common use of an alley between the two houses, which was not made a part of, or referred to in, the deed on the same date conveying the house sold, could not be considered in construing the deed, or in determining the rights of the vendee and the owner of the adjoining house.—*Mitchell v. Seipel*, 53 Md. 251, 36 Am. Rep. 404.

(t) Where one conveyed certain property in trust, to be sold, and out of the proceeds to pay releasing creditors, and the surplus, if any, to the grantor, parol evidence is inadmissible to prove that he intended and believed he was executing an assignment of all his property to his creditors, non-releasing as well as releasing, before any surplus should inure to his benefit, and that the omission of a clause from the deed to that effect was by the inadvertence of the scrivener, and that the trustees were of the same belief.—*Farrow v. Hayes*, 51 Md. 498.

(u) An imperfect description of a note in a guaranty thereof cannot be helped out by parol.—*Ordeman v. Lawson*, 49 Md. 135. [Cited and annotated in 28 L. R. A. (N. S.) 876, 877, on relief from mistake of law as to effect of instrument.]

(v) Where a contract is reduced to writing, in the form of correspondence between the contracting parties, oral evidence is inadmissible to vary the terms of the contract.—*Delamater v. Chappell*, 48 Md. 244.

(w) The written contract embodied in the subscription for stock of a corporation cannot be varied by parol evidence of prior or contemporaneous transactions or agreements of the parties. The writing speaks for itself, and all prior oral agreements are merged therein.—*Scarlett v. Academy of Music*, 46 Md. 132.

(x) In an action on a negotiable note after maturity by the indorsee against the maker, it is not competent for the latter to show by parol evidence an agreement between himself and the payee to the effect that the note was not to be negotiated.—*McSherry v. Brooks*, 46 Md. 103. [Cited and annotated in 43 L. R. A. 462, on contemporaneous agreements and their breach as defense to note.]

(y) Intention in making bill of sale cannot be shown by parol.—*Ecker v. McAllister*, 45 Md. 290. [Cited and annotated in 23 L. R. A. (N. S.) 376, 386, 396, on right of one to testify as to his intent.]

(z) Parol evidence is inadmissible to add to, vary, or change the terms of a deed not attacked on the ground of fraud or mistake.—*Howard v. Rogers*, 4 H. & J. 278; *Clagett v. Hall*, 9 G. & J. 80. [Cited and annotated in 20 L. R. A. 114, on parol evidence as to



consideration of deed; in 39 L. R. A. (N. S.) 907, on grantee's oral promise to grantor as giving rise to constructive trust.] *Cole v. Albers*, 1 Gill 412; *Woollen v. Hillen*, 9 Gill 185, 52 Am. Dec. 690; *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; *Hertle v. McDonald*, 2 Md. Ch. 128; *In re Young's Estate*, 3 Md. Ch. 461. [Cited and annotated in 20 L. R. A. 112, on parol evidence as to consideration of deed.] *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339; *Snowden v. Pitcher*, 45 Md. 260.

(aa) Where a note was assigned by a written assignment, letters written six months before the assignment, and expressing the purpose of the assignor, could not operate to alter or qualify the assignment as afterwards actually made.—*Dixon v. Clayville*, 44 Md. 573. [Cited and annotated, see supra.]

(bb) Parol evidence is inadmissible to add a warrant to a contract to sell a steam engine, "all complete, and all be left in good order," for a certain sum.—*Rice v. Forsyth*, 41 Md. 389. [Cited and annotated in 14 L. R. A. 494, on implied warranty of quality in sales by description; in 22 L. R. A. 188, on implied warranty of fitness of property bought for special purpose.]

(cc) Parol evidence is admissible to show that, when defendant agreed in writing to sell his store and stock of goods on specified terms, it was orally agreed between the parties, prior to the completion of the contract, that the vendee bought with the distinct understanding that defendant was not to go into business in the town where the store was located, and that the good will of the store, and the agreement of defendant not to set up another store in the same town, was part of the consideration of the purchase.—*Fusting v. Sullivan*, 41 Md. 162. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(dd) Parol evidence as to the circumstances attending the sale of lands is admissible to show that time was not of the essence of the contract, which contained a recital: "Balance of purchase money to be paid within thirty days from date, said S. [vendor] giving said T. [purchaser] proper title."—*Scarlett v. Stein*, 40 Md. 512.

(ee) In the absence of mistake or fraud,

parol evidence is not admissible to vary or add to the terms of a written contract.—*Wesley v. Thomas*, 6 H. & J. 24. [Cited and annotated in 28 L. R. A. (N. S.) 876, 878, 913, on relief from mistake of law as to effect of instrument.] *Watkins v. Stockett*, 6 H. & J. 435. [Cited and annotated in 28 L. R. A. (N. S.) 876, 921, 922, on relief from mistake of law as to effect of instrument.] *King v. Clogg*, 40 Md. 341.

(ff) Where a policy of insurance stated that the company insured plaintiffs against loss or damage "on merchandise, their own" or held by them in trust, or in which they had an interest or liability, parol evidence was inadmissible to show that the policy does not cover "merchandise, their own," as stated, but was intended to cover merchandise only under certain trusts, as the terms of the contract were plain and unambiguous.—*Hough v. People's Fire Ins. Co.*, 36 Md. 398. [Cited and annotated in 16 L. R. A. (N. S.) 1182, on parol-evidence rule as to varying or contradicting written contracts, as effected by doctrine of waiver or estoppel of insurer.]

(gg) Parol evidence was not admissible to show that where the word "degrees" was mentioned in a deed, the word "perches" should be substituted, as the effect would not be to explain, but to change, the language of the deed.—*Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486.

(hh) Parol evidence is admissible to establish a contemporaneous, collateral, substantive agreement, relating to the same subject-matter as the written contract, and forming part of the consideration thereof.—*Basshor v. Forbes*, 36 Md. 154.

(ii) Where one indorses his name in blank on the back of a note before delivery, he is liable as a joint maker; and parol evidence is inadmissible to show that he signed as indorser merely, unless it appears that the payee knew and consented to such arrangement.—*Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411.

(jj) Where plaintiff, by reason of a mathematical miscalculation, agreed to, and did, pay a greater sum for certain property than he had intended, parol evidence is inadmissible to show what the real amount was in-

tended to be, and to recover the excess.—*Boyce v. Wilson*, 32 Md. 122.

(kk) When a party has, by deed, conveyed all his farm for a specified sum of money, which has been paid him, he cannot set up an antecedent or accompanying parol contract contradicting the deed, both as to price and quantity.—*Bladen v. Wells*, 30 Md. 577. [Cited and annotated in 68 L. R. A. 930, on recital of money consideration in deed as contractual.]

(ll) W. mortgaged certain real estate to N. to secure the payment of \$2,500. Subsequently he confessed a judgment in favor of A. Afterwards W., with his wife, executed a deed of the land to L., and, on the following day N. executed a release to W., reciting payment of the mortgage debt, and some days afterwards L. executed a mortgage for \$4,000 to N. Held, that the release was not susceptible of parol explanation in order to connect the released mortgage with that subsequently executed by L. to N. of the same property, so as to give it precedence over the judgment of A. in the distribution of the proceeds of the mortgaged property.—*Neidig v. Whiteford*, 29 Md. 178.

(mm) In an action by an assignee of a mortgage, evidence of a parol agreement between the mortgagor and mortgagee, made at the time of the execution of the mortgage, to the effect that the mortgagee would pay another outstanding mortgage, or else allow the mortgagor, in making payment, to reserve a sum sufficient to satisfy such outstanding mortgage, was inadmissible, because it varied and contradicted a written contract evidenced by the mortgage.—*Timms v. Shannon*, 19 Md. 296, 81 Am. Dec. 632. [Cited and annotated in 31 L. R. A. (N. S.) 237, on admissibility of parol evidence as to manner or means of paying written contract not within statute of frauds, purporting to be payable in money.]

(nn) A statement of payments, with a memorandum annexed acknowledging receipt of the sums mentioned in the statement, on account of a certain specified claim, was held to be competent, but not conclusive, evidence upon the question of application of payments; the statement having been made with reference to a compromise and

being manifestly erroneous in some respects.—*Calvert v. Carter*, 18 Md. 73.

(oo) Where, prior to the sale of a one-half interest in land by trustees to defendant, they exhibited to him a plat showing that the land contained 716 acres, which in fact contained but 500 acres, and the contract was for one-half of the "Over the Creek Farm," for \$6,300, parol evidence is not admissible on part of the trustees to show that the land conveyed was to contain 350 acres, "more or less."—*Kent v. Carcaud*, 17 Md. 291.

(pp) Where land has been conveyed to two as tenants in common, and the interest of one has been sold to a third party on a judgment against him prior to the date of the deed, the other tenant cannot set up, against the title of such third person, that the interest conveyed to the co-tenant, and sold on execution, was intended to be only in the nature of a mortgage to secure money lent by him in part payment for the land.—*Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339.

(qq) A parol agreement, under which there has been partial performance, is not, when reduced to writing, so merged that it cannot be resorted to to show acts done or rights acquired under it. The merger takes effect only so far as to exclude evidence of variance between the two contracts.—*Mills v. Matthews*, 7 Md. 315.

(rr) Though a parol agreement to convey land be valid by reason of its having been partly executed, it continues, nevertheless, executory in its character, and as such, if reduced to writing, the original contract becomes merged in the written one.—*Worthington v. Bullitt*, 6 Md. 172, affirming *Bullett v. Worthington*, 3 Md. Ch. 99.

(ss) In an action on a bond, merging a prior parol agreement relating to the same subject-matter, parol evidence is inadmissible to vary its terms and conditions.—*Bullett v. Worthington*, 3 Md. Ch. 99, affirmed in *Worthington v. Bullitt*, 6 Md. 172.

(tt) A. covenanted to convey to B. "three hundred and twenty acres of unimproved land in Clarke county, Missouri, being the same land which was purchased from government by C. and D., and by said C. and D. sold to said A." Held, that parol evidence

was inadmissible to show that the land intended to be embraced in the covenant was land conveyed to A. by C. alone or D. alone, for the covenant was not silent or ambiguous on the subject.—*Marshall v. Haney*, 4 Md. 498, 59 Am. Dec. 92. [Cited and annotated in 6 L. R. A. (N. S.) 946, 954, 964, on correction of misdescription of land in will.]

(uu) Where a mortgage was given to secure notes, and the parties made notes which on their face were not within its terms, they cannot show by parol, in order to bring such notes within the security, that they were antedated.—*Ohio Life Ins. & Trust Co. v. Winn*, 4 Md. Ch. 253.

(vv) Where the release of a mortgage recites that the mortgagor has fully paid and satisfied the debt to the mortgagees, parol evidence is inadmissible to explain such deed of release.—*Woollen v. Hillen*, 9 Gill 185, 52 Am. Dec. 690.

(ww) A receipt, being a mere acknowledgment of payment, is subject to parol explanation or contradiction.—*Robinett v. Wilson*, 8 Gill 179; *Shepherd v. Bevin*, 9 Gill 32.

(xx) Where a contract is susceptible of a sensible construction, parol evidence is inadmissible to explain or determine its construction, in the absence of mistake or fraud.—*Young v. Frost*, 5 Gill 287.

(yy) In an action on an account, where defendant produced plaintiff's receipt, reciting that a certain note had been received in part payment, it is not competent for defendant to vary the terms of the receipt by parol proof.—*Phelan v. Crosby*, 2 Gill 462.

(zz) In an action to recover installments due on a subscription contract by which defendants, with others, agreed to pay for certain shares in plaintiff's steamboat, evidence that, at a meeting of subscribers, at which plaintiff was present, it was determined not to pay the subscription, because of plaintiff's failure to comply with the subscription agreement, was inadmissible to show non-performance by plaintiff, as it was an attempt to vary a written contract by a parol agreement.—*Sothoron v. Weems*, 3 G. & J. 435.

(aaa) Parol evidence of a sale will not be admitted to vary the memorandum of the sale made at the time by the agent of both

parties.—*Stoddert v. Vestry of Port Tobacco Parish*, 2 G. & J. 227.

(bbb) A bill of parcels being considered evidence of a contract, and a sufficient memorandum in writing to take the case out of the statute of frauds, parol evidence cannot be received substantially to change it.—*Batturs v. Sellers*, 6 H. & J. 249.

(ccc) Where a conveyance describes the premises as bounding on a certain river, the court should exclude evidence outside of the grant to prove that the line referred to does not bound on such river.—*Dorsey v. Hammond*, 1 H. & J. 190.

(ddd) Where the description in a deed is made by course and distance, without reference to any monument, parol evidence is not admissible to vary the course and distance given.—*Hamilton v. Cawood*, 3 H. & McH. 437, 1 Am. Dec. 378.

(eee) A receipt for the purchase money, indorsed on the back of a deed of bargain and sale, is not conclusive evidence of its payment.—*O'Neale v. Lodge*, 3 H. & McH. 433, 1 Am. Dec. 377. [Cited and annotated in 20 L. R. A. 102, on parol evidence as to consideration of deed.]

(fff) A grantor was seised of a tract of land called "A," and afterwards had it resurveyed and patented under the name of "Tract B," and conveyed it by that name, giving a special description by course and distance. Held, that, though the two tracts were reputed to be the same, parol evidence was inadmissible to prove that any part of the original tract passed by the deed which was not included in the lines in the deed.—*Helms v. Howard*, 2 H. & McH. 57.

#### § 442.—Completeness of writing.

##### Cross-References.

Matters not included in writing or for which it does not provide, see ante, § 417.

Writing incomplete on its face, see ante, § 411.

(a) Where a contract of sale contained no warranty, though the place for the warranty was indicated, evidence of an oral warranty is admissible.—*White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

(b) Contract to put in furnaces, merely guarantying that there should be a certain saving in cost of fuel, and being silent as to

how the saving should be ascertained, evidence of a contemporaneous verbal understanding that there should be a test of a certain kind, is admissible, it not interfering with the writing.—*Hawley Down Draft Furnace Co. v. Hooper*, 90 Md. 390, 45 Atl. 456.

(c) Where a guaranty written on a note bears no date, parol evidence is admissible to show that it was made at the time of the execution of the note.—*Ordeman v. Lawson*, 49 Md. 135. [Cited and annotated in 28 L. R. A. (N. S.) 876, 877, on relief from mistake of law as to effect of instrument.]

(d) When a written contract for the sale of real estate is silent as to the mode in which payment is to be made, parol testimony is admissible to show how and in what payment was to be made, that being an independent collateral fact.—*Paul v. Owings*, 32 Md. 402.

(e) Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is admissible to show such additional stipulations as are not inconsistent with the writing.—*Creamer v. Stephenson*, 15 Md. 211. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(f) Parol evidence is admissible to show that the purchaser at a chancery sale knew of the incumbrance for ground rent on the premises, though no mention of rent in arrear was made in the advertisement of sale.—*Farmers & Planters Bank v. Martin*, 3 Md. Ch. 224.

(g) Where the number of acres in the tract sold was not ascertained at the time of sale, but it was agreed to estimate the quantity at 300 acres, and that any excess should be paid for at a fixed price, the vendor executed a bond for conveyance, and the vendee gave his bond for the purchase money, parol evidence was admissible to establish the contract in relation to the excess, where the vendee's bond was silent with regard to the contract of sale, and was merely an obligation for the payment of money.—*Hall v. Maccubbin*, 6 G. & J. 107.

(h) To an action of debt defendant pleaded, by way of set-off, a claim for various articles sold and delivered. At the trial he proved a lease of land to plaintiff, in consideration of plaintiff's paying defendant a certain annual

sum for life and all claims and demands existing against defendant at the date of the lease. He also proved an appraisement, at the request of parties, of various articles of personal property, which the appraisers certified plaintiff was to take as his property at the valuation; that such articles were delivered to plaintiff at the valuation; and that the lease, appraisement, and delivery were made at the same time. Plaintiff then proposed to prove a verbal agreement between him and defendant that the value of this property should be applied by plaintiff to the payment of the outstanding debts of defendant. Held, that, as the appraisers' certificate did not show in what manner the property valued was to be paid for, parol evidence was admissible to ascertain that fact.—*McCreary v. McCreary*, 5 G. & J. 147. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.]

(i) On petition of a slave for his freedom, where the owner introduced a certificate of a tax collector that the former had given oath before him, the owner may prove by the testimony of the tax collector that, when he made such oath, he proved satisfactorily to the collector that the petitioning slave had been an inhabitant of another state three years prior to his importation into Maryland, which statement was omitted from the certificate.—*Harry v. Lyles*, 4 H. & McH. 215.

#### § 443.—Relation of oral agreement to writing.

##### Annotation.

Admissibility of parol evidence to show reservation of growing crops from deed.—23 L. R. A. (N. S.) 1218, note.

Right to show parol warranty in connection with a contract of sale of personalty.—19 L. R. A. (N. S.) 1183, note.

Parol evidence that written instrument for payment of money was executed in reliance on parol promise that payment was subject to a condition not incorporated therein.—18 L. R. A. (N. S.) 434, note.

(a) When a written communication is accompanied by verbal declarations or admissions of the parties to each other, these latter are admissible as independent evidence, though not to prove the contents of the writing as a substitute for it. Facts may

be sometimes proved by parol of which there is evidence in writing.—*Cramer v. Shriner*, 18 Md. 140.

(b) At a settlement between two parties a written memorandum was used, and at the same time they made certain independent declarations and admissions. Held, that at the trial the memorandum could not be produced, but a third party could testify as independent matter to the verbal declarations and admissions of the parties.—*Cramer v. Shriner*, 18 Md. 140.

(c) A written instrument, executed by one of the parties to an oral agreement in execution of such agreement, does not exclude oral evidence of the original contract.—*Hardesty v. Jones*, 10 G. & J. 404, 32 Am. Dec. 180; *Harwood v. Jones*, Id.

#### § 444.—Condition precedent to obligation under writing.

##### Cross-References.

Existence of condition or contingency in general, see ante, § 420.

Relation of oral agreement to writing, see ante, § 443.

(a) In an action on a stock subscription, parol evidence is inadmissible to affix a condition not warranted by the corporation law—as here, that there was an understanding that payment might be made in land, instead of money.—*Baile v. Calvert College Educational Soc.*, 47 Md. 117.

(b) The maker of a note given in settlement of accounts between himself and his co-partner on a dissolution of the firm cannot, in an action against him on the note by an indorsee thereof, show by parol evidence an agreement between himself and his co-partner that the note was not to be paid until it should be ascertained whether certain partnership accounts, which, at the time of the settlement in which the note was given were considered doubtful, could be collected.—*McSherry v. Brooks*, 46 Md. 103. [Cited and annotated in 43 L. R. A. 462, on contemporaneous agreements and their breach as defense to note.]

(c) An agreement between an indorser and the makers of a note that it was not to be delivered as a note indorsed unless and until a bill of sale of a steamer was executed and delivered by her owners to the makers, and until a first lien was given thereon by the

latter to the indorser, is not per se evidence in an action on the note by the holder against the indorser.—*Ricketts v. Pendleton*, 14 Md. 820. [Cited and annotated in 43 L. R. A. 482, on contemporaneous agreements and their breach as defense to note; in 18 L. R. A. (N. S.) 290, on parol evidence to show bill or note delivered upon condition.]

(d) Defendant may show by parol that a note on which he is sued as indorser was delivered as an escrow, or that it was delivered to plaintiff to be held on a condition to be performed before the interest of the holder could attach.—*Ricketts v. Pendleton*, 14 Md. 320. [Cited and annotated, see supra.]

#### § 445. Subsequent agreements.

##### Cross-References.

Agreements as to performance or enforcement, see post, § 465.

Contemporaneous or subsequent agreement affecting decree, see ante, § 441.

Modification of contract of sale by executed agreement, see "Vendor and Purchaser," § 82.

Showing continuance of partnership after expiration, of term, see "Partnership," § 62.

(a) Where the signature of one party to a contract is followed by a seal, and there is no seal following the signature of the other party, any subsequent agreement of the parties affecting the liability of the other party would be available as a defense in an action against him on the contract, and admissible in evidence, as the contract is a simple contract so far as that party is concerned.—*Baltimore Pearl Hominy Co. v. Linthicum*, 112 Md. 27, 75 Atl. 737.

(b) Where, by a written agreement, a certain indebtedness is secured by the assignment of a life insurance policy, parol evidence is admissible to show that subsequently it was agreed that other indebtedness should be secured thereby.—*Morgan v. Dugan*, 80 Md. xvii, memorandum case, 30 Atl. 558, full report.

(c) In an action for money loaned, money had and received, money due plaintiff on account stated, and, as alleged in a special count, for money due on a written contract between plaintiff and defendant in reference to the management of a certain business, defendant pleaded never indebted, payment,

set-off, and an account in bar. Defendant proved that the business under the original contract had been greatly enlarged by parol agreements, so as to include hotel keeping and other business, the incurring of heavy expenses, the remittance of the net cash to plaintiff, the charge in plaintiff's account of the articles furnished to carry on the business, the payment of a portion of the expenses from sale of goods and a portion out of defendant's funds, and that it was all done by the authority of plaintiff. *Held*, that it was error to exclude evidence of subsequent oral agreements on the ground that the same would contradict the written contract.—*Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524. [Cited and annotated in 52 L. R. A. 557, 591, on party's books of account as evidence in own favor.]

(d) In an action to recover for a breach of a contract to sell and deliver a quantity of apples, parol evidence is admissible to prove that the original contract, though in writing, had been afterwards modified by a supplementary verbal agreement.—*Kribs v. Jones*, 44 Md. 396. [Cited and annotated in 4 L. R. A. (N. S.) 981, on parol modification of contract required to be in writing.]

(e) Parol evidence is admissible to show a subsequent agreement enlarging the time for the performance of a contract, which was reduced to writing, or changing the place of performance, or a waiver of some of the conditions thereof; or a parol agreement supplementing the written contract.—*Coates v. Sangston*, 5 Md. 121.

(f) Where one sold his land, which was incumbered by a mortgage and judgment, and the purchaser entered into a written contract promising to pay one of vendor's creditors by a certain day, a subsequent parol agreement pointing out the mode in which title to the land should be secured to the purchaser, and in effect carrying the contract into execution, but postponing the creditor's payment, is not a variance of the original written agreement; for, even where the time of payment is of the essence of the contract, strict compliance may be waived by the vendor.—*Reed's Heirs and Adm'rs v. Chambers*, 6 G. & J. 490.

(g) Parol evidence is admissible to prove that a written order, entered among the pro-

ceedings of the board of directors of a bank, was rescinded and annulled by a subsequent verbal order, of which no minute in writing was made.—*Whittington v. Farmers Bank*, 5 H. & J. 489.

§§ 446, 447. (Omitted from the classification used herein.)

#### (D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

##### Cross-References.

Expert testimony, see post, § 518.

Customs and usages to explain contract, see "Customs and Usages," § 15.

Evidence as to interpretation of justice's judgment or order, see "Justices of the Peace," § 130.

Extrinsic evidence to aid construction of statute, see "Statutes," § 221.

Extrinsic evidence to aid construction of trust, see "Trusts," § 119.

Extrinsic evidence to aid construction of will, see "Wills," §§ 486-490.

#### § 448. Grounds for admission of extrinsic evidence.

(a) Where a contract plainly provided that a device would increase boiler capacity 15 per cent., in an action for the price, an objection to a question by defendant as to what plaintiff promised to save 15 per cent. of was properly sustained; the contract itself being plain on that point.—*Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38.

(b) Where a separation agreement between husband and wife was unambiguous, parol evidence was inadmissible to show the intent of the parties in executing the same.—*Lemmert v. Lemmert*, 103 Md. 57, 63 Atl. 380.

(c) M. and wife mortgaged to P. a lot and buildings, etc., "and also all the household and kitchen furniture in the dwelling on said lot, subject, however, to the claim of F. thereupon for the unpaid purchase money for the portion of said furniture now being delivered." The construction of this clause being in question, on the contention of F. that all the furniture in the house was subject to this claim, *held*, that, as the nature and extent of F.'s claim could not be definitely ascertained from this clause, extrinsic evidence might be admitted to show what it was.—*Fryer v. Patrick*, 42 Md. 51.

(d) Where a debtor executes a deed of composition with creditors, discussions among the latter and their impressions about the claim of one of them, before accepting the deed, are inadmissible to control its interpretation and construction, in the absence of charges of fraud in procuring the composition.—*Murray v. Spencer*, 24 Md. 520.

(e) The principles applicable to the admission or rejection of parol evidence of a usage to aid in the interpretation of written instruments apply as well to its admission by the court in aid of construction as to its admission when offered to establish the meaning of an instrument, to be submitted under the court's direction to a jury.—*Murray v. Spencer*, 24 Md. 520.

(f) To elucidate an ambiguity in a written contract, evidence of conversations and circumstances attending the negotiation of the agreement is admissible.—*Parks v. Parks*, 19 Md. 323. [Cited and annotated in 20 L. R. A. 108, on parol evidence as to consideration of deed.]

(g) In an action on a promissory note, defendant offered in evidence certain receipts of plaintiff, dated in January, 1855, for wheat, as a partial set-off. To bar these receipts, plaintiff produced an account, and at the close of it a receipt as follows: "Mch., 1855. Rec'd pay't of all store and saddler's bills to date, and all wheat delivered at Lingamore and Ceresville Mills to date,"—signed by defendant. The account was of the defendant with the plaintiff, also, with plaintiff and his father, as a firm; also, with plaintiff as administrator of his father; and the mills belonged to plaintiff and his father. No person being named in the receipt, and no items of grain appearing in the account corresponding to those claimed by the defendant, the plaintiff offered further evidence, by parol testimony, to show that the settlement was intended to be final, as between defendant and plaintiff, in all his capacities, except as to a quantity of grain. Defendant objected to the admission of this evidence. *Held*, that since it did not tend to contradict or invalidate the receipt, but only to explain it, it was admissible.—*Cramer v. Shriner*, 18 Md. 140.

(h) A party who claims under a lease, stipulating that he "shall have and hold the

premises [a part of a manor] according to manor regulations," may prove by parol that by such regulations the tenants have a right to remove their away-going crops at any time within a reasonable period after the determination of their leases.—*Dorsey v. Eagle*, 7 G. & J. 321.

#### § 449. Nature of ambiguity or uncertainty in instrument.

*Cross-Reference.*

See ante, §§ 417, 448.

#### § 450.—In general.

*Annotation.*

Parol evidence to vary or contradict insurance policy which is ambiguous.—16 L. R. A. (N. S.) 1181, note.

(a) In a suit by administrators against decedent's heirs to sell land which had been conveyed to the heirs by decedent by a deed reciting a consideration and the receipt of payment thereof, to pay the consideration named in the deed which had not been paid, parol evidence was admissible that decedent intended by the recital of payment to evidence the understanding of himself and the grantees that it was not intended to be paid; the effect of the evidence not being to contradict the terms of the deed, but to explain what would otherwise, on proof that the consideration had not been paid, be a contradiction in its terms.—*Koogle v. Cline*, 110 Md. 587, 73 Atl. 672. [Cited and annotated in 25 L. R. A. (N. S.) 1195, on parol evidence as to consideration of deed.]

(b) Plaintiff, by a written contract, agreed to sell defendants the good will and the right to manufacture certain medicines, and defendants covenanted therein to pay the widow of the original proprietor of the medicines a certain sum per year during life, and at her death a certain sum to the children, according to the will of such original proprietor in devising the rights to his sons, through whom plaintiff obtained his rights, as recited in the preamble of the contract. When the contract was executed, and the property delivered, plaintiff signed and delivered to defendants a paper in the nature of a bill of sale, which recited that in consideration of \$10,000 paid to him by defendants he bargained and sold the property. The \$10,000 was paid excepting a sum equal

to that payable to the children. *Held*, that in determining whether the sum payable to the children was to be taken as part of the \$10,000, it was error to admit evidence of the circumstances attending the execution of the contract and of the admissions of plaintiff, since the contract is unambiguous.—*Cassard v. McGlannan*, 88 Md. 168, 40 Atl. 711.

(c) The designation in deed of place of beginning, as "on the north side of W. street, beginning, for outbounds, east 160 feet from L. street, extended to the east corner of lot \* \* \* owned by B., and running with W. street," is unambiguous, and cannot be varied or explained by testimony as to understanding of the parties.—*Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322.

#### § 451.—Patent ambiguity.

##### *Cross-References.*

See ante, § 450; post, §§ 452, 461.

(a) Where the only ambiguity in a lease is whether the 20th day of the month, on which the lease distinctly says the rent is to be paid, means the first or last day of the current month of the tenancy, evidence offered by the lessor to prove that the lessee had been paying the rent in advance, and had received a receipt stating that the payment was in advance, and that the former installments of rent had each been paid at or near the beginning of the months of the tenancy, is inadmissible. The ambiguity is a patent one, for it is apparent on the face of the lease itself, and hence is not explainable by parol evidence.—*Castleman v. Du Val*, 89 Md. 657, 43 Atl. 821.

(b) The description in a deed of the land intended to be conveyed was defective, in that the word "degrees" was erroneously used, instead of the measure of length, in stating the distances,—e. g. "north thirty-eight degrees," instead of "north thirty-eight perches." *Held*, that the effect of the evidence was not to explain but to change the language of the deed, and that if an ambiguity existed it was a patent one, and that parol evidence could not be admitted to contradict or control the language of the deed, but that latent ambiguities might be explained by such evidence.—*Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486.

(c) In all cases of ambiguity arising on the face of a certificate or grant, as to the location of a tract of land, the jury is the proper tribunal to decide the fact of a location, which may well be ascertained in such cases by evidence dehors the certificate or grant.—*Dorsey v. Hammond*, 1 H. & J. 190. See *Belt's Lessee v. Miller*, 4 H. & McH. 536; *Davis v. Batty*, 1 H. & J. 264; *Thompson v. Brown*, Id. 335. Compare *Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486.

#### § 452.—Latent ambiguity.

##### *Cross-Reference.*

See ante, §§ 450, 451.

(a) Parol evidence is not admissible to raise and explain a latent ambiguity in a written guaranty, where there is no obscurity or ambiguity in the language employed.—*Lazear v. National Union Bank*, 52 Md. 78, 36 Am. Rep. 355.

(b) Extrinsic evidence is only admissible to explain latent ambiguities in testamentary or other instruments in writing.—*Mitchell v. Mitchell*, 6 Md. 224. [Cited and annotated in 6 L. R. A. (N. S.) 954, 955, on correction of misdescription of land in will.] See *Dorsey v. Hammond*, 1 H. & J. 190; *Warner v. Miltenberger's Lessee*, 21 Md. 264; *Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486.

#### § 453. Writing illegible or unintelligible.

##### *Annotation.*

Admissibility of parol evidence to aid in construction of fire insurance policy covering "additions."—33 L. R. A. (N. S.) 161, note.

#### §§ 454-457. Meaning of words, phrases, signs, or abbreviations.

##### *Cross-Reference.*

Customs and usages to explain contract, see "Customs and Usages," § 15.

(a) In a suit for personal injury caused by an automobile, it was not improper to permit the surveyor who prepared a plat in evidence which showed the surroundings of the place of the accident to explain it.—*Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326.

(b) Parol evidence is admissible to show that the expressions "floor slab" and "roof slab," in a written contract for the construction of reinforced concrete portion of



a building, "columns, beams, floor, and roof slabs," etc., were used in a technical sense, designating not merely the floor or roof, but also the ceiling below it, as the roof or floor is constructed at the same time as the ceiling, together forming one integral portion of the building.—*Ætna Indemnity Co. v. Waters*, 110 Md. 673, 73 Atl. 712.

#### § 458. Relation and application of language to facts in general.

##### Cross-Reference.

See ante, § 398.

(a) Parol evidence may be resorted to to explain the position of the parties, and of the subject-matter and other surrounding circumstances, at the time of concluding the contract, so that the court may be put into the position of the parties.—*Ginther v. Townsend*, 114 Md. 122, 78 Atl. 908.

(b) A statement shown by the minute book to have been made at a directors' meeting, that the chairman stated that G. has made a satisfactory settlement of the amounts due by him to the company, and that the entries will be made upon the books of the company at once, may be shown by parol evidence to refer to the amount, and not to the payment, of the indebtedness.—*John C. Grafflin Co. v. Woodside*, 87 Md. 146, 39 Atl. 413.

#### § 459. Identification of parties.

##### Cross-References.

Contradicting, varying, or adding to terms of instrument, see ante, § 418.  
Latent ambiguity, see ante, § 452.  
Prior or contemporaneous agreement affecting parties, see ante, § 441.

##### Annotation.

Parol evidence to establish identity of legatee or devisee.—47 L. R. A. (N. S.) 514, note.

Parol evidence to show persons meant by ambiguous designation in policy on property belonging to decedent's estate.—42 L. R. A. (N. S.) 82, note.

Parol evidence to disclose and charge principal on negotiable paper executed by agent.—21 L. R. A. (N. S.) 1080, note.

Parol evidence to show that the parties to a written contract which merely names a class or species contemplated a particular quality or kind.—9 L. R. A. (N. S.) 967, note.

Admissibility of parol evidence to identify grantees in deed describing them by firm name.—1 L. R. A. (N. S.) 157, note.

Admissibility of parol evidence as to resemblance between persons.—52 L. R. A. 500, note.

Admissibility of extrinsic evidence to show who is liable as the maker of a note.—20 L. R. A. 705, note.

(a) Where the certificate of a mortgagee's affidavit as to the consideration of the mortgage did not show that the affidavit was made by an officer of the mortgagee in his official capacity, as required by Code, art. 21, §§ 32, 33, such fact could be shown by parol evidence.—*Buck v. Gladfelter*, 122 Md. 34, 89 Atl. 317.

(b) Where plaintiffs made a proposition to an electric company to furnish apparatus, and the offer was accepted by a letter from defendants, providing certain modifications were made, but suggesting no different parties, and the terms of the contract as concluded required defendants to deliver the old apparatus of the company in part payment for the new, there was such an ambiguity as to parties as would permit parol evidence as to whether the defendants, and not the company, were the parties to the contract.—*Morrison v. Baechtold*, 93 Md. 319, 48 Atl. 926.

(c) In an action against a corporation on a contract for royalty for the use of a patent issued to plaintiff, parol evidence is inadmissible to show that the patent was issued to him for the joint benefit of himself and his brother, who was a stockholder in defendant corporation, and that, up to the time of bringing the suit, by verbal understanding, one-half of the royalty had been paid to plaintiff, and one-half to his brother.—*Zihlman v. Cumberland Glass Co.*, 74 Md. 303, 22 Atl. 271.

(d) In an action on a contract executed in a firm name by one partner, where the authority of the partner to so bind the firm is in question, parol evidence is admissible to show such authority, or a subsequent ratification by the partnership.—*Herzog v. Sawyer*, 61 Md. 344.

(e) Plaintiff in ejectment may show by parol that he and the grantee named by a different name in the deed under which he claims are in fact one and the same person. In this case the name in the declaration was "Eldred W. M.," and the name in the deed, "Eldridge W. M."—*Mobberly v. Mobberly*, 60 Md. 376.

(f) Parol evidence is admissible to show that the principal debtor on the face of a

mortgage made by husband and wife on the wife's land was in fact the husband, and not the wife, and that therefore, on a foreclosure, the husband should be allowed to set off a debt due him from the mortgagee.—*Spencer v. Almoney*, 56 Md. 551. [Cited and annotated in 21 L. R. A. 323, on set-off on mortgage foreclosure.]

(g) Where an officer of a corporation accepts a bill of exchange in such a manner that it is impossible to tell from the acceptance whether he intended to bind the corporation or acted merely as an individual, parol evidence is admissible to prove the true nature of the transaction, and whether he intended to bind the corporation or merely himself.—*Laflin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472.

(h) D. & Co. applied to an insurance company for a policy on a tannery, stating in the application that the insurance proposed was in addition to a sum insured in other companies. The policy was issued, and, in an action thereon to recover for a loss by fire, it appeared that at the time of the application there was no insurance on the property in the name of D. & Co., but that there was an insurance in the name of D. & A., trustees, etc. Held, that parol testimony was admissible to determine whether the interest of D. & Co., or that of D. & A., was the subject-matter referred to in the application.—*Planters Mut. Ins. Co. v. Deford*, 38 Md. 382. [Cited and annotated in 17 L. R. A. 273, on parol evidence to vary, etc., written contract.] *Frederick Co. Mut. Fire Ins. Co. v. Deford*, 38 Md. 404.

(i) Where one contracts in writing for the purchase of goods on credit, and the contract shows on its face that the purchaser contracted as agent for a third party, whose name is disclosed in the contract, parol evidence is not admissible to show that the credit was given to the agent personally.—*McClernan v. Hall*, 33 Md. 293.

(j) The officers of an incorporated company joined in making a note, describing themselves in the body of the note by their official titles, and appending the same to their signatures. In an action by the payee, to charge the makers personally, held, that as the note was, on its face, ambiguous as

to whether the parties signing the note did so in their individual or official capacity, it was competent for either party to show, by relevant extraneous proof, on what account the note was given.—*Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139.

(k) A judgment was confessed by a member of a firm in favor of A., and simultaneously entered for the use of certain creditors of the firm. The persons for whose use the judgment was entered were creditors of the debtors prior to the execution of a trust deed by the members of the firm for the benefit of creditors, and had executed releases of their claims in conformity with such deed, and it was for the claims so released that the judgment was rendered and the attachment issued. Held, that, on an attachment by nonreleasing creditors based on the invalidity of the deed, parol proof was admissible to show that the debts which formed the consideration of the judgment in favor of A. were due to other parties, and that it was recovered for their benefit.—*Citizens Fire, Marine & Life Ins. Co. v. Wallis*, 23 Md. 173.

(l) Though there is nothing, either in the body of an instrument, or attached to the signature, to indicate that it was intended to be anything other than the personal obligation of the party signing it, parol evidence is admissible to show that the maker or obligor was acting in the matter as agent merely.—*Oelrichs v. Ford*, 21 Md. 489. [Cited and annotated in 53 L. R. A. 522, on use of books of account as evidence on issues between other parties.]

(m) Where the plaintiff deposited merchandise with a firm, taking a receipt therefor in the firm name, and afterwards sold the merchandise, and surrendered the receipt to the firm, and received for the merchandise the individual note of one of the firm, on the sale, such note is not evidence as to who were the parties vendor and vendee, or such evidence as could not be added to, contradicted, or varied by parol evidence.—*Folk v. Wilson*, 21 Md. 538, 83 Am. Dec. 599. [Cited and annotated in 20 L. R. A. 599, on proof against one person of declarations by another to show partnership; in 52 L. R. A. 841, on partnership books of account as evidence.]

(n) A corporate agent purchased land, and took a bond for conveyance in his own name, and gave therefor a note signed in his own name, and in such name as agent for the corporation. *Held*, that, in a suit against the corporation on the note, parol evidence was inadmissible to contradict the bond by showing that the corporation was the real purchaser of the land.—*Savage Mfg. Co. v. Worthington*, 1 Gill 284.

(o) In assumpsit for work done and materials furnished, where plaintiff gave in evidence a written settlement acknowledging a balance due by defendant, it is admissible for defendant to show that the items in the settlement are partnership claims due plaintiff and another.—*Barger v. Collins*, 7 H. & J. 213.

(p) Where defendants executed a bond for the faithful performance of their duties as administrators, and one of them filled in the name of their decedent, and an inventory subsequently returned by them gave decedent another name, parol evidence was admissible to show that the person in the inventory was the same as named in the bond.—*State v. Wootton*, 4 H. & J. 21.

#### § 460. Identification of subject-matter.

(a) In the trial of issues as to plaintiffs' rights to money paid an administrator in settlement of a claim for the death of his intestate, evidence that the agent of the company paying the money was advised before he made the settlement that the only person with any claim against the company was the mother of deceased, and that the settlement must be made under the law of the District of Columbia, where the death occurred, that the form of the release was one the agent usually employed in such cases in settlement of claims under the laws of Maryland, and that the claim for the death of the deceased, referred to in the release signed by the administrator, was understood by the agent and the administrator to be the claim of the mother, does not contradict or vary the terms of such release, but was admissible to identify the subject-matter of the contract.—*Dronenburg v. Harris*, 108 Md. 597, 71 Atl. 81.

(b) Where defendant wrote to plaintiff soliciting a bid for scrap iron not including engines, generators, valves, or piping in a

building, and offered any further information desired, and plaintiff made an appointment to meet defendant to see the scrap iron and find out what was to be sold, and thereafter wrote making a bid for all the old material "which you have for sale" in the building, parol evidence was admissible to show whether structural iron in the building was included in the sale.—*United Rys. & Electric Co. v. H. Wehr & Co.*, 103 Md. 323, 63 Atl. 475.

(c) When one physician sells the good will of his practice to another by a written contract, parol testimony is admissible to show in what locality the seller practiced his profession.—*Warfield v. Booth*, 33 Md. 63.

(d) One who had given a mortgage of land to secure a loan signed an obligation to extinguish a prior mortgage when it became due. In an action brought for the breach of this obligation, it appeared that the land was erroneously described in the obligation as "the land conveyed to W. on the day of the date of the obligation," whereas it was not so conveyed, although such conveyance was intended. *Held*, that as the extinguishment of the mortgage was the object of the promise, the breach of that promise, the cause of action, and the variation in the time or mode of conveyance of the land affected in no way the rights of the parties, the maxim "Falsa demonstratio non nocet," was applicable, and that evidence was admissible to explain the recitals of the agreement and to identify the subject-matter.—*Criss v. Withers*, 26 Md. 553; *Criss v. English*, Id. [Cited and annotated in 28 L. R. A. (N. S.) 792, on relief from mistake of law as to effect of instrument.]

(e) In an action of ejectment, or trespass q. c. f., plaintiff will not be allowed to supply deficiencies in his locations by parol evidence of possession, boundaries, and name, by general reputation, etc.—*Clary v. Kimmell*, 18 Md. 246.

(f) A conveyance of a farm in W. county, near H., late the estate of D., containing 171 acres, by the "trustees or representatives" of A. B., "as by deed recorded may appear," which deed is referred to, does not present ambiguity which calls for explanation by extrinsic evidence.—*Berry v. Matthews*, 13 Md. 537.

(g) A deed of gift from a father to his two sons, conveying to them "one-half of all my personal estate of which I may die possessed," passes to them one-half of such estate as can be shown by parol proof to remain in his possession at the time of his death, after payment of his debts and other proper expenses, and charges of administration.—*Hannon v. State*, 9 Gill 440.

(h) An agreement under sale for the conveyance of land described it as "a farm on which is a gristmill, sawmill, and milling apparatus, containing 230 acres." Held, that, the agreement being a contract relating to land, every part of which must be in writing, parol testimony is not admissible to correct the uncertainty in the description.—*Taney v. Bachtell*, 9 Gill 205.

(i) Parol evidence is admissible to identify property conveyed by a bill of sale.—*Coale v. Harrington*, 7 H. & J. 147.

(j) Parol evidence is admissible to prove that land granted to the husband of a demandant is the same land out of which dower is demanded.—*Keefer v. Young*, 2 H. & J. 53.

(k) Where no ambiguity exists in a description as to the location of the boundaries called for, the court may exclude evidence outside of the grant to prove such location.—*Dorsey v. Hammond*, 1 H. & J. 190.

#### § 461. Showing intent of parties as to subject-matter.

##### Cross-Reference.

See post, § 462.

##### Annotation.

Admissibility of extrinsic evidence as to whether omission of child from will was intentional.—51 L. R. A. (N. S.) 646, note.

Admissibility of parol evidence, as between indorser and indorsee, that unrestricted indorsement was made merely to transfer title to the owner.—28 L. R. A. (N. S.) 530, note.

Right of witness to give conclusions as to his intent.—23 L. R. A. (N. S.) 379, note.

Right to show by parol evidence that indorsement unrestricted in form was made for purpose of collection only.—17 L. R. A. (N. S.) 838, note.

Parol evidence to show intention of party indorsing paper before delivery.—18 L. R. A. 33, note.

(a) While the acts of the parties may be looked to to discover the meaning of a contract, the language of which is obscure, the parties may not testify as to the understand-

ing or interpretation of the contract.—*Diamond v. Shriver*, 114 Md. 643, 80 Atl. 217.

(b) Although extrinsic evidence is not legally admissible to alter, contradict, or vary the terms of a written contract, yet it is well settled that where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, proof of independent facts collateral to the instrument may be admitted.—*Chesapeake Brewing Co. v. Goldberg*, 107 Md. 485, 69 Atl. 37.

(c) In an action to establish the rights of preferred stockholders after reorganization of a railway company, evidence of the situation of the parties, the objects and purposes for which the reorganization agreement was made, and of all the agreements, resolutions, etc., is admissible, where the issue is whether the certificate contains the entire agreement.—*Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327; *James v. Same*, Id.

(d) Defendants, in negotiating for electric lighting supplies, consisting of dynamos and lamps, stated that the company must be equipped with the new apparatus by fall, to which plaintiff replied that the whole outfit could be delivered within 30 days. The negotiations had been opened by an offer from plaintiffs to furnish new apparatus, and the contract guaranteed that the dynamos they proposed furnishing would operate the number of lamps specified. Separate prices were furnished for the lamps and dynamos, and separate bills sent, payable on the same terms, at the same time. Held, that parol evidence was properly admitted to prove the circumstances surrounding the parties, to aid the court in determining the nature of the contract.—*Morrison v. Baechtold*, 93 Md. 319, 48 Atl. 926.

(e) Parol evidence is admissible to show that a married woman by her trading contracts intended to charge her separate estate.—*Conn v. Conn*, 1 Md. Ch. 212.

(f) A. gave a bond to convey to B. 120 acres of a tract of land, containing 275 acres, without any designation of the part to be conveyed, nor any description whereby the same could be identified and located. He afterwards conveyed a portion of the same tract by metes and bounds to C., a bona fide purchaser, without notice that there was any designation of the 120 acres to be conveyed

in virtue of the bond. There was no evidence that any election was made by either of the parties to the bond or their representatives anterior to the conveyance to C. *Held*, that parol evidence was not admissible to show that it was intended that the 120 acres should be laid off from a certain part of the land.—*Huntt v. Gist*, 2 H. & J. 498.

#### § 462. Showing purpose of writing.

##### Cross-References.

See ante, § 461.

Parol evidence to show pledge, see "Pledges," § 16.

Showing absolute bill of sale a mortgage, see "Chattel Mortgages," § 38.

Showing absolute deed a mortgage, see "Mortgages," § 37.

Showing chattel mortgages to be assignment for creditors, see "Assignments for Benefit of Creditors," § 51.

##### Annotation.

May an instrument not on its face of a testamentary character be shown by extrinsic evidence to be such, so as to take effect as a will.—13 L. R. A. (N. S.) 1203, note.

(a) Parol evidence, while inadmissible to vary or contradict the terms of a written instrument, is admissible to show that a writing was not intended as a contract or as the binding record of a contract.—*Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275.

(b) A trustee sold property under a decree of the court, and for one of the deferred payments of the purchase money took from the purchasers a note, payable to his order, as trustee, indorsed by J., R., and S., as securities for the drawer. The note was afterwards indorsed above J., R., and S.'s signatures by the trustee, and sold to defendant. *Held*, that in an action by the beneficiary before maturity of the note, to enjoin defendant from collecting it, parol evidence is admissible to show the character in which J., R., and S. stood relative to the note,—whether as sureties or as guarantors of the preceding indorsement.—*Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304.

(c) A grantor's intention in executing the deed of assignment cannot be proven by his own statement of his intention, but it must be gathered from the deed itself, and from the grantor's acts and the surrounding circumstances.—*Ecker v. McAllister*, 45 Md. 290. [Cited and annotated in 23 L. R. A.

(N. S.) 376, 386, 396, on right of one to testify as to his intent.]

(d) Parol evidence is not admissible to prove the intention of a contract under seal. It is admissible only to prove fraud or mistake.—*Young v. Frost*, 5 Gill 287.

(e) Where it does not appear, either from the plats themselves or the surveyor's explanations, what was the object or design of certain lines on plats returned under a warrant of survey, nor from the surveyor's certificate that he had ever made such locations, it is not competent to show that the surveyor laid out such lines for a counter location of a tract of land described in the plats.—*Mundell v. Perry*, 2 G. & J. 193.

(f) An administrator executed a bond in 1812, which was approved by the court, on which he obtained letters of administration. In 1816 he executed a similar bond, which was placed on the records of the court, and on which an action was brought against one of the sureties therein, who pleaded non est factum, and that the bond was delivered as an escrow. It was proved that the obligors signed and sealed the bond. *Held*, that parol evidence was admissible to prove how the bond of 1816 came into the office of the register of wills, and why it was recorded, but that no such evidence was admissible respecting the bond of 1812.—*Craufurd v. State*, 6 H. & J. 231.

#### § 463. Showing mode of performance of obligation.

##### (E) SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION.

#### § 464. Grounds for admission of extrinsic evidence.

#### § 465. Agreement as to performance or enforcement.

(a) Parol evidence is admissible to show a subsequent agreement enlarging the time for the performance of a contract, which was reduced to writing, or changing the place of performance, or a waiver of some of the conditions thereof, or a parol agreement supplementing the written contract.—*Coates v. Sangston*, 5 Md. 121.

(b) Where one sold his land, which was incumbered by a mortgage and judgment, and the purchaser entered into a written con-

tract promising to pay one of vendor's creditors by a certain day, a subsequent parol agreement pointing out the mode in which title to the land should be secured to the purchaser, and in effect carrying the contract into execution, but postponing the creditor's payment, is not a variance of the original written agreement; for, even where the time of payment is of the essence of the contract, strict compliance may be waived by the vendor.—*Reed's Heirs and Adm'rs v. Chambers*, 6 G. & J. 490.

#### § 466. Release or other discharge without performance.

##### Annotation.

Admissibility of parol evidence to show that release was delivered upon condition.—86 L. R. A. (N. S.) 1147, note.

#### § 467. Estoppel or waiver.

##### Cross-Reference.

See ante, § 414.

(a) In an action to recover on a contract for services, parol evidence is admissible to show plaintiff's assent to the abandonment by defendant of the work on which plaintiff was employed, as showing a waiver or abandonment of the original agreement.—*Herzog v. Sawyer*, 61 Md. 344.

#### § 468. Performance.

(a) An insurance policy provided for payment of the loss unless the insurer should within a fixed time make good the damage. Held, that, in an action on the policy, defendant might show by parol that after the liability to repair accrued, and before the expiration of the time fixed by the policy, they arranged for extending the time for making the necessary repairs, and that by performance of this agreement they were discharged from their covenant to pay the amount of the loss.—*Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170.

(b) Where a will authorized an executor to sell certain lands within two years, and the lands were conveyed by the executor after that time, parol evidence is admissible to show the time of the sale.—*Harlan v. Brown*, 2 Gill 475, 41 Am. Dec. 436.

#### § 469. Payment.

(a) Where a party maintains the validity of a deed, and seeks, on the allegation that the consideration money has not been paid,

to enforce its payment by the assertion of the vendor's lien, evidence may be admitted to prove that he has been satisfied for the purchase money, by receiving something else as an equivalent therefor.—*Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392. [Cited and annotated in 20 L. R. A. 102, 106, on parol evidence as to consideration of deed; in 24 L. R. A. (N. S.) 415, on parol evidence to show true nature of transaction where recited consideration of deed not shown.]

### XII. OPINION EVIDENCE.

##### Cross-References.

Evidence admissible by reason of admission of similar evidence of adverse party, see ante, § 155.

Hearsay evidence of opinions, see ante, § 314.

Statement of agent's opinion as amounting to admission, see ante, § 242.

Fees of expert witnesses, see "Costs," § 187; "Witnesses," § 28.

Impeachment of witnesses, see "Witnesses," § 352.

In criminal prosecutions, see "Criminal Law," §§ 448-494.

In proceedings for deportation of Chinese persons, see "Aliens," § 32.

Opinions involving disclosure of privileged communication, see "Witnesses," §§ 184-223.

Review of rulings as dependent on presentation of objection in lower court, see "Appeal and Error," § 204.

#### (A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

##### Cross-References.

Effect, see post, § 568.

Right to impeach witnesses in reference to conclusions and matters of opinion, see "Witnesses," § 384.

#### § 470. Grounds for admission.

(a) A witness cannot give his opinion as to whether, when he saw a fight going on between two named persons, the life of one of the antagonists was endangered, where the facts on which he bases his opinion can be specifically described.—*Tucker v. State*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181.

(b) Where all the facts can be adequately exhibited to the jury, and the subject under its investigation does not require special skill and knowledge, the evidence of the opinions of witnesses will not be admitted.—*Baltimore & Y. Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346.

# § 471. Conclusions and matters of opinion or facts.

## Cross-References.

See ante, § 181.

Expert testimony, see post, § 505.

## Annotation.

Admissibility of opinion evidence as to cause of occurrence or accident.—L. R. A. 1915A, 1045, note.

Admissibility of opinion evidence as to cause of death, disease, or injury.—L. R. A. 1915A, 1056, note.

Admissibility of opinion of party or witness as to extent of monetary damages sustained in consequence of personal injury.—52 L. R. A. (N. S.) 167, note.

Admissibility of opinion evidence as to safety of place or appliance.—51 L. R. A. (N. S.) 565, note.

Admissibility of opinion of witness as to damaging effect of libel or slander.—35 L. R. A. (N. S.) 1119, note.

(a) In an action by a person who claimed that she was so frightened by an engine whistle and escaping steam as to cause her to fall, it was proper to permit her to testify as to what caused her to fall.—*Baltimore & O. R. Co. v. Harris*, 121 Md. 254, 88 Atl. 282.

(b) In action for injuries sustained at railroad crossing, claimed to have resulted from fright caused by an unusually loud whistle, evidence as to how the sound of such whistle compared with that of other whistles plaintiff had heard *held* properly admitted.—*Baltimore & O. R. Co. v. Harris*, 121 Md. 254, 88 Atl. 282.

(c) Where contestants read a clause from the will to a witness in behalf of herself and the other contestants, objection to the question, "What does that mean, do you know?" was properly sustained.—*Conrades v. Heller*, 119 Md. 448, 87 Atl. 28.

(d) In an action for breach of a warranty of the condition of an automobile, testimony by the salesman that the president and manager of defendant knew of its defective condition, because other cars went wrong, is inadmissible.—*White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

(e) An answer to a question, as to what extent pulleys were boxed, that they were not boxed in, and that they could not box them in, was properly received in evidence.—*Dettering v. Levy*, 114 Md. 273, 79 Atl. 476.

(f) Where the witness described the conduct and speech of testatrix when she learned

that her interest in real estate left by her husband was for life only, the overruling of the motion to strike out the expression of the witness that "she got wild" was not erroneous, as an expression of the opinion of the witness as to her sanity.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(g) Where the caveator seeking the revocation of a will on the ground of testamentary incapacity merely testified to various facts showing that testatrix was mentally infirm, and she did not give any opinion on the subject of the testamentary capacity, a motion to exclude her testimony was properly overruled.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(h) A statement of a witness, in an action for the possession of real estate involving the location of a boundary, that defendant had accepted a boundary line as it stood at a particular time, was properly stricken out.—*Jacobs v. Disharoon*, 113 Md. 92, 77 Atl. 258.

(i) In an action for towing scows, where defendant claimed that they were lost through plaintiff's negligence, evidence that plaintiff's secretary admitted that the hawser was an improper one and that the loss was due to its use was inadmissible, being only an expression of opinion; the secretary not being shown to be an expert in hawsers.—*American Towing & Lightering Co. v. Baker-Whiteley Coal Co.*, 111 Md. 504, 75 Atl. 341.

(j) In an action on a subcontractor's bond, conditioned on his conforming to his contract, it was proper to refuse to permit a witness to say why the contractor did not pay the subcontractor's pay roll, presented after the work had been stopped; for the question called for the opinion of the witness, and not a statement of the contractor against his interest.—*Etna Indemnity Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369.

(k) Where the actuary of an association testified that he had no knowledge of a letter having been issued from his office, and stated the routine of the office in such matters, the court properly sustained an objection to a question calling for his opinion as to its issuance.—*Willner v. Silverman*, 109 Md. 341, 71 Atl. 962.

(l) In an action against a railroad company for the death of plaintiff's decedent in a collision at a crossing, it is reversible error to allow a witness to testify as to the location of the train when he heard the crash, when he was in his office 180 feet from the crossing, with closed windows, on a damp foggy night, since such testimony is mere conjecture or opinion.—*Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439; 72 Atl. 340. [Cited and annotated in 41 L. R. A. (N. S.) 690, on admissibility of evidence as to habits, custom, or reputation of one injured or killed, on question of his own negligence.]

(m) Where two passengers engaged in a quarrel on defendant's boat, and one, shooting at the other, injured a third passenger, evidence that it was difficult to tell how soon the captain responded when apprised of the difficulty, but that witness did not believe the affair would have happened if the captain had promptly responded, and that if the captain, who was present when the quarrel began, had paid proper attention, it would not have occurred, was properly stricken out as conclusions.—*Tall v. Baltimore Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120.

(n) The effect of the words "Protest waived" on a note, is matter of law, for determination of the court, so a witness cannot give his opinion of the effect thereof.—*Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059.

(o) The testimony of one partner "that the firm was not aware of any fraud" is inadmissible, since he can only testify as to his own want of knowledge.—*McCosker v. Banks*, 84 Md. 292, 35 Atl. 935.

(p) On the issue as to the state of the banking account between parties, it is proper to refuse to permit a witness to be asked to state "approximately," if he cannot do so accurately, the state of the account.—*Hopper v. Beck*, 83 Md. 647, 34 Atl. 474.

(q) A witness was asked by plaintiff's counsel: "If a broker is employed by the vendor of real estate to find a purchaser for his property, and he does introduce to the vendor, as a probable purchaser, a man who buys within a reasonable time, the broker is entitled to his commissions, the only qualification to this rule being the rule that, where

two or more brokers are employed to negotiate the same transaction, the broker who first succeeds is entitled to full commissions, and the others are not entitled to any." Held, objectionable as calling for a mere statement of the law as established by usage.—*Blake v. Stump*, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

(r) In an action on an injunction bond, evidence was introduced that plaintiff who was engaged in supplying milk to customers, began the erection of a brick stable to replace one which had been partially burned down, and was stopped in August by an injunction, which continued until December 6th following; that after it was dissolved he went on to complete the building, and had it finished by December 25th; that while the injunction was in force, plaintiff's cows were deprived of their accustomed and proper shelter, and were more exposed to the weather. The following question was then propounded to a witness: "What was the effect upon the cows if any, in consequence of being exposed to the wind and cold weather because you could not finish the brick stable while the injunction suit was pending?" Held, that the question was proper.—*Lange v. Wagner*, 52 Md. 310, 36 Am. Rep. 380.

(s) Possession is a question of law, and, where possession is the point in issue, it is not competent for a witness to testify that he took possession. He must testify to the acts he performed, and it is for the court to say whether or not these constitute possession.—*Thistle v. Frostburg Coal Co.*, 10 Md. 129. [Cited and annotated in 14 L. R. A. (N. S.) 291, on witness' right to state who was possessor of property.]

(t) The impression made upon the mind of a witness by the conduct, manner, bearing, conversation, appearance, and acts of a testator in various business transactions is not mere opinion. It is knowledge, and strictly analogous to the cases of personal identity and handwriting.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated in 17 L. R. A. 497, on burden of proving testamentary capacity; in 35 L. R. A. 120, on presumption of continuance of insanity; in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 37 L. R. A. 263, on what are insane de-



lusions; in 38 L. R. A. 721, 722, 727, 732, 738, on nonexpert opinions as to sanity or insanity; in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close; in 27 L. R. A. (N. S.) 77, on what is testamentary capacity.]

(u) A witness cannot testify, on the exhibition of an account to him, that he believes the account to be correct, and the goods mentioned therein were sold to a certain person by plaintiff on the faith of a letter of credit given by defendant, though the letter has been given in evidence to the jury.—*Salmon v. Feinour*, 6 G. & J. 60. [Cited and annotated in 63 L. R. A. 979, on competency of witnesses to handwriting.]

(v) A witness testified "that the sum of \$150, retained by W., as he [the witness] understood and presumed, was about the sum intended to be charged for discount," etc. Held, that the expression, "as he [the witness] understood and presumed," taken alone, imported his opinion, and was inadmissible, but that, as it could not be separated from other parts of his testimony, without doing more mischief than the retaining it would do, it was admissible.—*Burt v. Gwinn*, 4 H. & J. 507.

#### § 472. Matters directly in issue.

##### Annotation.

Right of witness to give conclusions as to his intent.—23 L. R. A. (N. S.) 379, note.

Right of witness to give opinion on exact issue.—36 L. R. A. 64, note.

(a) It is error to permit a nonexpert witness to testify, in an action for injuries to a traveler struck by an electric car at a crossing, as to whether the motorman could have stopped the car from the time he first saw the traveler on the track, that being a question for the jury.—*Capital Traction Co. v. Contner*, 120 Md. 78, 87 Atl. 904.

(b) Where the issues in garnishment were whether a transfer by the judgment debtor to his wife was in fraud of creditors and whether the money in the hands of the garnishee belonged to the judgment debtor or his wife, a question asked the garnishee as to whom the money in his hands belonged was objectionable as calling for a mere opinion on issues for the jury under the evi-

dence.—*Farley v. Colver*, 113 Md. 379, 77 Atl. 589.

(c) In an action for the contract price of canned goods, where there was no question that 501 cases had been sold and delivered at 77½ cents per dozen, but not paid for, and the only question was what abatement, if any, defendant was entitled to for inferior quality thereof, and for the nondelivery of others, embraced in the contract, an answer of a plaintiff to the question how much defendant owed him, that he owed for 501 cases at 77½ cents per dozen, was not inadmissible as an opinion upon the question to be determined by the jury, but was proper; it being equivalent to a statement as to how much plaintiff claimed had been delivered and not paid for.—*Webster v. P. W. Moore & Son*, 108 Md. 572, 71 Atl. 466.

(d) In an action by a servant against a master for injuries caused by a fellow servant starting an engine which lifted a heavy bucket on which plaintiff was working, it was not error to refuse to allow defendant to ask a witness whether the fellow servant knew anything about running a hoisting engine; the jury being required to answer such question.—*McCall's Ferry Power Co. v. Price*, 108 Md. 96, 69 Atl. 832.

(e) In an action for injuries resulting from plaintiff's horse becoming frightened by defendant's automobile, the opinion of persons who had been in the livery business a long time, and had known plaintiff's horse for a number of years, as to whether the horse was fit for a lady to drive, is inadmissible, as the jury could determine that question from testimony of witness' knowledge of the horse and its traits.—*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875.

(f) In an action for injuries to plaintiff's trees, evidence of a witness' estimate or judgment of the damage in exact figures was objectionable as invading the province of the jury.—*Western Union Telegraph Co. v. Ring*, 102 Md. 677, 62 Atl. 801.

(g) On an issue as to whether plaintiff was a servant of defendant, an offer to prove that defendant had the right to command plaintiff's services and to discharge him was objectionable, as the offer of an ultimate fact.—*Bently, Shriver & Co. v. Edwards*, 100 Md. 652, 60 Atl. 283.

(h) On an issue as to whether a note sued on by defendant bank had been sold to plaintiff by another bank, or merely discounted, it was error to allow an employee of the first bank, who had not made any entries in the pass book, to state that he understood that entries therein showed a discount; the inference to be drawn from the entries being for the jury.—*Black v. First Nat. Bank*, 96 Md. 399, 54 Atl. 88.

#### § 473. Inferences or impressions from collective facts.

(a) In an action for injuries to plaintiff's property from the discharge of smoke and burning cinders from defendant's engines, where plaintiff had stated the facts inducing him to believe that cinders had set fire to his stable, such testimony could not be excluded because on cross-examination he declined to state that in his own knowledge the burning of the stable was caused by cinders from defendant's engines.—*Baltimore Belt R. Co. v. Stattler*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

(b) The contents of a letter cannot be proven by the witness' understanding of its import.—*City of Baltimore v. War*, 77 Md. 593, 27 Atl. 85. [Cited and annotated in 14 L. R. A. (N. S.) 758, 759, 765, on evidence of specific instances to prove character.]

(c) Where all the facts can be adequately exhibited to the jury, and the subject under its investigation does not require special skill and knowledge, the evidence of the opinions of witnesses will not be admitted.—*Baltimore & Y. Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346.

(d) Parol evidence is admissible to show that property which partnership articles provided should be furnished for the use of the firm by one partner was to remain the individual property of the latter by virtue of an oral agreement to that effect.—*Walker v. Schindel*, 58 Md. 360.

(e) A witness who testifies in regard to conversations had with a party must state either the language used, or the substance thereof. The impression left upon his mind by the conversations is not evidence.—*Elbin v. Wilson*, 33 Md. 135.

(f) On judicial settlement of the accounts of a deceased trustee, where the estate con-

sisted of a farm operated by him, the gross profits and expenses may be estimated on the opinions of neighboring farmers, in the absence of better evidence.—*Dennis v. Dennis*, 15 Md. 73.

#### § 474. Special knowledge as to subject-matter.

(a) A nonexpert may not give his opinion as to testator's mental capacity, in the absence of a showing that he had adequate knowledge and was qualified to express such an opinion.—*Whisner v. Whisner*, 122 Md. 195, 89 Atl. 398.

(b) One who lived in the same house with testatrix for six years preceding making of her will may testify as to whether at the time she was capable of making a valid deed or contract.—*Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852.

(c) A nonexpert witness who rented testatrix's farm, and saw her almost weekly during a considerable period of time immediately following the time when she made her will, is competent to testify as to whether she was at that time capable of executing a valid deed or contract.—*Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852.

(d) A witness who has helped pick tomatoes in a field is competent to give an estimate of the number of tomatoes left in the field.—*Dolby v. Laramore*, 121 Md. 618, 89 Atl. 442.

(e) A witness who has while traveling on electric cars of a company observed how quickly the cars could be stopped is not thereby rendered competent to testify as to the distance in which a car of the company equipped like the other cars could be stopped.—*Capital Traction Co. v. Contner*, 120 Md. 78, 87 Atl. 904.

(f) In a personal injury suit it was not error to allow witnesses to state whether they had noticed any change in plaintiff's physical condition since the accident, how nervousness which arose after the accident manifested itself, and as to how recent the manifestations were where witnesses were well acquainted with plaintiff and had ample opportunity to observe the changes in her condition to which they testified.—*Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326.

(g) In actions against street railroads for injuries in a crossing accident, those who witness the accident may testify to the speed of the car, and those familiar with the place of the accident may describe it.—*United Rys. & Electric Co. v. Ward*, 113 Md. 649, 77 Atl. 593. [Cited and annotated in 34 L. R. A. (N. S.) 785, on evidence as to speed of street cars.]

(h) A witness who has the means of knowing a testator's mental condition, and who discloses the means so as to show both that he possesses them and that they are adequate, may state the result thereof and express his opinion as to the mental capacity of testator.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(i) The testimony of a witness, in a suit to contest a will on the ground of testamentary incapacity, that testatrix shortly after the execution of the will had stated that there was no need of her making a will, that testatrix was not able to remember anything, that she would become drowsy during a conversation and would fall asleep, that she was apprehensive that some one would get into her house to kill her, that she became slovenly in her habits, and that during the month after the execution of the will she looked for a brother to visit her who had been dead for 10 years, showed ample knowledge to support the opinion of the witness that testatrix was mentally incompetent.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(j) Two isolated interviews had by a witness with testatrix 10 months before the execution of her will, contested on the ground of testamentary incapacity, are insufficient to show sufficient knowledge of the witness to express an opinion as to testatrix's mental condition.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(k) In an action by building contractors for a balance due, one of them was allowed, over a general objection, to answer a question as to whether he could state whether or not, based on his experience as a builder, the building was put up in accordance with the written specifications, plans, and contract. The question was a formal or opening one, as he was then asked separately as to compliance with all the provisions of the contract on their part. *Held*, as against ob-

jection on the ground that the witness was asked the very question the jury were to decide, that the witness was not a mere expert, but had actual knowledge as to whether the work called for by the contract had been done, and, while the question asked for an answer based on his experience as a builder, it was not a hypothetical question put to an expert without actual knowledge of facts calling for a mere opinion.—*Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son*, 112 Md. 360, 76 Atl. 854.

(l) Where, in an action against a county for the death of decedent through driving off an open drawbridge, it was claimed that defendant was negligent in allowing the draw to remain without any barriers while open, testimony of a witness as to what in his judgment was necessary to safeguard the bridge at night when the draw was open was inadmissible, the witness not being shown to possess any special knowledge or skill qualifying him to instruct the jury.—*Commissioners of Anne Arundel County v. State*, 107 Md. 210, 68 Atl. 602.

(m) In an action by a servant for injuries caused by a fellow servant starting an engine which lifted a heavy bucket on which plaintiff was working, defendant contending that the bucket was lifted by a counter weight, a witness for plaintiff was asked whether it was "possible to jerk that bucket up except through the instrumentality of the engine." It was not shown that the witness was an engineer, but he had been working around hoisting engines for 12 years. He testified on cross-examination that the counter weight was not in working order at the time, and intelligently explained that the weight, if working would pull the bucket down, and that only the engine could lift it up in the air. His testimony was corroborated by defendant's foreman. *Held*, that there was no error in permitting the witness to answer the question asked on behalf of plaintiff.—*McCall's Ferry Power Co. v. Price*, 108 Md. 96, 69 Atl. 832.

(n) In a personal injury suit it was not error to allow witnesses to state whether they had noticed any change in plaintiff's physical condition since the accident, how nervousness which arose after the accident manifested itself, and as to how recent the

manifestations were where witnesses were well acquainted with plaintiff and had ample opportunity to observe the changes in her condition to which they testified.—*Fletcher v. Dixon*, 107 Md. 420, 77 Atl. 326.

(o) Where a nonexpert had not testified to any knowledge he had concerning testatrix, he was incompetent to express any opinion concerning her mental capacity.—*Packham v. Ludwig*, 103 Md. 416, 63 Atl. 1048; *Packham v. Glendmeyer*, Id.

(p) In an action for injuries to plaintiff's trees, it was error for the court to permit a witness to testify to the value of a tree like those injured, for wood or timber, after merely answering that he knew something about the value of such trees, without a further showing as to his knowledge of the subject.—*Western Union Telegraph Co. v. Ring*, 102 Md. 677, 62 Atl. 801.

(q) An attorney, who had known testator for 15 years, and who had been accustomed to meet him socially, and who had transacted business for him, was properly asked what testator's mental condition was the day that the attorney drew the will, as compared with his mind as he knew him before.—*Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

(r) Evidence by a sister-in-law that she had known testator since his marriage, and had been at his house frequently; that she had seen his bad conduct there, and that he was abusive to his wife, which conduct had caused her to leave him several times; and that he had a cancer in his head, which had been twice removed and had reappeared,—was a sufficient foundation to authorize witness to give an opinion as to testator's mental condition.—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398. [Cited and annotated in 27 L. R. A. (N. S.) 15, 36, 91, on what is testamentary capacity.]

(s) Evidence by a witness that testator met him in the road on one occasion, grabbed his horse, and asked witness what he was doing for his soul, and afterwards denied the incident when witness alluded to it; and that on another occasion he asked witness to kill him, saying that he would leave everything to the witness, whereupon testator drew up a paper tending to exonerate the witness from blame should he perform his request, and, on witness refusing to kill him,

testator burst out crying, saying that he had nothing to live for,—is sufficient to qualify the witness to testify as to testator's mental capacity to make a will.—*Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

(t) Evidence by a witness that testator attempted to commit suicide 25 years before he made his will is not sufficient to qualify the witness to testify as to the testator's mental capacity at the time of making his will.—*Brashears v. Orme*, 93 Md. 442, 49 Atl. 620.

(u) In a will contest, a witness, who was a member of the fraternal society to which the testator belong, testified as to a visit he made the testator for the purpose of paying testator the society allowance for the death of testator's wife, which had occurred the preceding week, and he stated that the testator was in a very weak condition, and was not able to write a receipt for the money. Two other visits were made by the witness, two years later, when the testator was on his deathbed, and at both of these times the testator refused to talk, and seemed very weak and to be suffering. Held, insufficient to warrant the witness to testify as to the testator's mental capacity to execute a will.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(v) A witness testified as to two business transactions with a testator, the first where he had borrowed money of the testator and paid it back, and the second where he had applied for another loan and been refused, the testator stating that he did not have a dollar in the world, as his affairs were all mixed up, though in fact testator was wealthy. The witness also testified as to seeing the testator again a few months later, and that he seemed very weak physically, and depressed. Held, insufficient to warrant an opinion as to the testator's mental capacity to execute a will.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(w) The fact that a testator, after having paid his lodge dues for a number of years in advance, asked the member to whom they had been paid on several different occasions how his (the testator's) account with the lodge stood, does not constitute a sufficient foundation for the opinion of the member as to the testator's mental capacity to make a will, though such witness had business

transactions with the testator six years before.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(x) A witness, testator's cousin, having had one business transaction with the testator, and basing his opinion on the physical change in the testator after the death of the testator's wife, and his great grief thereat, is incompetent to express an opinion as to the testator's mental capacity to execute a will, since physical change, grief, and subdued spirits may exist consistently with an unimpaired intellect.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(y) A witness, frequently seeing and conversing with testator a number of years before the execution of his will, and basing his opinion on the fact that the testator was formerly a large man, but had lost flesh after his wife's death, and on the reluctance of the testator to converse with witness, is incompetent to express an opinion as to the testator's mental capacity to execute a will.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(z) A witness, basing his opinion on two conversations with testator, had five months apart, and in which the testator was mistaken as to the identity of a watch, but at once recollected the facts when reminded of them, and where he was unable to recall who a certain niece of his was, but when told she was a sister of the witness and her full name given remembered her, is not competent to testify as to the mental capacity of the testator.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(aa) A witness, basing an opinion as to the mental capacity of a testator to execute a will on the physical condition of the testator, is not competent to testify as to such capacity, since physical debility is not a criterion of mental capacity.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(bb) A witness, basing an opinion on conversations which show that a testator was physically weaker and more forgetful than formerly, is incompetent to testify as to the testator's mental capacity to execute a will.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(cc) Where the physical condition of a testator had changed after the execution of

his will, it was error to permit a witness to be asked whether the testator was mentally capable of executing a will when she saw him three weeks after its execution, and two weeks before his death.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(dd) A single conversation with a testator, in which he had twice miscalled the name of witness' son after having been corrected, and in which testator stated that he could not remember well, as his head was not the same as it used to be, is insufficient to warrant an opinion by a nonexpert as to the testator's mental capacity.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(ee) In an action for damages caused by the washing away of a bridge, alleged to have been unskillfully built, it is competent to allow a witness to testify, from his knowledge of the stream, extending back to 1844, whether the width of the span and height of the bridge were sufficient to enable the water to pass.—*Harford County Com'rs v. Wise*, 71 Md. 43, 18 Atl. 31. [Cited and annotated in 51 L. R. A. (N. S.) 567, on opinion evidence as to safety of place or appliance.]

(ff) In an action for services to defendant's testator, the opinion of a witness, who knew that plaintiff was much engaged in private business of testator, as to what the services were worth, is admissible, though the nature of the employment was unknown to the witness at the time.—*Stoner v. Devilbiss*, 70 Md. 144, 16 Atl. 440.

(gg) In an action to recover damages for injuries caused by a defective turnpike, the testimony of a witness who had previously stated that he was well acquainted with the condition of the road as to its safety for purposes of travel is admissible, though it does not appear that the witness is an expert.—*Baltimore & L. Turnpike Co. v. Cassell*, 66 Md. 419, 7 Atl. 805. [Cited and annotated in 51 L. R. A. (N. S.) 582, on opinion evidence as to safety of place or appliance.]

(hh) In an action against a turnpike company to recover damages resulting from its failure to keep the metaled part of its road level with the rest, a surveyor who has made a plat of the road at the place of the accident may, although not an expert, give his opinion as to whether the road at that point was safe for travel by wagons and carriages.

—*Baltimore & Y. Turnpike Road v. Crowther*, 63 Md. 558, 1 Atl. 279. [Cited and annotated in 51 L. R. A. (N. S.) 582, on opinion evidence as to safety of place or appliance.]

(ii) In general, the mere naked opinions of persons who are not professional medical attendants as to the testamentary capacity of a testator are not admissible; but where the witness was a brother of the testator, engaged in a joint business, it was held that the intimacy of the witness with the testator, having continued during the latter's life and afforded him opportunities of judging of the testator's mind and its changes, rendered his opinion admissible.—*Weems v. Weems*, 19 Md. 334. [Cited and annotated in 38 L. R. A. 728, 732, on nonexpert opinions as to sanity or insanity; in 37 L. R. A. (N. S.) 597, on opinion evidence by nonexpert as to contractual or testamentary capacity.]

(jj) A witness who had seen a party write, although but once, and has in this mode acquired a knowledge of the general character of his handwriting, is competent to testify in regard to its genuineness. The impression in this case may be exceedingly faint and imperfect, but it is nevertheless testimony, provided the witness can declare that, from his knowledge of the defendant's handwriting thus acquired, he believes it to be genuine.—*Smith v. Walton*, 8 Gill 77. [Cited and annotated in 63 L. R. A. 165, on examination of witnesses to handwriting by comparison; in 63 L. R. A. 967, 977, 982, on competency of witnesses to handwriting; in 36 L. R. A. (N. S.) 164, on opinion evidence as to ancient signature.]

(kk) A witness who has seen defendant write, although but once, is competent to speak with respect to the genuineness of his disputed signature.—*Edelen v. Gough*, 8 Gill 87. [Cited and annotated in 63 L. R. A. 968, on competency of witnesses to handwriting.]

(ll) A witness, the neighbor of a deceased testator, who had known him well for 25 years, often had dealings with him, and would never have hesitated to buy from or sell to him land or negroes for any amount, may prove that, in his opinion, the testator was of sound and disposing mind, and capable of executing a valid deed or contract,

during all the period of the witness' acquaintance with him.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated in 17 L. R. A. 497, on burden of proving testamentary capacity; in 35 L. R. A. 120, on presumption of continuance of insanity; in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 37 L. R. A. 263, on what are insane delusions; in 38 L. R. A. 721, 722, 727, 732, 738, on nonexpert opinions as to sanity or insanity; in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close; in 27 L. R. A. (N. S.) 77, on what is testamentary capacity.]

### § 474½. Subjects of opinion evidence in general.

#### Cross-Reference.

See ante, § 473.

(a) In an action for negligence causing the fright and running away of plaintiff's mules, evidence as to how mules will act when approaching an object calculated to frighten them, whether the witness had ever observed a mule to frighten at an object, and as to what was their conduct under the circumstances, was properly refused as evidence of matters occurring in the common business of life, concerning which the jury were competent to draw inferences from the facts without hearing opinions of witnesses.—*Cecil Paper Co. v. Nesbitt*, 117 Md. 59, 83 Atl. 254.

(b) In an action against a beneficiary association the first count of the declarations was for money had and received for the use of the plaintiff from certain affiliated associations. The secretary of one of the associations as a witness was asked whether a printed copy of the by-laws was an authorized edition. The receipt by the defendant for the use of the members' beneficiary of a certain sum from the association represented by the witness was admitted. Held, that it was not error to exclude a question asked such witness as to whether he would have paid the benefit if the members' dues had been paid on or before the day they were due.—*Wells & McComas Council, No. 14, J. O. U. A. M. v. Littleton*, 100 Md. 416, 60 Atl. 22.

(c) In an action for injury to a passenger

in an open street car, from being struck by a marble slab projecting from a passing wagon, a witness' testimony that, in his opinion, the noise of the wagon scraping against the car before the passenger was struck was loud enough to be heard by any one in the car who had any hearing, was admissible.—*Jones v. United Rys. & Electric Co.*, 99 Md. 64, 57 Atl. 620.

#### § 475. Personal identity and characteristics.

##### Annotation.

Opinions of witnesses as to identity of person referred to in action for defamation of unnamed person.—48 L. R. A. (N. S.) 364, note.

#### § 476. Age.

#### § 477. Bodily appearance or condition.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, § 509.

Intoxication, see post, § 478.

Special knowledge as to subject-matter, see ante, § 474.

(a) Testimony by plaintiff that his injury made him very nervous, and he could not sleep nights, and when he went to stoop over he had great pain, and that he suffered a good deal of pain from the testicle, going along the cord into his stomach was not inadmissible as opinion evidence.—*Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 512.

(b) Medical experts are the only witnesses competent to give the diagnosis of a disease, to testify in regard to its proper treatment secundum artem, and to express an opinion as to its probable duration, effects, and final termination.—*Baltimore & L. Turnpike Co. v. Cassell*, 66 Md. 419, 7 Atl. 805.

(c) The testimony of any ordinary individual is admissible to show what the physical condition and appearance of health of an injured person were after an accident, and continued to be.—*Baltimore & L. Turnpike Co. v. Cassell*, 66 Md. 419, 7 Atl. 805.

#### § 478. Mental condition or capacity.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, § 510.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

Privileged communications as basis of opinion, see "Witnesses," §§ 201, 202.

##### Annotation.

Opinion evidence by nonexperts as to intoxication.—11 L. R. A. (N. S.) 639, note.

Nonexpert opinion as to sanity or insanity.—38 L. R. A. 721, note.

(a) On an issue as to testamentary capacity, a question to a nonexpert whether he thought testator understood a disposition of a note to his brother which had already been paid held improper.—*Whisner v. Whisner*, 122 Md. 195, 89 Atl. 393.

(b) Where a witness in an action on a bond stated that she could not testify as to the maker's capacity for making a valid contract on the day of the alleged execution of the note because she was not there at such time, she might afterwards state that in her opinion he was then capable of executing a valid deed or contract.—*Line v. Line*, 119 Md. 403, 86 Atl. 1032.

(c) A witness may be asked whether one "appeared to be under the influence of liquor."—*Maryland & P. R. Co. v. Tucker*, 115 Md. 43, 80 Atl. 688.

(d) A witness, asked whether another was under the influence of liquor, by answering, "I do not know whether I can judge or not," disqualified himself from afterwards stating that "in his judgment" the witness appeared to be under the influence of liquor.—*Maryland & P. R. Co. v. Tucker*, 115 Md. 43, 80 Atl. 688.

(e) Subscribing witnesses to a will, who are not medical experts, cannot express an opinion as to the capacity of testator to make a valid deed or contract, as determined, not by habit, conduct, or demeanor, but by his physical condition, induced by sudden illness, and dethroning his normal mental faculties.—*Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

(f) Upon the trial of an issue upon the validity of a will, the opinion of a witness, not an expert, as to the physical capacity of the testator to hold conversations testified to by another witness, is not admissible in evidence.—*Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666. [Cited and annotated in 17 L. R. A. 494, on burden of proving testamentary capacity; in 22 L. R. A. 371, on signature by mark; in 35 L. R. A. 118, 119, on presumption of continuance of insanity;

in 36 L. R. A. 724, 735, on presumption and burden of proof as to sanity; in 38 L. R. A. 740, 743, on nonexpert opinions as to sanity or insanity; in 39 L. R. A. 719, on opinions of subscribing witnesses as to sanity or insanity; in 6 L. R. A. (N. S.) 576, on weight of subscribing witness' testimony against testator's competency; in 27 L. R. A. (N. S.) 15, 26, 91, on what is testamentary capacity; in 35 L. R. A. (N. S.) 688, as to whether competency of attesting witness is to be determined as of time of attestation or of probate.]

(g) The mere naked opinions of other persons than the subscribing witnesses to a will, not occupying the position of medical men, are inadmissible in reference to the mental capacity of a testator whose will may be controverted.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated in 17 L. R. A. 497, on burden of proving testamentary capacity; in 35 L. R. A. 120, on presumption of continuance of insanity; in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 37 L. R. A. 263, on what are insane delusions; in 38 L. R. A. 721, 722, 727, 732, 738, on nonexpert opinions as to sanity or insanity; in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close; in 27 L. R. A. (N. S.) 77, on what is testamentary capacity.]

(h) The impression made upon the mind of a witness by the conduct, manner, bearing, conversation, appearance, and acts of a testator in various business transactions is not mere opinion. It is knowledge, and strictly analogous to the cases of personal identity and handwriting.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated, see *supra*.]

#### § 479. Pecuniary condition.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.  
Special knowledge as to subject-matter, see ante, § 474.  
Value of personal property of alleged insolvent, see post, § 489.

(a) The amount of the professional income of a deceased dentist is to be ascertained by the testimony of witnesses who knew his character and professional reputation, as well as the extent of his practice in the

place where he lived and its neighborhood, and not by the testimony of experts.—*State v. Cecil County Com'rs*, 54 Md. 426.

(b) A witness having stated his knowledge of facts touching the insolvency of certain parties, his opinion as to whether or not, from the circumstances of the parties and his knowledge, they were insolvent, is admissible.—*Hayes v. Wells*, 34 Md. 512.

#### § 480. Handwriting.

##### Cross-References.

See ante, § 473; post, § 502.  
Conclusions and matters of opinion or facts, see ante, § 471.  
Expert testimony, see post, § 511.  
Special knowledge as to subject-matter, see ante, § 474.

##### Annotation.

Opinion evidence as to ancient signature.—36 L. R. A. (N. S.) 162, note.  
Competency of nonexpert witnesses to handwriting.—63 L. R. A. 964, note.

#### § 481. Due care and proper conduct.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.  
Expert testimony, see post, §§ 512-515.  
Matters directly in issue, see ante, § 472.  
Special knowledge as to subject-matter, see ante, § 474.

(a) In an action against a railroad company for the death of a slave, the opinion of a witness that the slave's life might have been saved had the defendant's agents used reasonable, ordinary diligence, is inadmissible.—*Scaggs v. Baltimore & W. R. Co.*, 10 Md. 268.

#### § 482. Custom or usage.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.  
Expert testimony, see post, § 516.

#### § 483. Nature, condition, and relation of objects.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.  
Expert testimony, see post, § 519.  
Matters directly in issue, see ante, § 472.  
Special knowledge as to subject-matter, see ante, § 474.

##### Annotation.

Admissibility of opinions as to existence of defect in appliances furnished servant.—41 L. R. A. 153, note.

(a) In an action against a railroad company for personal injuries, alleged to be due



to the dangerous condition in which defendant had left a highway, the location of which it had changed under permission from the county commissioners, the opinion of the county commissioners as to the condition of the road is inadmissible.—*Rowe v. Baltimore & O. R. Co.*, 82 Md. 493, 33 Atl. 761. [Cited and annotated in 51 L. R. A. (N. S.) 582, on opinion evidence as to safety of place or appliance.]

(b) A witness may testify to the existence of a mill site without being an expert.—*Clagett v. Easterday*, 42 Md. 617.

#### § 484. Quantity.

##### Cross-References.

Expert testimony, see post, § 520.

Special knowledge as to subject-matter, see ante, § 474.

(a) The testimony of passengers who had been riding on the line beyond the city limits several times a day, stating from casual observation their estimate of the number of passengers who rode on that portion of the line, is incompetent to show the amount of such receipts.—*Baltimore Union Pass. Ry. Co. v. City of Baltimore*, 71 Md. 405, 18 Atl. 917; *Union Pass. Ry. Co. v. Same*, Id.

#### §§ 485-489. Value.

##### Cross-References.

Conclusions and matters of opinion or facts, see ante, § 471.

Evidence of tax assessment to show value of property, see ante, § 113.

Expert testimony, see post, §§ 522-525.

Matter directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

##### Annotation.

Opinion evidence on question of value of the use or rental of property.—44 L. R. A. (N. S.) 501, note.

(a) Plaintiff, to rebut the liability to a distress for rent, having proved that the consideration for the letting was the making of certain improvements on the leased property, a farm, is entitled to ask a witness, a farmer in the neighborhood, whether in his judgment the improvements made by plaintiff were a proper equivalent for a fair rent.—*Dailey v. Grimes*, 27 Md. 440.

#### § 490. Space or distance.

##### Cross-References.

See ante, § 483.

Conclusions and matters of opinion or facts, see ante, § 471.

Special knowledge as to subject-matter, see ante, § 474.

#### § 491. Time.

#### § 492. Rate of speed.

##### Annotation.

Evidence as to speed of automobiles or other road vehicles.—34 L. R. A. (N. S.) 778, note.

#### § 493. Cause and effect.

##### Cross-References.

See ante, § 481.

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, §§ 527-529.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

(a) In an action against a beneficiary association to recover death benefits, where a witness testified to having paid the last payment of dues for the deceased member, it was not error to refuse to allow her to be asked what the effect would be if the dues were not paid before the last meeting night in the month in which payment was made.—*Wells & McComas Council, No. 14, J. O. U. A. M. v. Littleton*, 100 Md. 416, 60 Atl. 22.

(b) In an action of slander for words spoken, by which the nomination of the plaintiff to an office of profit by the Senate of the United States was rejected, a senator testified, in his deposition, as follows: "But the charges above mentioned, from their character, could not have failed to produce its rejection, even if there existed no other reason for it; and they doubtless, I presume, had a very considerable effect in producing it." Held, that these words, being only the opinion of the witness, were not competent evidence.—*Law v. Scott*, 5 H. & J. 438. [Cited and annotated in 35 L. R. A. (N. S.) 1120, on admissibility of opinion as to damaging effect of libel or slander.]

(c) In an action for slander for words spoken, by which the nomination of plaintiff to an office of profit by the Senate of the United States was rejected, a senator could testify that the alleged slanderous charges induced him to vote against the nomination.—*Law v. Scott*, 5 H. & J. 438. [Cited and annotated, see supra.]

#### §§ 494-498. Damages.

##### Cross-References.

Expert testimony, see post, §§ 530-534.

Matters directly in issue, see ante, § 472.

Opinions as to value as determining amount of damages, see ante, §§ 486-489.

Special knowledge as to subject-matter, see ante, § 474.

(a) Opinions of witnesses acquainted with the land as to any increase in value by opening a street are admissible.—*City of Baltimore v. Smith & Schwartz Brick Co.*, 80 Md. 458, 31 Atl. 428.

(b) The opinion of a witness that, as a probable effect of widening a street, ladies would not be deterred, by crowds who congregate there, from walking on such street, is not admissible to show the benefits of the improvement.—*Friedenwald v. City of Baltimore*, 74 Md. 116, 21 Atl. 555.

(c) Evidence as to what a particular person, if he owned the property, would be willing to pay to have the pole of a telephone company in the footway adjoining plaintiff's warehouse removed, or how much more rent he would be willing to pay if it was removed, or how much he considered the rental value to be depreciated for the purposes of his own business, is inadmissible to show the actual damage.—*Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

#### § 498½. Determination of question of competency.

##### Cross-References.

Competency of experts, see post, § 546.

Examination of witnesses, testimony in general, see post, § 500.

(a) The law of evidence cannot be safely extended so far as to exclude every question to which the answer might possibly involve a matter of law,—as, where the witness upon cross-examination was asked if he "had ever authorized any one to waive his discharge under the insolvent laws, or the bar of the statute of limitations," held, that the question was admissible.—*Morris v. Hazlehurst*, 30 Md. 362.

#### § 499. Examination of witnesses.

#### § 500.—Testimony in general.

##### Cross-Reference.

See ante, § 498½.

(a) A question asked a witness as to whether a purchaser entered into possession of the land as it was staked by the vendor was misleading, as leading the witness to state that the purchaser took possession of the property, as far as the witness knew.—*Jacobs v. Disharoon*, 113 Md. 92, 77 Atl. 258.

(b) Nonexpert witnesses for the caveatee

who are competent, from their acquaintance and relations with testator to give an opinion as to his competency, may be asked if they observed any indication of lack of mind or understanding on testator's part.—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398. [Cited and annotated in 27 L. R. A. (N. S.) 15, 36, 91, on what is testamentary capacity.]

(c) A witness as to testator's mental capacity cannot give an opinion as to whether testator was entirely sane, but such opinion must be confined to the question whether he had a disposing mind.—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398. [Cited and annotated, see supra.]

(d) Where a nonexpert witness had testified to a business transaction with testator, whose mental capacity was in issue, in which transaction the testator had stated he could not pay his household expenses without selling stocks, etc., he in fact being wealthy, and the witness stated he did not know the testator was under the impression that people sometimes get, it was error to ask the witness what sort of people get such impressions, and to explain that wealthy people often were afraid they would have to go to the poor house, which fear was due to their state of mind.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

#### § 501.—Facts forming basis of opinion.

##### Cross-Reference.

See ante, §§ 474, 478.

(a) In an action for compensation for towing scows which were lost at sea as a result of a hawser parting, the admission of the opinion of witnesses as to the cause of its parting was error, where the question calling for the opinion did not refer to the fact that the hawser had parted twice previously.—*American Towing & Lightering Co. v. Baker-Whiteley Coal Co.*, 117 Md. 660, 84 Atl. 182, Ann. Cas. 1914A, 46.

(b) The testimony of experienced engineers familiar with the tracks and a switch where a person was struck by an engine held properly excluded where the testimony was not confined to the conditions existing at time of accident, as described by engineer.—*State v. Baltimore & O. R. Co.*, 117 Md. 280, 83 Atl. 166.

(c) It is error to permit a witness to say that one took possession of real estate, as

far as he knew, without disclosing his knowledge.—*Jacobs v. Disharoon*, 113 Md. 92, 77 Atl. 258.

(d) The testimony of a witness, in a suit to contest a will on the ground of testamentary incapacity, that he had known testatrix for about 40 years, and had at her request administered on the estate of the husband, who had died about 3 years before the execution of the will, that testatrix was in ill health at the time of the death of her husband and subsequently grew weaker, and that her memory failed so that she would make different statements about the same thing, apparently forgetting what she had said before, that 2 days before the execution of the will he visited her, and that she then proposed to give him a bookcase, and on his declining it she said she would give it to his son who was dead, and that though she was reminded of that fact she persisted in her proposal to make the gift to the son, etc., was a sufficient basis to enable the witness to express his opinion as to the testamentary incapacity of testatrix.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(e) The testimony of a witness in a suit to contest a will on the ground of testamentary incapacity that testatrix shortly after the execution of the will had stated that there was no need of her making a will, that testatrix was not able to remember anything, that she would become drowsy during a conversation and would fall asleep, that she was apprehensive that some one would get into her house to kill her, that she became slovenly in her habits, and that during the month after the execution of the will she looked for a brother to visit her who had been dead for 10 years, formed a sufficient basis to support the opinion of the witness that testatrix was mentally incompetent.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(f) A subscribing witness to a will may testify that he considered the testator capable of making the will, though the witness has not testified that he investigated testator's mental capacity at the time the will was executed, as a due investigation by the witness will be presumed, and he may be cross-examined in relation thereto.—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398. [Cited and annotated, see *supra*, § 500.]

(g) Opinions of nonexpert witnesses as to the mental capacity or sanity of another must be accompanied by a statement of the facts on which such opinions are based.—*Stewart v. Spedden*, 5 Md. 433. [Cited and annotated in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 38 L. R. A. 722, 737, on nonexpert opinions as to sanity or insanity.] *Kerby v. Kerby*, 57 Md. 345; *Chase v. Winans*, 59 Md. 475. [Cited and annotated in 38 L. R. A. 721, 743, 747, on nonexpert opinions as to sanity or insanity.]

(h) A subscribing witness to a will may give his opinion as to the testator's capacity without giving the facts on which he bases the same.—*Williams v. Lee*, 47 Md. 321. [Cited and annotated in 38 L. R. A. 722, 734, on nonexpert opinions as to sanity or insanity; in 39 L. R. A. 716, 717, on opinions of subscribing witnesses as to sanity or insanity.]

(i) The mere opinion of a witness relative to the sanity of a party is not admissible, yet, in connection with the facts on which it is formed, his opinion is evidence, provided those facts are of such a nature as will enable him to form a knowledge of the party's intellect.—*Stewart v. Redditt*, 3 Md. 67. [Cited and annotated in 38 L. R. A. 721, 737, 739, on nonexpert opinions as to sanity or insanity.]

(j) Where there is proof of general rationality and also of delusion in a testator, it would be an encroachment on the rights of the jury for the court to assume that the delusion under which the testator labored was habitual, and therefore put the onus of proof that he was free of such delusion at the execution of his will on the caveatees.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated in 17 L. R. A. 497, on burden of proving testamentary capacity; in 35 L. R. A. 120, on presumption of continuance of insanity; in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 37 L. R. A. 263, on what are insane delusions; in 38 L. R. A. 721, 722, 727, 732, 738, on nonexpert opinions as to sanity or insanity; in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close; in 27 L. R. A. (N. S.) 77, on what is testamentary capacity.]

## § 502.—Cross-examination and re-examination.

### Cross-Reference.

Voir dire cross-examination as to source of knowledge, see ante, § 474.

(a) In an action for injuries to plaintiff's property from the discharge of smoke and burning cinders from defendant's engines, where plaintiff had stated the facts inducing him to believe that cinders had set fire to his stable, such testimony could not be excluded because on cross-examination he declined to state that in his own knowledge the burning of the stable was caused by cinders from defendant's engines.—*Baltimore Belt R. Co. v. Sattler*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

(b) In an action upon a promissory note, where the defense is a denial that the defendant indorsed the note, and a witness who has frequently seen the defendant write, and is familiar with his signature, testifies that, in his opinion, the indorsement is not the defendant's signature, and states that his opinion is based upon the fact that the defendant's handwriting is heavier and larger than the indorsement in question, it is competent, on cross-examination, notwithstanding the Maryland rule against the proof of handwriting by comparison of hands, to exhibit to the witness, for the purpose of refreshing his memory, a letter on a subject foreign to the case, which had been shown to the defendant, and by him admitted to be in his handwriting, both body and signature, and then ask the witness whether he still retained his opinion.—*National Bank of Chester Co. v. Armstrong*, 66 Md. 113, 6 Atl. 584, 59 Am. Rep. 156. (See Code, art. 35, § 7.) [Cited and annotated in 63 L. R. A. 165, 170, on examination of witnesses to handwriting by comparison.]

(c) In an action on a promissory note, a witness testified as to his knowledge of defendant's handwriting, examined the note, and declared it to be in defendant's handwriting. Held, that, upon cross-examination, he was properly asked "when he first saw the note," and "who showed him the note."—*Herrick v. Swomley*, 56 Md. 439. [Cited and annotated in 62 L. R. A. 845, on comparison of handwriting; in 63 L. R. A.

978, on competency of witnesses to handwriting.]

(d) It is not competent, upon cross-examination of an ordinary witness called to impugn the genuineness of a signature, to show him other papers signed by the same name, but irrelevant to the case, in order to test the accuracy of the witness.—*Armstrong v. Thruston*, 11 Md. 148. [Cited and annotated in 63 L. R. A. 175, on examination of witnesses to handwriting by comparison; in 65 L. R. A. 155, on procedure in proof of handwriting.]

## § 503.—Corroboration.

### Annotation.

Necessity of corroboration of admission or testimony of party to divorce in relation to the state of mind.—25 L. R. A. (N. S.) 45, note.

§ 504. (Omitted from the classification used herein.)

## (B) SUBJECTS OF EXPERT TESTIMONY.

### Cross-References.

Effect of expert testimony, see post, §§ 570-574.

Expert testimony as to the effect of certain employment to show that it is not matter for police regulation, see "Constitutional Law," § 47.

In criminal prosecutions, see "Criminal Law," §§ 469-476.

## § 505. Matters of opinion or facts.

(a) Testimony whether, under certain hypothetical circumstances, a member of a beneficiary association, would be a beneficial or nonbeneficial member, was properly excluded.—*Wells & McComas Council, No. 14, J. O. U. A. M. v. Littleton*, 100 Md. 416, 60 Atl. 22.

## § 506. Matters directly in issue.

(a) Where a passenger on a boat was injured by alleged negligence in leaving a stairway door unguarded, the question of negligence was for the jury, and was not a proper subject for expert testimony.—*Baltimore C. & A. Ry. Co. v. Moon*, 118 Md. 380, 84 Atl. 536.

(b) Experts may not usurp the province of the court and jury by drawing conclusions of law or fact on which the decision of the case depends, and they may not express their opinion as to what is due care in a particular case; the question being for the jury.—*Han-*

*rahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 812.

(c) Whether a city was negligent in locating a sewer so as to injure the adjoining property of an individual or was negligent in any detail of the construction of the sewer is for the jury to determine from the facts, and an expert may not express his opinion thereon.—*Hanrahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 812.

(d) A practical lumberman, testifying as an expert after examining timber land damaged by a fire, may not testify as to the amount of damages; that being for the jury from a consideration of the whole case.—*Carter v. Maryland & P. R. Co.*, 112 Md. 599, 77 Atl. 301.

(e) Expert testimony is inadmissible on a question which court or jury can themselves decide on the facts, or where the relation of facts and their probable results can be determined without special skill.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [Cited and annotated in 51 L. R. A. (N. S.) 846, 849, on photographs as evidence; in 32 L. R. A. (N. S.) 1094, 1118, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

#### § 507. Matters of common knowledge or observation.

##### Annotation.

Right of court to decide question as to quickest means of stopping train as matter of common knowledge.—14 L. R. A. (N. S.) 261, note.

(a) The agent offered ship brokers as experts to testify as to whether, under the circumstances, it would have been reasonably prudent to engage outward cargo from Montreal for June loading, whether it would have been prudent to engage grain and cattle for June loading, and whether it was possible for that vessel to be loaded and sail from Montreal in June. *Held*, that, as the question was one of which the court or jury could decide the facts, it was not a case for the admission of expert testimony.—*Stumore v. Shaw*, 68 Md. 11, 11 Atl. 360.

(b) The opinion of a witness, based on the testimony of other witnesses as to whether there was anything about a certain wagon

and horses attached thereto calculated to frighten an ordinarily quiet and well-broken horse, was inadmissible as expert testimony.—*Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884.

#### § 508. Matters involving scientific or other special knowledge in general.

(a) Persons having technical and peculiar knowledge may give their opinion when the question involved is such that the jurors are incompetent to draw their own conclusions from the facts without the aid of experts.—*White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

(b) Persons having technical knowledge on certain subjects may, as a general rule, give their opinions, when the jurors are incompetent to draw their own conclusions from the facts.—*Harris v. Consolidation Coal Co.*, 111 Md. 209, 73 Atl. 805.

(c) The general opinion among eminent jurists who have often been employed in cases of ejectment may be appealed to as evidence of what the law was then considered to be on a point where there are no adjudged cases to the contrary.—*Armstrong v. Ristean*, 5 Md. 256, 59 Am. Dec. 115.

#### § 509. Bodily condition.

##### Cross-References.

Cause and effect of personal injuries, see post, § 528.

Competency of experts, see post, § 537.

(a) Opinions of physicians as to a person's physical condition to marry, being more or less speculative or conjectural, if not misleading, should not be admitted where based entirely on nervous condition.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606.

(b) A trust was created for the benefit of the settlor and his wife for their joint lives, with a provision that, if said settlor should die leaving his wife and a child or children surviving him, the property should be distributed to the widow and the child or children, as if said settlor had died intestate and owning the property, and that, if said settlor should survive his wife, and die leaving children, the trust should be discharged, and the children take absolutely. Subsequently the settlor and his wife joined in a

bill to have the trust set aside, there being no children. *Held*, that expert evidence was inadmissible to prove that it was impossible for the wife to bear children.—*Ricards v. Safe Deposit & Trust Co.*, 97 Md. 608, 55 Atl. 384, 63 L. R. A. 145; *In re Ricards' Trust Estate*, Id. [Cited and annotated in 48 L. R. A. (N. S.) 866, 873, on doctrine as to possibility of issue extinct as affecting property rights.]

### § 510. Mental condition or capacity.

#### Cross-References.

See ante, § 478.

Competency of experts, see post, § 537.

#### Annotation.

Expert opinions as to sanity or insanity.—39 L. R. A. 305, note.

(a) In suit for death of a lineman coming in contact with a live wire, experts cannot give opinions as to his mental state, and so cannot testify whether he knew the danger of wires with a high current, whether a lineman could tell by examination whether insulation was only weather-proof, and not pure rubber covering, and whether every experienced lineman knows the danger of standing on a dry pole and handling alternating current wires without rubber gloves.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [Cited and annotated in 51 L. R. A. (N. S.) 846, 849, on photographs as evidence; in 32 L. R. A. (N. S.) 1094, 1118, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

### § 511. Handwriting.

#### Cross-Reference.

Comparison by experts, see post, §§ 561-567.

### § 512. Due care and proper conduct in general.

#### Annotation.

Admissibility of expert testimony in action for damages from escape and explosion of gas.—29 L. R. A. 345, note.

### § 513. Construction and repair of structures, machinery, and appliances.

#### Cross-References.

See ante, § 507.

Competency of experts, see post, § 539.

(a) An expert in digging sewer trenches and in the use of lagging in such work is competent to testify as to whether a sewer built adjoining the property of an individual should have been opened entirely or built in sections, as bearing on the approved method of building sewers.—*Hanrahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 312.

(b) An expert may not give his opinion in response to a question as to whether, if usual precautions had been taken for protecting a water pipe, a third person would have found some evidence of it.—*Hanrahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 312.

(c) In an action for injuries to a servant of a contractor erecting the superstructure of a bridge on concrete piers erected by another, caused by the collapse of a pier because not sufficiently hardened, evidence of those familiar with concrete construction as to the properties and hardening process of concrete, and the time it takes to dry out, and the usual time allowed for the hardening process, and their opinion as to the danger and natural result of placing heavy weights on a concrete pier before it has hardened, was legitimate evidence.—*Pennsylvania Steel Co. of Philadelphia v. Nace*, 113 Md. 460, 77 Atl. 1121.

(d) Where, in an action for the death of a lineman, coming in contact with a live wire, evidence showed that the insulation on the wire and adjacent wires had been cleanly cut, it was proper to permit an expert to testify that the purpose of removing insulation on the wires was to test them.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [Cited and annotated, see supra, § 510.]

(e) In an action against a railroad for damage to property by the construction of tunnels and operation of trains therein adjacent to the property, where the case was tried on evidence offered under the general issue, expert testimony was admissible to show that the defendant had not complied with a city ordinance requiring defendant to cover an open space between the tunnels with a shed supplied with smoke escapes.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654.

(f) A civil engineer may give his opinion as an expert as to whether a railroad was

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

properly constructed so as to provide outlets to drain the surface water from plaintiff's lands.—*Baltimore & S. P. R. Co. v. Hackett*, 87 Md. 224, 39 Atl. 510.

(g) In a suit for injuries received on a defective bridge, a builder, who was acquainted with the enduring qualities of timber, was properly allowed to state that he examined the bridge in question nearly a year after the accident, and that, in his opinion, the decay of the timbers must have set in at the time of the accident.—*Washington, C. & A. Turnpike Co. v. Case*, 80 Md. 36, 30 Atl. 571.

(h) In action against the lessor of a flour mill for breach of a covenant to repair, the evidence of an experienced miller was admissible that, in the condition in which the bolting cloth was when he examined it, a new cloth was a necessary repair.—*Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

#### § 514. Management and operation of vehicles, machinery, and appliances.

##### Cross-Reference.

Competency of experts, see post, § 539.

##### Annotation.

Distance within which sparks from a properly equipped engine will set fire, as a subject of expert testimony.—22 L. R. A. (N. S.) 1039, note.

(a) It was proper to permit a competent witness to testify as to the distance in which a car equipped like the one which struck plaintiff and under similar conditions could be stopped as bearing on the issue whether the motorman could have stopped the car.—*Capital Traction Co. v. Contner*, 120 Md. 78, 87 Atl. 904.

(b) Expert witnesses who are thoroughly acquainted with the practical working of the machinery used in the manufacture of flour by the burr and roller processes, and have knowledge of the details of the working of each, may, where effect of adopting the roller process is in issue, be questioned as to "the physical conditions or facts in the operation of burr and roller mills."—*Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 7 Atl. 257.

(c) A mechanic may be permitted to state what contrivance would have prevented an injury to a passenger on a car crossing a

bridge, caused by a bridge projection.—*Baltimore & Y. Turnpike Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346.

#### § 515. Conduct of business.

##### Cross-References.

Common knowledge and experience, see ante, § 507.

\*Competency of experts, see post, § 540.

#### § 516. Custom or usage.

#### § 517. Laws of other states or countries.

(a) The construction of the statutes and the common law of a jurisdiction may be shown by a lawyer acquainted therewith.—*Dimpfel v. Wilson*, 107 Md. 329, 68 Atl. 561, 13 L. R. A. (N. S.) 1180.

(b) Testimony of lawyers is competent to prove the law of another state.—*Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317.

#### § 518. Construction of written instruments.

##### Cross-References.

See ante, § 461.

Letters patent, see "Patents," § 159.

(a) Evidence by an insurance company through its secretary, as an expert, to show that the term "carpenters," as used in its policy, was generally understood in the office of the company to refer to the employment and work of carpenters in erecting and adding to buildings insured, is inadmissible.—*Washington Fire Ins. Co. v. Davison*, 30 Md. 91.

#### § 519. Nature, condition, and relation of objects.

(a) Whether windows in the wall of a stable in which a large number of horses were kept would, in the ordinary use to which windows are put, create a nuisance, is not a subject of expert testimony.—*Metropolitan Sav. Bank v. Manion*, 87 Md. 68, 39 Atl. 90.

#### § 520. Quantity or capacity.

#### § 521. Value.

#### § 522.—In general.

#### § 523.—Services.

(a) In an action by a railroad to set aside an order of the Public Service Commission fixing rates, the court improperly excluded opinions of experts that the actual cost of transportation exceeded the rates established.—*Public Service Commission v. North-*

*ern Cent. Ry. Co.*, 122 Md. 355, 90 Atl. 105;  
*Same v. Baltimore & O. R. Co.*, 122 Md. 393,  
90 Atl. 119.

#### § 524.—Real property.

(a) In proceedings to condemn land to widen a street, the court properly permitted a question asked of a real estate agent offered as an expert, calling for his opinion as to the value of the land.—*City of Baltimore v. Yost*, 121 Md. 366, 88 Atl. 342.

(b) The value of land, contract for sale of which was breached, may be proved by testimony of one familiar with the value of property in the neighborhood, and who examined the property in question.—*Horner v. Beasley*, 105 Md. 193, 65 Atl. 820.

#### § 525.—Personal property.

(a) In an action against a storage and forwarding company for damages to plaintiff's household goods, testimony by a furniture expert as to their value at their redelivery is admissible to assist the jury in estimating the damage.—*Security Storage & Trust Co. v. Denys*, 119 Md. 330, 86 Atl. 613.

#### § 526. Cause and effect.

##### *Cross-References.*

See ante, § 519.

Competency of experts, see post, § 544.

Matters of common knowledge, see ante, § 507.

#### § 527.—In general.

(a) In an action by a materialman against a contractor for the unpaid balance due for materials furnished in the erection of a building, in which action defendant claimed damages in the sum of \$8,000 for additional cost incurred by him in erecting the building, caused by the failure of plaintiff to furnish the materials according to contract, expert testimony to show that the additional cost was incurred by reason of plaintiff's breach of contract was inadmissible, since the fact, being capable of reasonable ascertainment, could have been established in the ordinary way, especially where the testimony in some particulars was based on facts not in evidence, and was vague, uncertain, and speculative.—*Stewart v. American Bridge Co.*, 108 Md. 200, 69 Atl. 708.

#### § 528.—Injuries to the person.

(a) In action for injuries claimed to have been caused by fall resulting from fright,

testimony of expert that the probable effect of such fright would be to impair the plaintiff's nervous system and her control of her muscular movements *held* properly admitted.—*Baltimore & O. R. Co. v. Harris*, 121 Md. 254, 88 Atl. 282.

(b) In an action for personal injuries, a physician who examined plaintiff shortly after the injury may be allowed to testify as to his prognosis from such examination, where he also gave the results of subsequent examinations made by him, since in such examinations his conclusions just after the accident as to the probable results might be very important.—*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875.

(c) Where a physician who is examined as an expert in an action against a street-railway company for personal injuries testifies as to having found plaintiff in an abnormal condition; he may state whether such condition could have resulted from the accident complained of.—*United Rys. & Electric Co. v. Seymour*, 92 Md. 425, 48 Atl. 850.

(d) An expert may give his opinion as to whether deafness of a person injured was the natural and probable result of the accident.—*Baltimore City Pass. Ry. Co. v. Tanner*, 90 Md. 315, 45 Atl. 188.

#### § 529.—Injuries to property.

(a) On the issue whether a city and its contractor exercised proper care in the construction of a sewer, causing injury to adjoining property, an expert may testify as to the effect of water standing in the sewer on the lagging and on the foundations of an adjoining dwelling house to aid the jury in determining the issue.—*Hanrahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 312.

(b) In an action against a railroad for damage to property by the construction of tunnels and operation of trains therein adjacent to the property, expert testimony to show that the quantity of smoke cast on plaintiff's land was increased by the existence of the tunnels in that neighborhood over what it would have been if there had been no tunnels there was inadmissible.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654.

#### §§ 530-534. Damages.

##### *Cross-Reference.*

Competency of experts, see post, § 543½.



(a) In an action for injury to real property, a witness testifying merely as an expert is not permitted to testify either as to the fact or the amount of damage resulting from the injurious act, but may give his opinion as to the value of the property before and after the commission of the alleged tort.—*Baltimore Belt R. Co. v. Sattler*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

(b) Expert testimony as to the fact that smoke, vapors, and vibrations occasioned by the tunnels and operation of trains therein caused a diminution in the value of plaintiff's land was inadmissible.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654.

(c) Expert testimony as to the exact amount and extent of damage by construction and operation of railroad tunnels to adjoining property is inadmissible.—*Baltimore Belt R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654.

#### (C) COMPETENCY OF EXPERTS.

##### *Cross-References.*

To compare handwriting, see post, § 563.  
In criminal prosecutions, see "Criminal Law," §§ 477-481.

Review of rulings involving discretion of lower court, see "Appeal and Error," § 971.

#### § 535. Necessity of qualification.

(a) In an action for negligence causing the running away of the plaintiff's mules and his consequent injury, expert evidence as to the characteristics of mules was properly refused in the absence of any foundation establishing the witness' claim to expert knowledge.—*Cecil Paper Co. v. Nesbitt*, 117 Md. 59, 83 Atl. 254.

#### § 536. Knowledge, experience, and skill in general.

##### *Cross-References.*

Comparison of handwriting, see post, § 563.

Effect of testimony of expert as dependent on knowledge or skill, see post, § 572.

(a) A witness who had been shown to have been both a grower and canner of tomatoes was properly qualified to express an opinion as to the merchantable character of such fruit.—*Dolby v. Laramore*, 121 Md. 618, 89 Atl. 442.

(b) A freight clerk with 18 months' experience held not qualified to testify as to the

amount of shrinkage in transit of wool.—*New York & B. Transp. Line v. Lewis Baer & Co.*, 118 Md. 73, 84 Atl. 251.

(c) In slander, wherein defendant was charged with saying that plaintiff was a girl of "loose character," a witness well acquainted with the neighborhood in which the words were used, and who had heard them applied to females a great many times, was competent to testify that the words mean that a woman is not virtuous.—*Brinsfield v. Howeth*, 110 Md. 520, 73 Atl. 289.

(d) A graduate of a medical school who had practiced for five years was properly permitted to testify as a medical expert.—*Annapolis Gas & E. L. Co. v. Fredericks*, 109 Md. 595, 72 Atl. 534.

(e) An expert must possess such intelligence and familiarity with the subject as will enable him to express a well-informed opinion; the competency of the expert depending on the subject of the inquiry.—*Baltimore Refrigerating & Heating Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066.

(f) A cold-storage manager for 8 years, who had been 20 years in the business, and who had visited and examined various cold-storage plants, could testify that cold-storage plants usually had sewers in the cellars, and that the ice boxes were usually constructed air and water tight.—*Baltimore Refrigerating & Heating Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066.

#### § 537. Bodily and mental condition.

##### *Cross-Reference.*

Cause and effect, see post, § 544.

(a) Evidence held sufficient to qualify a witness to testify as an expert on neurasthenia.—*Baltimore, C. & A. Ry. Co. v. Moon*, 118 Md. 380, 84 Atl. 536.

(b) Where a physician had made a physical examination of one suing for a personal injury and testified that X-ray plates substantiated his diagnosis, he was competent to give the result of the examination.—*United Rys. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75. [Cited and annotated in 51 L. R. A. (N. S.) 859, on photographs as evidence.]

(c) A physician who frequently met insured socially could state the condition of his general health, though he rarely treated him

professionally.—*Standard Accident & Life Ins. Co. of Detroit, Mich. v. Wood*, 116 Md. 575, 82 Atl. 702.

(d) Where a medical witness had been a practicing physician since 1895, was a graduate of Baltimore Medical College, and had been connected with the Maryland General Hospital for six years, had attended plaintiff for four or five days when she received injuries for which recovery was sought, and on other occasions, including a visit a few days before the trial, he was qualified to testify as to the ultimate effect of her condition on her mind.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606.

(e) A physician need not be an alienist, in the sense that he is a specialist in that line, to qualify him to testify as to mental conditions.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606.

(f) A physician may give his opinion as to the mental capacity of testator, without first stating the circumstances upon which the opinion is founded, even though the physician has never attended the testator professionally, except to prescribe for him on two different occasions.—*Jones v. Collins*, 94 Md. 403, 51 Atl. 398.

(g) That one has nursed 20 or 30 cases of bone felon where lancing had been resorted to does not qualify her to state, as an expert, that an incision in such a case was not half way to the bone, because "it did not lay open," and "when an incision is deep it always lays open."—*Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094.

#### § 538. Due care and proper conduct in general.

(a) A qualified expert was competent to testify whether any precautions were taken against injuring a house by an excavation in an adjoining alley, where, though not present when the excavation was made, he had seen it the next day when only partially filled, and could see what had been done.—*Whiting-Middleton Const. Co. v. Preston*, 121 Md. 210, 88 Atl. 110.

(b) The foreman of an elevator, who is familiar with the operation of tugs, and had frequent opportunities of observing how they brought vessels into the wharf at the elevator, is competent to testify as to whether a certain vessel was skillfully or negligently

brought to the pier by the captain of a tug, to be placed in position to be loaded.—*Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338.

#### § 539. Machinery and mechanical devices and appliances.

(a) In an action for damages for breach of a warranty in the sale of an automobile, testimony by the salesman, who admitted he knew practically nothing about the mechanical construction of the car, that it was defective, is inadmissible, because he was not an expert.—*White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617.

(b) One who had been a seafaring man for 40 years and a captain for 30 years, and who had had experience in towing all over the world, was competent to testify as an expert as to the sufficiency of a towing hawser.—*American Towing & Lightering Co. v. Baker-Whiteley Coal Co.*, 111 Md. 504, 75 Atl. 341.

(c) A metal worker of 35 years' experience, who learned his trade with a railroad company, and was familiar with high-grade pressure steel pipes, and knew the effects of sulphur water on them, but who had not worked in mines, and did not know the methods of inspecting high-pressure pipes by those engaged in mining, was not competent to testify as an expert, as to whether it was safe to maintain high-grade pressure pipes in sulphur water in a coal mine, whether a proper testing of the pipes would disclose a defect therein, and whether the method of inspecting the pipes was proper.—*Harris v. Consolidation Coal Co.*, 111 Md. 209, 73 Atl. 805.

(d) One who had been engaged in constructing and building sewers and drains for 20 years, though not an engineer, and not having a collegiate education as an engineer, was qualified to testify, as an expert, as to the negligent construction of a sewer.—*Cahill v. City of Baltimore*, 93 Md. 233, 48 Atl. 705.

(e) The testimony of a surveyor and civil engineer, who had been a bridge superintendent, was admissible to prove that the bridge had been constructed of inferior materials and workmanship, though his opinion was based on an examination of the materials and workmanship in the foundations of the

abutments two years after the bridge was destroyed—*Harford County Com'rs v. Wise*, 71 Md. 43, 18 Atl. 31. [Cited and annotated in 51 L. R. A. (N. S.) 567, on opinion evidence as to safety of place or appliance.]

#### § 539½. Construction and operation of railroads.

(a) An assistant master mechanic of a railroad, familiar with the construction of a particular locomotive, having testified that it was in good condition at the time of an accident caused by its running wild, was competent to testify that when its reverse bar was in the center, as it appeared to have been left just before the accident, the locomotive could not move because the ports through which the steam enters the steam chest were closed, and the opening of the throttle would not open them.—*Maryland, D. & V. Ry. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005. [Cited and annotated in 32 L. R. A. (N. S.) 1086, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

#### § 540. Conduct of business, custom, or usage.

#### § 541. Laws of other states or countries.

(a) A lawyer, 34 years of age and residing in New York city, is competent to testify whether a receiver, in making a sale under the statute law of New York, complied with its requirement as to notice.—*Consolidated Real Estate & Fire Ins. Co. v. Cashow*, 41 Md. 59. [Cited and annotated in 25 L. R. A. 453, on oral proof of foreign laws.]

#### § 542. Physical facts.

(a) A witness who had no personal experience in the formation of gases in the earth, or in a pit dug in the earth, but whose information was derived from reading on the composition of air, was not qualified to testify as an expert as to whether there would likely be any definite chemical gases, and, if so, what, in soil composed of ashes, garbage, refuse, etc., deposited to fill up the land.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818. [Cited and annotated in 32 L. R. A. (N. S.) 1127, on admissibility of evidence of condition before and after accident of

property whose defects alleged to have caused injury.]

(b) Where a witness has never noted the effect of air on garbage, nor made any tests as to how long it takes garbage to decompose, he is not qualified to testify whether in a garbage dump 25 feet deep the decomposition producing carbon dioxide progresses uniformly throughout, or more rapidly in one part than in another, or whether the decomposition would be completed throughout in six or seven years, or so far completed as no longer to give off carbon dioxide.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818. [Cited and annotated, see supra.]

(c) A witness who had no experience as to the formation of gases during actual excavation, but only in electrical conduits completed and in use, was not competent to testify whether there was any effective way of dispersing dioxide gas in dangerous quantities in excavation work.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818. [Cited and annotated, see supra.]

(d) Where a witness could only say what he would expect as to the formation of gas under the circumstances in question, and not what gases would be formed, his opinion was properly excluded.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818. [Cited and annotated, see supra.]

#### § 543. Value.

(a) Certain witnesses held not qualified to testify as to the value of board.—*Giering v. Sauer*, 120 Md. 295, 87 Atl. 774.

(b) On an issue of the value of plaintiff's services in nursing decedent preceding his death, a witness, who had acted as an untrained nurse for 15 years, was properly permitted to state the value of the services rendered by plaintiff, who was also an untrained nurse.—*Doyle v. Gibson*, 119 Md. 36, 85 Atl. 961.

(c) In an action by a subcontractor on a contract providing that payment was to be made when payments were received by the contractor, and judgment notes were issued in favor of the contractor upon which judgments by confession had been entered, evidence of plaintiff, who testified that he had been a contractor all his life, and had installed nearly a hundred plants of the character involved in the contract, and had occa-

sion to value plants of the same kind, and would value the plant at a certain amount was admissible, as tending to show by a qualified expert that the judgments were collectible.—*Rumsey Electrical Mfrs. Co. v. Livers*, 112 Md. 546, 77 Atl. 295; *Rumsey v. Livers*, Id.

(d) Where witnesses in an action to review a tax assessment on the easements held by a gas company in the streets of a city had been students of taxation and tax laws for many years, had been called upon to value the easements of public service corporations in many cities, and knew the character and extent of the easements of the gas company, they were qualified as experts to give their opinions as to the correctness of the assessment in question.—*Consolidated Gas Co. v. City of Baltimore*, 105 Md. 43, 65 Atl. 628.

(e) Where a witness is shown to be qualified to value an easement in a city street, it is not necessary that he be qualified to value the easement as real estate, since the value of the easement does not depend upon whether it is classed as real or personal property.—*Consolidated Gas Co. v. City of Baltimore*, 105 Md. 43, 65 Atl. 628.

(f) In an action for the destruction of a vessel, a waterman of over 20 years' standing, who had a special knowledge of the vessel destroyed, and knew the value of boats, was competent to express an opinion as an expert on the value of the vessel destroyed.—*Gossage v. Philadelphia, B. & W. R. Co.*, 101 Md. 698, 61 Atl. 692.

(g) In an action for services as nurse in B., the testimony of a trained nurse, who testified that she was acquainted with the value of services of nurses, and that she received her training in B., is admissible, though she did not locate the place to which her knowledge applied.—*Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324.

#### § 543½. Damages.

#### § 544. Cause and effect.

(a) An experienced plumber, knowing the water pressure in the part of the city where a pipe bursted, was competent to say whether the lessening of such pressure had a tendency to cause pipes to break.—*E. Beck & Co. v. Hanline Bros.*, 122 Md. 68, 89 Atl. 377.

(b) A physician, who had attended plain-

tiff, suing for a personal injury, and who had diagnosed the injury, is competent to give an opinion, within his knowledge, as to whether the injury will be permanent or not, as a basis for the award of damages.—*United Rys. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75.

(c) A physician, present and seeing other physicians examining plaintiff, suing for a personal injury, held competent to express an opinion as to the character of the injury, and whether permanent or not.—*United Rys. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75.

(d) Where a medical witness had not only not qualified as an electrical expert, or as a medical expert acquainted with effects of an electric current, but cross-examination showed that he was not so qualified, it was error to allow him to testify, as to whether an electric shock from a wire or mere fright caused plaintiff's illness.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606. [Cited and annotated in 33 L. R. A. (N. S.) 104, on waiver of objection to testimony by cross-examination.]

(e) Where a medical witness did not profess to be an expert on electricity except as affecting the body, his testimony as to whether, where a live wire did not touch the body or clothing, a person could have received an electric current from it, was properly excluded.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606. [Cited and annotated, see supra.]

(f) Where a medical witness testified he himself had had two shocks from lightning, and had had three patients suffering from electric shocks, he was sufficiently qualified to say whether in his judgment the condition in which he had found plaintiff on a certain occasion was such as might naturally and probably have been produced by an electric shock.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606. [Cited and annotated, see supra.]

(g) An experienced grazier is a competent witness, on a hypothetical statement of certain disturbances and frightening of cattle, to testify as to the effect of such disturbances upon their fattening properties; but he will not be allowed to say, as matter of opinion, that the construction of a railroad

through the pasture where they were feeding would disturb them, such opinion not falling within his peculiar qualification.—*Baltimore & O. R. Co. v. Thompson*, 10 Md. 76.

**§ 545. Preliminary evidence as to competency.**

(a) Before a witness can testify as an expert, his fitness must be established by a preliminary examination, and the court may examine the witness, or find the fact from the testimony of others.—*Harris v. Consolidation Coal Co.*, 111 Md. 209, 73 Atl. 805.

**§ 546. Determination of question of competency.**

*Cross-References.*

Nonexpert witnesses, see ante, § 498½.

Review of questions of fact, see "Appeal and Error," § 992.

(a) In an action for the death of a servant, where a witness stated that during the 15 years he had been engaged in excavating work he had only encountered gas in two places, it was within the discretion of the trial court to exclude his opinion as an expert as to gas to be encountered in excavation work.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818. [Cited and annotated in 32 L. R. A. (N. S.) 1127, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(b) Admissibility of expert evidence is largely discretionary.—*Baltimore Refrigerating & Heating Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066.

**(D) EXAMINATION OF EXPERTS.**

*Cross-References.*

As to handwriting, see post, §§ 566, 567.

Change of venue for convenience of expert witnesses, see "Venue," § 52.

In criminal prosecutions, see "Criminal Law," §§ 483-490.

**§ 547. Mode of examination in general.**

*Cross-Reference.*

In equity, see "Equity," § 352.

(a) Where X-ray plates and photographs had been proved and interpreted by a physician, it was competent for him to explain them to the jury.—*United Rys. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75. [Cited and annotated in 51 L. R. A. (N. S.) 859, on photographs as evidence.]

(b) A question asked an expert as to the ordinary method adopted to prevent the breakage of water pipes, which assumes without proof that the testimony of a witness showed that something had been left undone which might have been done, is improper.—*Hanrahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 312.

(c) In an action for the price of an electric light plant, it was proper to permit plaintiff, in rebuttal, to examine his expert witnesses in reference to their views and experience as to what defendant's experts had testified were, in their opinion, injudicious features of the method of erecting the plant.—*Kernan v. Crook, Horner & Co.*, 100 Md. 210, 59 Atl. 753.

(d) A grazier was called as an expert, and was asked "What, in your opinion, is the difference between the value of cattle depastured in Hayes's big pasture in the fall, compared with what they would have been had they been pastured quietly, and if they had not been disturbed by the making of the railroad?" Held, that the question was incompetent, as assuming what had not been proved, to wit, that any deterioration which the cattle had sustained, and also that they had deteriorated at all, was owing to the construction of the railroad.—*Baltimore & O. R. Co. v. Thompson*, 10 Md. 76.

**§ 548. Questions and answers based on personal knowledge of expert.**

(a) A question to an opinion witness as to the value of board, "From your own experience boarding alone and with your wife, what do you think would be a fair price for the board of Mr. G. in his lifetime?" and also as to what was a fair price for a nurse's services, was improper.—*Giering v. Sauer*, 120 Md. 295, 87 Atl. 774.

(b) An answer, "Yes, I am satisfied that the doctor examined his heart," before the anæsthetic was administered, was not objectionable as an inference.—*Standard Accident & Life Ins. Co. of Detroit, Mich. v. Wood*, 116 Md. 575, 82 Atl. 702.

(c) In an action for the price of an electric light plant, it was proper to permit plaintiff to ask his expert witness, who had superintended the erection of the plant, to state of his own knowledge what was the character of the dynamo, and how many lights it was

expected to furnish.—*Kernan v. Crook, Horner & Co.*, 100 Md. 210, 59 Atl. 753.

(d) A question to the miller as to the effect upon the quality and value of the flour manufactured in the mill "during the lease," while the bolting cloths were in the worn-out condition described by him, because of the want of necessary repairs to them, was too broad, as the witness only examined the cloths at one point of time during the lease.—*Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

**§ 549. Questions and answers based on facts testified to by expert.**

(a) A question asked a physician, "What will be the ultimate effect of the condition from which the plaintiff is suffering, as you have testified, upon her mind?" where based on the condition in which the witness had testified that he had found plaintiff, and which the examination of himself and another physician had shown, was not objectionable in form.—*United Rys. & Electric Co. v. Corbin*, 109 Md. 442, 72 Atl. 606.

**§ 550. Questions and answers based on testimony of others.**

(a) Where the mental capacity of the testatrix was questioned, a medical expert cannot testify as to his opinion as to her competency, based upon part of the testimony which he read and part which he heard during the trial.—*Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852.

(b) Where an expert witness had not seen a water pipe which broke, and knew nothing of it, and had merely heard the testimony of a witness on the subject, a question "Do you know what causes a breakage in a case of that sort?" was too broad and vague.—*Hanrahan v. City of Baltimore*, 114 Md. 517, 80 Atl. 312.

(c) It is error to admit the testimony of experts, on the issue of testamentary capacity of J., in answer to the question, what would have been the effect of the mental condition of J. had he taken the medicine prescribed by C. "in the quantities, and as frequently as prescribed by him," for the nine days just before she executed the will; C. having testified that he directed M. to give J. opiates of certain kinds, and in certain quantities every three hours alternately, un-

less asleep, and often enough to keep her under the influence of it; and M. having testified that no one but she gave J. any medicine, and that she only gave her toddy frequently, and one pill before the will was executed, and three thereafter; and one witness having testified to having seen M. give J. medicine twice within an hour—once a pill and once liquid; and another witness, who was with J. as a nurse from the day before she made her will, testifying that during the time she was there M. gave J. the pills regularly, and as much more frequently as necessary to relieve the pain.—*Robinson v. Jones*, 105 Md. 62, 65 Atl. 814.

(d) If the facts are doubtful, and remain to be found by the jury, an expert, who has heard the evidence, cannot give his opinion upon the case on trial, but he may be asked his opinion upon a similar case hypothetically stated.—*Baltimore & L. Turnpike Co. v. Cassell*, 66 Md. 419, 7 Atl. 805.

(e) An expert who has heard all the testimony in a case as to sanity may be asked what his opinion would be, "upon the hypothesis that the testimony given by the witnesses, etc., is all true."—*Jerry v. Townsend*, 9 Md. 145. [Cited and annotated in 36 L. R. A. 64, on witness' right to give opinion as to sanity or mental capacity; in 39 L. R. A. 310, on expert opinions as to sanity or insanity.]

**§ 551. Hypothetical questions and answers.**

**§ 552.— In general.**

*Annotation.*

Opinion of expert witness as basis of question to other witnesses.—29 L. R. A. (N. S.) 537, note.

(a) On a will contest, a hypothetical question to a physician, as to the testator's capacity, based on evidence of the habits of testator and diseases from which he suffered, which evidence was insufficient to show that the testator was incompetent to make a will, was properly excluded.—*Baughner v. Gesell*, 103 Md. 450, 63 Atl. 1078.

(b) It is not necessary to put the evidence in the form of a hypothetical question for the opinion of an expert, he being familiar therewith.—*Baltimore City Pass. Ry. Co. v. Tanner*, 90 Md. 315, 45 Atl. 188.

**§ 553.—Form and sufficiency of questions.**

(a) Hypothetical question *held* not to have assumed the existence of a fact not proven.—*E. Beck & Co. v. Hanline Bros.*, 122 Md. 68, 89 Atl. 377.

(b) In an action for damages to property from the breaking of a water pipe on defendants' premises, a question as to means of preventing bursting of pipes in an "extraordinary freeze," without further defining such freeze, *held* properly excluded.—*E. Beck & Co. v. Hanline Bros.*, 122 Md. 68, 89 Atl. 377.

(c) A question to an expert whether there is any usual method of preventing the falling of houses by reason of the digging of a trench close by was too general, as conditions vary, and the question should have been made applicable to the facts of the particular case.—*Whiting-Middleton Const. Co. v. Preston*, 121 Md. 210, 88 Atl. 110.

(d) A hypothetical question put to an expert as to the possibility of stopping a train within a specified distance, which omits any reference to the speed at which the train was running, omits an element forming an essential basis on which to support an answer.—*Northern Cent. Ry. Co. v. Green*, 112 Md. 487, 76 Atl. 90.

(e) A hypothetical question must express every material element of the hypothesis founded on the evidence, and it must not import into the question any element not founded on the evidence.—*Northern Cent. Ry. Co. v. Green*, 112 Md. 487, 76 Atl. 90.

(f) Hypothetical questions on which experts gave the opinion that plaintiff's cattle contracted Texas fever in the pens of defendant carrier where they were unloaded to be fed were objectionable in assuming, contrary to the fact, that, when they reached defendant's line, they were reloaded into cars other than those in which they were brought there, and omitting reference to the fact that between the alleys, through one of which southern cattle were taken to their pens, and through the other of which northern cattle were taken to their pens, was an alley 10 feet wide, over which no cattle passed.—*Baltimore & O. R. Co. v. Dever*, 112 Md. 296, 75 Atl. 352.

(g) A question as to what a witness would expect as to the formation of gas from his knowledge of the gases given out in vegetable decomposition was properly excluded as assuming the presence of vegetable matter at the place in question, where the only evidence on the point was that garbage was supposed to be collected separately and deposited at other dumps, and that the place in question was an ash dump, and not a garbage dump.—*State v. Flanigan*, 111 Md. 481, 74 Atl. 818. [Cited and annotated in 32 L. R. A. (N. S.) 1127, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(h) In a suit to contest a will on the ground of testamentary incapacity, a hypothetical question put to physicians, calling for their opinion as to testamentary capacity, which contained a description of the situation and environment of testatrix, and which presents the pertinent facts of her personal history and the progress of the disease with which she was afflicted, of the changes in her habits and disposition as she approached the testamentary period, of her use of profane language, of her relations with her daughter and son-in-law, including an account of a quarrel between the latter and herself, of the failure of memory, drowsiness, vacillation of mind, delusions, and hallucinations, etc., was sufficient on which to base an opinion.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(i) The statement in the hypothetical question that testatrix thought some one had a design on her, made in connection with a recital of the fact that during the year before and the early part of the year in which the will was executed testatrix had a dread of her house being robbed, and that some one would break in and do her bodily harm, and that on occasions in the two months preceding the execution of the will she imagined she saw the flash of a pistol fired through her window and saw the ball fall on the floor, and could not be persuaded of her error, was not open to the objection that no explanation was given as to the nature of the design and as to its truth or falsity.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(j) The failure of a hypothetical question, put to a physician testifying in a suit to

contest a will on the ground of testamentary incapacity, to state the contents of the will disinheriting in part a daughter of testatrix, was not prejudicial to the party seeking to sustain the probate of the will, where the question contained the declarations of testatrix, as shown by the evidence, that her daughter should have all she possessed.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(k) Where a hypothetical question, asked physicians testifying in a suit to contest a will on the ground of testamentary incapacity, would not have been more favorable to the party objecting to the question had it set forth the result of the testimony of a witness, the omission to do so did not render the question defective.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(l) A hypothetical question, stating that testatrix drew a knife on her son-in-law on the occasion of a quarrel shown by the testimony, while the evidence of the quarrel showed that testatrix jabbed or cut at him with a knife, was not objectionable as not conforming to the evidence.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(m) A hypothetical question, put to physicians testifying in a suit to contest a will on the ground of testamentary incapacity, may include the matter of the delusions of testatrix as shown by the evidence to throw some light on the question of her mental condition.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(n) Hypothetical questions need not include all the facts in evidence, and, when they are challenged for any supposed defects, the sole inquiry is whether they contain a fair presentation of the case as proved.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(o) Since litigants in an action at law are entitled to the judgment of a jury on all the facts, expert testimony on hypothetical questions which substitute inferences for facts ought to be received with caution.—*Miller v. Leib*, 109 Md. 414, 72 Atl. 466.

(p) Hypothetical question designed to show a physician's professional ignorance or neglect in treating a broken hip, were improper where they failed to refer to the patient's tubercular condition, since the state of her health had an important bearing on

the proper treatment of the injury.—*Miller v. Leib*, 109 Md. 414, 72 Atl. 466.

(q) A hypothetical question should be not only based on facts in evidence, but should be so framed as to fairly represent those facts, and not give the situation a false color by the method of their statement.—*Miller v. Leib*, 109 Md. 414, 72 Atl. 466.

(r) A hypothetical question omitting vital and essential facts testified to is properly disallowed.—*Baltimore, C. & A. Ry. Co. v. Trader*, 106 Md. 635, 68 Atl. 12.

(s) In an action on an accident insurance policy, it was not error to refuse to allow a long hypothetical question on redirect examination based upon assumed facts of an autopsy on insured's death, there being no evidence as to the facts disclosed at the autopsy.—*Thomas v. Fidelity & Casualty Co. of New York*, 106 Md. 299, 67 Atl. 259.

(t) On an issue as to the capacity of a testator, a hypothetical question to a medical expert based on an assumption of fact shown only by hearsay testimony was not admissible.—*Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082.

(u) Questions to expert witnesses, which assume facts that have not been proven in the case, are erroneous.—*United E. L. & P. Co. v. State*, 100 Md. 634, 60 Atl. 248. [Cited and annotated in 32 L. R. A. (N. S.) 1098, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(v) Where there is positive evidence showing the mental capacity of a testator to make a valid will, and the facts and circumstances adduced to show his mental incapacity are legally insufficient to furnish any foundation for an inference that he was incompetent, it is not error to refuse to permit medical experts to answer hypothetical questions as to his mental condition, based on such facts and circumstances.—*Berry v. Safe Deposit & Trust Co.*, 96 Md. 45, 53 Atl. 720. [Cited and annotated in 3 L. R. A. (N. S.) 172, on ability to comprehend property and natural objects of bounty as test of testamentary capacity; in 27 L. R. A. (N. S.) 15, 28, 32, 53, 69, 73, on what is testamentary capacity.]

(w) An assumption in a hypothetical question, in regard to the mental capacity of a testator, that his failure to comprehend a



certain conversation was due to the "condition of his mind," was erroneous, where the evidence showed the testator comprehended the conversation when the same was explained to him by a third person present at the time, and hence the conclusion that the testator was mentally incapacitated was unwarranted.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(x) In a will contest, a hypothetical question to a medical expert, for the purpose of proving testator's mental incapacity, was erroneously submitted, where it assumed that certain statements made by the testator were so made because of a "misconception" on the testator's part, since "misconception" may mean an insane delusion, the question thereby assuming the fact to be proved.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(y) A hypothetical question, submitted to a medical expert for the purpose of proving a testator's mental incapacity, was erroneously submitted, where it assumed that the testator had made certain statements because of a "misconception," such word being used in the sense of mistake; since the assumption that a man makes a mistake is not sufficient to justify the conclusion that he is incapable of executing a will.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(z) A hypothetical question as to the inference in regard to a testator's mental capacity to be drawn from his weak physical condition was erroneously submitted, where the question assumed that such condition was caused by old age, disease, and grief over the death of his wife; the assumption that weak physical condition denotes mental degeneration being false.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(aa) In a will contest, where it had been proved that the testator habitually repeated a certain word, a hypothetical question to a medical expert, for the purpose of proving the testator's mental incapacity, which related one incident of the repeating of this word and excluded the testator's habit of using the same, was erroneously submitted, since it gave a wrong coloring to the facts in the omission of part of the evidence in re-

gard to the facts assumed.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(bb) In a will contest, a hypothetical question to a medical expert, for the purpose of proving testator's mental incapacity, was erroneously submitted, where based on facts in regard to which no evidence had been submitted.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(cc) A hypothetical question to a medical expert for the purpose of proving the testator's mental incapacity was erroneous, where the facts assumed were based on hearsay testimony.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(dd) A hypothetical question was improperly admitted where it was not sufficiently explicit to warrant the formation of an opinion.—*Safe Deposit & Trust Co. v. Berry*, 93 Md. 560, 49 Atl. 401.

(ee) Where a physician is examined as an expert as to the effect of injuries received by plaintiff by being run over by a street car, a hypothetical question based on the evidence is not inadmissible because the question does not refer to all the testimony bearing on plaintiff's condition.—*United Rys. & Electric Co. v. Seymour*, 92 Md. 425, 48 Atl. 850. [Cited and annotated in 34 L. R. A. (N. S.) 786, on evidence as to speed of street cars.]

(ff) Where the performance of certain services by plaintiff for defendant was in issue, a question to a witness as an expert, based upon the assumption that such services had been performed, and calling for the value thereof, is improper.—*Walker v. Rogers' Ex'x*, 24 Md. 237.

#### § 554.—Scope and sufficiency of answers.

#### § 555. Facts forming basis of opinion.

##### Cross-References.

See ante, § 511.

Questions and answers based on facts testified to by expert, see ante, § 549.

(a) Where an expert was asked if he saw any lagging in a trench to prevent the sinking of an adjoining house, to which he replied that there was some lagging, but it was improperly put in, he should not have been permitted to say the lagging was improperly put in without first informing the jury how

it was put in.—*Whiting-Middleton Const. Co. v. Preston*, 121 Md. 210, 88 Atl. 110.

(b) Where components of an embalming fluid used on a body were in issue, and the undertaker had given a physician samples of a fluid used in his work, but could not say that the samples were of the same composition as those used on the body, evidence of the analysis of the samples was not admissible.—*Standard Accident & Life Ins. Co. of Detroit, Mich. v. Wood*, 116 Md. 575, 82 Atl. 702.

(c) In a suit to contest a will on the ground of testamentary incapacity, the testimony of a physician that he had attended testatrix once or twice a week during the last three or four years of her life, that she had suffered from Bright's disease, accompanied by heart trouble, that her condition physically and mentally was gradually failing, that in the early part of the year during which the will was executed her mind at times was very feeble, that she was forgetful, that on several occasions while she would be talking she would fall asleep, that in July of that year, the month in which the will was executed, she was failing physically and mentally, followed by the statement on cross-examination that she might have been more herself at times when he was not present, and that if she was in such condition she might have been capable to make a will, was not too vague and uncertain to form the basis of an opinion that testatrix was incapable during July to execute a will.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(d) In a suit to contest a will on the ground of testamentary incapacity, the court may suspend the examination in chief of the caveator to allow physicians to answer hypothetical questions calling for their opinion as to the capacity of testatrix as against the objection that the hypothetical questions could not include the facts to which the caveator might testify.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(e) Where a hypothetical question is proper under the evidence at the time it is propounded, it is not error to overrule an objection on the ground that it does not include testimony that may be subsequently given.—*Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

(f) On an appeal to the Baltimore City Court from an assessment by the Appeal Tax Court, one of the special assessors of the Appeal Tax Court who had passed on the assessment was called as a witness, and, after qualifying as an expert on valuations, testified on direct examination to a personal examination of the property assessed, and to his personal knowledge of sales and rentals in the neighborhood, and to his information from the owners and tenants, and from the record of sales kept by the assessors. He was then asked to give the data relied on by him in making this assessment, which related exclusively to sales, leases, or mortgages on property in that neighborhood of which he was informed by others, and to give in each case the source of his information, and to give the data and information relied on in making the assessment in question, which was derived exclusively from an inspection of the land records, and also to give the data and information relied on in making the assessment as to sales, leases, and mortgages on property in the neighborhood, derived personally from the vendors, vendees, lessors, lessees, mortgagors, or mortgagees themselves, other than the petitioner in this case. *Held*, that the testimony sought was not inadmissible on direct examination as based on hearsay, but was admissible as relating to the facts forming the basis of the witness' opinion.—*City of Baltimore v. Hurlock*, 113 Md. 674, 78 Atl. 558.

(g) On an appeal to the Baltimore City Court from an assessment by the Appeal Tax Court, one of the special assessors of the Appeal Tax Court, who had passed on the assessment, was called as a witness, and, after qualifying as an expert on valuations, while on direct examination produced a diagram, which was in court in obedience to an order of court made in accordance with Balto. City Code 1906, Charter, § 170, and explained that it was a plat showing the block in which the property in question was located, together with the analysis of the assessors of the lots in the diagram liable to taxation, and the assessment description of these lots, the rate per foot, and the amount the improvements were assessed for, and

that it contained petitioner's information as to the gross rentals of the property, and also data as to sales, leases, and mortgages of property in that neighborhood. *Held*, that the diagram was admissible as relating to the facts forming the basis of the witness' opinion.—*City of Baltimore v. Hurlock*, 113 Md. 674, 78 Atl. 558. (See Balto. City Rev. Charter, § 170.)

(h) An expert witness is not competent to testify to the existence of a mental state of another, resting merely in the opinion of the expert, without any basis for the inference as to the mental state.—*Consolidated Gas, E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651. [Cited and annotated in 51 L. R. A. (N. S.) 846, 849, on photographs as evidence; in 32 L. R. A. (N. S.) 1094, 1118, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.]

(i) In an action for injuries to real property, an expert witness, testifying as to the value of the property before and after the commission of the alleged tort, may state to the jury the reasons upon which his opinion is based, in order that they may judge of the value of his testimony.—*Baltimore Belt R. Co. v. Sattler*, 102 Md. 595, 62 Atl. 1125, 64 Atl. 507.

(j) Where there is proof of general rationality and also of delusion in a testator, it would be an encroachment on the rights of the jury for the court to assume that the delusion under which the testator labored was habitual, and therefore put the onus of proof that he was free of such delusion at the execution of his will on the caveatees.—*Townshend v. Townshend*, 7 Gill 10. [Cited and annotated in 17 L. R. A. 497, on burden of proving testamentary capacity; in 35 L. R. A. 120, on presumption of continuance of insanity; in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 37 L. R. A. 263, on what are insane delusions; in 38 L. R. A. 721, 722, 727, 732, 738, on nonexpert opinions as to sanity or insanity; in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close; in 27 L. R. A. (N. S.) 77, on what is testamentary capacity.]

#### § 556. References to authorities on subject.

#### § 557. Experiments and results thereof.

#### § 558. Cross-examination and re-examination.

##### Annotation.

Limitations of evidence to handwriting.—64 L. R. A. 303, note.

(a) The court has no power to compel a party to produce, for use on re-examination, a scientific magazine on which, on cross-examination of an expert witness, he based questions to test the value of the opinion of the witness.—*Louis Eckels & Sons Ice Mfg. Co. v. Cornell Economizer Co.*, 119 Md. 107, 86 Atl. 38.

(b) In an action by a servant for injuries, a doctor, on cross-examination by defendant, in answer to the question, "Doesn't nature always improve a condition like that in time, gradually?" replied: "This man will improve. Nature is going to improve him as far as I can see now. He is not always going to be as he is." *Held*, that the question on redirect examination: "You think nature will improve him. Is or is not his whole system more susceptible to anything else? Will it not surrender more easily to an attack of disease?"—was not objectionable, since it did not elicit from the expert an opinion as to the consequences of the injury contingent, speculative, and too remote, but was addressed to the present condition of plaintiff in consequence of his injuries, and was in response to the doctor's answer on cross-examination to the question immediately preceding it.—*McCall's Ferry Power Co. v. Price*, 108 Md. 96, 69 Atl. 832.

(c) The rule that a hypothetical question to an expert witness must be based upon proven facts does not apply to cross-examination; the extent to which examination may be had in collateral matter resting within the sound discretion of the trial court, and the exercise of such discretion being not reviewable unless abused.—*Thomas v. Fidelity & Casualty Co. of New York*, 106 Md. 299, 67 Atl. 259.

(d) On the trial of a caveat to a will a physician who testified to testator's incapacity was properly asked the following question on cross-examination: "If it should turn out in the proof that every piece of

property he owned was mentioned\* in this will, and that all his beneficiaries are mentioned in this will, and that he had charged certain ones with advancements, and that he had made certain provisions in regard to certain stock mentioned therein, and that all this originated with him himself, and without any knowledge on the part of counsel, do you mean to say that such a man as that was incapable of making a valid deed or contract?" regardless of whether the question was framed with strict regard to the usual form of hypothetical questions or not.—*Struth v. Decker*, 100 Md. 368, 59 Atl. 727.

(e) In an action for the price of an electric light plant, one of defendant's experts testified that the coupling of the engine and dynamo was too short, and he was asked on cross-examination whether the engine room was large enough to have permitted a longer coupling. *Held*, that an objection to such question on the theory that it appeared that the engine room had been selected by plaintiff, and that there were other rooms that could have been used, was properly overruled.—*Kernan v. Crook, Horner & Co.*, 100 Md. 210, 59 Atl. 753.

#### § 559. Corroboration.

#### § 560. Contradiction.

(a) In an action to recover the damages done to a lot by the construction of an elevated railroad, opinion evidence as to damages done an adjoining lot cannot be contradicted by proof of the amount received by the owners of the lot in settlement of such damages.—*Lake Roland El. Ry. Co. v. Weir*, 86 Md. 273, 37 Atl. 714. [Cited and annotated in 43 L. R. A. (N. S.) 993, on evidence as to price paid for other property by party seeking condemnation for public use.]

### (E) COMPARISON OF HANDWRITING.

#### Cross-References.

Effect, see post, § 573.

Writings submitted to jury for comparison, see ante, §§ 197, 198.

In criminal prosecutions, see "Criminal Law," § 491.

#### § 561. Grounds for allowing comparison.

#### Annotation.

Comparison of handwritings.—62 L. R. A. 818, note.

(a) A witness cannot testify to the genuineness of a signature from a comparison of handwriting.—*Smith v. Walton*, 8 Gill 77. [Cited and annotated in 63 L. R. A. 165, on examination of witnesses to handwriting by comparison; in 63 L. R. A. 967, 977, 982, on competency of witnesses to handwriting; in 36 L. R. A. (N. S.) 164, on opinion evidence as to ancient signature.] *Miller v. Johnson*, 27 Md. 6. [Cited and annotated in 62 L. R. A. 845, on comparison of handwriting.] *Herrick v. Swomley*, 56 Md. 439. [Cited and annotated in 62 L. R. A. 845, on comparison of handwriting; in 63 L. R. A. 978, on competency of witnesses to handwriting.] (See Code, art. 35, § 7.)

(b) Comparison of hands by a juxtaposition of two writings is inadmissible, either as a primary and sufficient, or as corroborative, evidence, except when the writing to be proved is of such antiquity that it cannot be proved in the ordinary way, or where the other writings to be compared with it are already in the case and before the jury for some other purpose.—*Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540. [Cited and annotated in 35 L. R. A. 812, on photographs as evidence; in 62 L. R. A. 845, on comparison of handwriting; in 63 L. R. A. 978, on competency of witnesses to handwriting; in 63 L. R. A. 439, on competency of handwriting as standards for comparison.] (See Code, art. 35, § 7.)

#### § 562. Writings to be proved.

#### § 563. Competency of expert.

#### Cross-Reference.

Knowledge, experience and skill in general, see ante, § 536.

#### Annotation.

The competency of expert witnesses for comparison of handwriting.—63 L. R. A. 937, note.

(a) On an issue as to whether a note held by a bank was genuine, the cashier, who had been in the bank for 15 years, and who had seen the signatures of the alleged maker, was competent to testify as to his opinion from a comparison with signatures shown to be genuine, as authorized by Code 1904, art. 35, § 7.—*Councilman v. Towson Nat. Bank*, 103 Md. 469, 64 Atl. 358. (See Code 1911, art. 35, § 7.)

**§ 564. Standard of comparison.***Annotation.*

Competency of handwritings as standards for comparison.—63 L. R. A. 428, note.

(a) The testimony of a photographer is inadmissible to establish the forgery of certificates of stock, in an action thereon, by comparing them with copies obtained by a photographic process of certain signatures assumed to be genuine, and pointing out the differences between the supposed genuine and the disputed signatures.—*Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540. [Cited and annotated in 35 L. R. A. 812, on photographs as evidence; in 62 L. R. A. 845, on comparison of handwriting; in 63 L. R. A. 978, on competency of witnesses to handwriting; in 63 L. R. A. 439, on competency of handwritings as standards for comparison.] (See Code, art. 35, § 7.)

**§ 565. Mode of making comparison.****§ 566. Examination of expert.***Annotation.*

Opinion of experts as to handwriting by comparison.—42 L. R. A. 773, note.

Procedure in proof of handwriting; examination of witness.—65 L. R. A. 151, note.

**§ 567. Cross-examination.****(F) EFFECT OF OPINION EVIDENCE.***Cross-References.*

In criminal prosecutions, see "Criminal Law," §§ 493, 494.

Instructions, see "Trial," § 235.

**§ 568. Opinions of witnesses in general.***Annotation.*

Competency of opinion as to handwriting of lost instrument based upon comparison with admittedly genuine handwriting.—41 L. R. A. (N. S.) 391, note.

Weight of testimony of subscribing witnesses as to sanity or insanity of testator.—39 L. R. A. 720; 6 L. R. A. (N. S.) 575, notes.

Weight of nonexpert opinions as to sanity or mental capacity.—38 L. R. A. 745, note.

(a) In determining the value of the hire of slaves, the testimony of those who did not know them is not entitled to equal weight with that of those who did know them.—*Lee v. Pindle*, 12 G. & J. 288.

**§ 569. Testimony of experts.****§ 570.— In general.***Annotation.*

Conclusiveness of testimony of experts.—42 L. R. A. 753, note.

(a) Upon the question of the validity of a deed according to the law of the state where it was made, the opinion of two lawyers of that state that it appears to be legal and valid to convey the property to the grantee, and that they know of no statute affecting the correctness of their opinion, is sufficient proof, being uncontrolled by other evidence, of the law of said state, in an action in which the deed is offered in evidence.—*Wilson v. Carson*, 12 Md. 54. [Cited and annotated in 25 L. R. A. 453, on oral proof of foreign laws.]

**§ 571.— Nature of subject.***Annotation.*

Conclusiveness of the testimony of experts as to the value of professional services.

—45 L. R. A. (N. S.) 181, note.

Measure of proof as to sanity in criminal case.—44 L. R. A. (N. S.) 125, note.

Expert opinions as to sanity or insanity.—39 L. R. A. 328; 42 L. R. A. 767, notes.

(a) Expert evidence as to whether a switch is an element of danger, so as to require its removal from the footway of a proposed street over the tracks of a railroad company, for the expense of which the company may claim damages from the city, is not binding on the jury, though uncontroverted.—*Baltimore & O. R. Co. v. City of Baltimore*, 98 Md. 535, 56 Atl. 790.

**§ 572.— Knowledge or skill of expert.****§ 573. Comparison of handwriting.***Cross-Reference.*

See ante, §§ 561-567.

**§ 574. Conflict with other evidence.**

(a) A codicil was not set aside on the ground of testator's incapacity, 50 years after his death, upon the testimony of two witnesses as to certain impressions made upon their minds by certain acts of testator, one witness giving clear testimony to the testator's competency.—*Chase v. Winans*, 59 Md. 475. [Cited and annotated in 38 L. R. A. 721, 743, 747, on nonexpert opinions as to sanity or insanity.]

### XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

#### Cross-References.

- Admissibility as judicial admissions, see ante, §§ 210, 211.  
 Admissibility of evidence in rebuttal of evidence in other proceedings, see ante, § 155.  
 As self-serving declaration, see ante, § 271.  
 Testimony of agent at former trial as admission, see ante, § 243.  
 At preliminary proceedings in bastardy prosecutions, see "Bastards," § 56.  
 Competency to impeach witness by showing inconsistent statements, see "Witnesses," § 393.  
 Depositions taken for former trial or other proceeding, see "Depositions," §§ 98-100.  
 Effect of admission of incompetent evidence without objection at former trial, see "Trial," § 105.  
 Effect of stipulation in suit, see "Stipulations," § 14.  
 In admiralty, see "Admiralty," § 73.  
 In criminal prosecutions, see "Criminal Law," §§ 539-548.  
 Limiting cross-examination of witness to matters covered by original testimony on former trial, see "Witnesses," § 269.  
 Proceeding to protect or enforce exemption rights, see "Exemptions," § 148.  
 Subrogation affecting admissibility of deposition, see "Subrogation," § 1.  
 Use by witness to refresh memory, see "Witnesses," § 255.

#### § 575. Grounds for admission in general.

#### § 576. Death or disability of witness.

##### Annotation.

Admissibility, after death of adversary, of testimony or deposition of party given or taken before the former's death and relating to a personal transaction with him.—14 L. R. A. (N. S.) 488, note.

(a) The testimony of a witness, since deceased, in a former suit, is admissible in a subsequent suit between the same parties or their privies in reference to the same subject-matter.—*Calvert v. Coxe*, 1 Gill 95; *Marshall v. Henry*, 9 Gill 251; *Price v. Lawson*, 74 Md. 499, 22 Atl. 206.

#### § 577. Absence of witness.

##### Annotation.

Testimony on preliminary examination of witnesses not available at time of trial.—25 L. R. A. (N. S.) 868, note.

#### § 577½. Nature of former proceeding.

##### Annotation.

Testimony of accused at coroner's inquest.—70 L. R. A. 33; 33 L. R. A. (N. S.) 465, notes.

(a) It is not error to allow a witness to testify as to what a deceased person had affirmed before commisisoners to perpetuate the bounds of land, where such testimony was not repugnant to the matter in the registered affirmation produced.—*Howell v. Tilden*, 1 H. & McH. 84.

#### § 578. Opportunity for cross-examination.

(a) Affidavits of third persons, since dead, made on a motion to set aside a judgment on default, are not admissible in evidence, where they were made ex parte, and without an opportunity for cross-examination.—*Walsh v. McIntyre*, 68 Md. 402, 13 Atl. 348.

#### § 579. Identity of issues.

(a) To prove the boundaries of land claimed by plaintiff, a court commissioner appointed in another suit at the instance of plaintiff's lessor can, on behalf of plaintiff, testify as to what was sworn to before him with respect to the lines by a son of one who was formerly surveyor of the county in which the land is situated.—*Bladen v. Cockey*, 1 H. & McH. 230.

#### § 580. Identity of parties.

(a) There being no privity of estate between an heir and an administrator, the testimony of a deceased witness in an action by an administrator is not admissible in a later suit by an heir against the same party.—*Jacob Tome Institute v. Davis*, 87 Md. 591, 41 Atl. 166.

(b) In a claim against the surety on a trustee's bond on the ground of insolvency of the principal, the heirs of the surety are not bound by evidence taken to establish such insolvency, by other persons than the claimant, and also taken before the commencement of proceedings by such claimant.—*Kent v. Waters*, 18 Md. 53.

#### § 581 Preliminary evidence.

##### Cross-Reference.

Hearsay evidence as to absence of witness, see ante, § 317.

(a) The testimony of an absent witness, taken on a survey by the surveyor, and returned in his book of explanation, is inadmissible, where evidence has not been offered to prove that the absence of such witness is caused by physical inability which renders

him unable to attend.—*Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280.

(b) A witness called to prove the testimony given on a former trial by another witness must profess and be able to state all the facts testified to.—*Black v. Woodrow*, 39 Md. 194.

(c) The testimony of a witness, taken on a survey under the authority of the court in a former ejectment between persons under whom the present parties claim, is inadmissible, where it is not shown that due diligence has been used to procure the attendance of the witness, though he is a nonresident of the state, and upwards of 80 years of age.—*Darnall v. Goodwin*, 1 H. & J. 282.

### § 582. Mode of proof.

#### Cross-References.

See ante, §§ 162, 578.

Admissibility of transcript of evidence given at coroner's inquisition in proceeding to revoke certificate or license of physician, see "Physicians and Surgeons," § 11.

Competency as witnesses of judges, jurors, and judicial officer as to proceedings before them, see "Witnesses," §§ 70-74.

(a) Evidence given at a former trial could not be proved by reading to a witness from an alleged transcript what "purported" to be "extracts" from the testimony given on the occasion named by the named witnesses, and asking him whether as a fact the testimony was given as it purported to have been from the transcript so used.—*Packham v. Ludwig*, 103 Md. 416, 63 Atl. 1048; *Packham v. Glendmeyer*, Id.

(b) Longhand notes, as transcribed by a stenographer, of the testimony of a witness at a former trial of the same case, are not admissible.—*Herrick v. Swomley*, 56 Md. 439. [Cited and annotated in 62 L. R. A. 845, on comparison of handwriting; in 63 L. R. A. 978, on competency of witnesses to handwriting.]

(c) Minutes of testimony, taken by counsel or by a judge on a former trial, can only be resorted to as memoranda to refresh the memory of a witness testifying to what then took place.—*Waters v. Waters*, 35 Md. 531. [Cited and annotated in 36 L. R. A. 69, on witness' right to give opinion as to sanity or mental capacity; in 38 L. R. A. 728, 735, 737, on nonexpert opinions as to sanity or insanity.]

(d) A witness need not state the very language in which the testimony of a witness was given, but should give the substance thereof.—*Garrott v. Johnson*, 11 G. & J. 173, 35 Am. Dec. 272.

(e) The evidence given by a deceased witness, in a former trial of the same cause and on the same issue, may be proved in a subsequent trial, but not the legal effect of such evidence.—*Bowie v. O'Neale*, 5 H. & J. 226.

### § 583. Effect.

## XIV. WEIGHT AND SUFFICIENCY.

#### Cross-References.

Conclusiveness and effect of admissions, see ante, § 265.

Conclusiveness and effect of declarations, see ante, § 313.

Conclusiveness and effect of documentary evidence, see ante, § 383.

Effect of evidence given at former trial or in other proceeding, see ante, § 583.

Effect of opinion evidence, see ante, §§ 568-574.

Evidence preliminary to evidence of admissions, see ante, §§ 256-258.

Evidence to sustain judgment, see "Judgment," § 19.

Proof as to destruction or loss of and search for primary evidence, see ante, § 183.

Sufficiency of secondary evidence, see ante, § 186.

Conformity of findings of court to evidence, see "Trial," § 396.

Credibility, impeachment, contradiction and corroboration of witnesses, see "Witnesses," §§ 311-416.

Effect of tax deeds as evidence, see "Taxation," §§ 788, 789.

In criminal prosecutions, see "Criminal Law," §§ 549-572.

Instructions as to weight and sufficiency, see "Trial," §§ 206-212, 235, 237.

Instructions invading province of jury, see "Trial," §§ 194, 195.

Insufficiency as ground for equitable relief against judgment, see "Judgment," § 427.

Insufficiency of evidence as ground for motion to modify judgment, see "Judgment," § 303.

Necessity of assignment of errors on appeal, see "Appeal and Error," § 719.

Of newly discovered evidence as affecting right to new trial, see "New Trial," §§ 106-108.

Questions for jury, see "Trial," §§ 139-143.

Review dependent on motion for new trial in lower court, see "Appeal and Error," § 294.

Review dependent on prejudicial nature of error, see "Appeal and Error," § 1061.

Review dependent on presentation of question in lower court, see "Appeal and Error," §§ 209-213.

Review dependent on presentation of question in record, see "Appeal and Error," §§ 694-697.

Review dependent on specification in assignment of errors, see "Appeal and Error," § 731.

Review dependent on taking of exception in lower court, see "Appeal and Error," § 268.

Review dependent on whether questions are of law or of fact, see "Appeal and Error," § 842.

Review, estoppel to allege error, see "Appeal and Error," § 882.

Review of discretion of court, see "Appeal and Error," § 973.

Rulings by referee on weight and sufficiency, see "Reference," §§ 68, 69.

Rulings on weight and sufficiency of evidence on trial by court, see "Trial," §§ 382-385.

Scope and extent of review, see "Appeal and Error," §§ 987-1024, 1094, 1095.

Statutes prescribing weight of evidence as infringement of right to jury trial, see "Jury," § 34.

Sufficiency as against infant, see "Infants," § 100.

Verdict contrary to evidence ground for new trial, see "New Trial," §§ 68-72.

Waiver and correction of errors in rulings as to weight and sufficiency, see "Trial," §§ 417-420.

*As to particular facts or issues.*

See "Accord and Satisfaction," § 26; "Adverse Possession," §§ 85, 114; "Boundaries," § 37; "Champerty and Maintenance," § 5; "Compromise and Settlement," § 23; "Conspiracy," § 19; "Customs and Usages," § 19; "Damages," §§ 184-192; "Death," § 4; "Dedication," § 44; "Deeds," §§ 206-212; "Descent and Distribution," § 71; "Domicile," § 10; "Easements," § 36; "Estoppel," § 118; "Fraud," § 58; "Fraudulent Conveyances," §§ 295-302; "Garnishment," § 164; "Gifts," §§ 49, 82; "Guaranty," §§ 91; "Highways," §§ 17, 68; "Marriage," § 50; "Money Received," § 18; "Negligence," §§ 134, 135; "Novation," § 12; "Partnership," §§ 52-56; "Payment," §§ 73-75; "Pledges," § 16; "Principal and Surety," § 161; "Release," § 57; "Statutes," § 286; "Trespass," § 46; "Usury," § 117.

Acceptance by railroad company of conveyance of right of way, see "Railroads," § 72.

Acquiescence in and ratification of reorganization of bank, see "Banks and Banking," § 65.

Advancement, see "Descent and Distribution," § 117.

Agency or authority, see "Attorney and Client," § 72; "Brokers," § 8; "Corporations," § 432; "Husband and Wife," §§ 23½, 25, 138; "Principal and Agent," §§ 23, 123.

Alienation of affections, see "Husband and Wife," § 333.

Alteration of written instrument, see "Alteration of Instruments," § 29.

Assumption of mortgage by grantee of property, see "Mortgages," § 280.

Assumption of risk by servant injured, see "Master and Servant," § 280.

Bar of statute of limitations, see "Limitation of Actions," § 197.

Bona fides of purchaser at execution sale, see "Execution," § 274.

Breach of covenant to return leased premises in good repair, see "Landlord and Tenant," § 160.

Breach of warranty of goods sold, see "Sales," § 441.

Cause of action, on application for default judgment, see "Judgment," § 126.

Cause of loss of or injury to cargo, see "Shipping," § 132.

Character of transaction as mortgage or other contract, see "Chattel Mortgages," §§ 39; "Mortgages," § 38.

Claims against bankrupt's estate, see "Bankruptcy," § 340.

Community or separate property, see "Husband and Wife," § 264.

Compensation for property taken for public use, see "Eminent Domain," §§ 205, 300.

Compromise or settlement of mortgage debt, see "Mortgages," § 319.

Consideration for contracts in general, see "Contracts," § 90.

Consideration of bill or note, see "Bills and Notes," § 518.

Construction of contracts in general, see "Contracts," § 175.

Construction of contracts of sale, see "Sales," § 87.

Construction of mortgage, see "Mortgages," § 109.

Contributory negligence in general, see "Negligence," § 135.

Contributory negligence of owner of animals injured on or near railroad tracks, see "Railroads," § 443.

Contributory negligence of passenger, see "Carriers," § 346; "Ferries," § 33.

Contributory negligence of person injured in crossing track at agricultural fair, see "Agriculture," § 4.

Contributory negligence of person injured at railroad crossing, see "Railroads," § 348.

Contributory negligence of person injured on or near railroad tracks, see "Railroads," § 398.

Contributory negligence of person injured on or near street railroad tracks, see "Street Railroads," § 114.

Contributory negligence of servant injured, see "Master and Servant," § 281.

Contributory negligence of traveler injured on street, see "Municipal Corporations," § 819.

Conversion, see "Trover and Conversion," § 40.

Corporate existence, see "Corporations," § 32.

Creation, existence, and validity of trusts, see "Trusts," §§ 44, 89, 110.

Delivery and acceptance of goods, see "Sales," § 181.

Delivery of bill or note, see "Bills and Notes," § 517.



Demand for payment of bill or note, see "Bills and Notes," § 526.  
 Discharge in bankruptcy, see "Bankruptcy," § 436.  
 Domicile or residence of parties seeking divorce, see "Divorce," § 62.  
 Duress in procuring execution of bill or note, see "Bills and Notes," § 520.  
 Execution, existence, and genuineness of will, see "Wills," §§ 300-306.  
 Execution of bill or note, see "Bills and Notes," § 517.  
 Existence and validity of contract of sale, see "Vendor and Purchaser," § 44.  
 Existence and validity of ordinances, see "Municipal Corporations," § 122.  
 Extension of time for payment of mortgage, see "Mortgages," § 319.  
 Fraud in procuring execution of bill or note, see "Bills and Notes," § 520.  
 Fraud in procuring making of marriage settlement, see "Husband and Wife," § 34.  
 Fraudulent diversion of bill or note, see "Bills and Notes," § 522.  
 Gambling contracts, see "Gaming," § 49.  
 Gift by husband to wife, and vice versa, see "Husband and Wife," §§ 49½, 49¾.  
 Good faith of purchaser of bill or note, and payment of value, see "Bills and Notes," § 525.  
 Good faith of purchaser of land, see "Vendor and Purchaser," § 244.  
 Identity of bill or note sued on, see "Bills and Notes," § 517.  
 Identity of names, see "Names," § 18.  
 Impeaching or contradicting certificates of acknowledgment, see "Acknowledgment," § 62.  
 Incompetency of fellow servant, see "Master and Servant," § 279.  
 Insufficiency of fund to effectuate charity, see "Charities," § 50.  
 Legality of bill or note, see "Bills and Notes," § 521.  
 Legality of contracts in general, see "Contracts," § 141.  
 Legitimacy of child, see "Bastards," § 6.  
 Liabilities of depositaries, see "Depositaries," § 11.  
 Liabilities of estate, see "Executors and Administrators," §§ 202-221.  
 Liability of connecting carriers, see "Carriers," § 185.  
 Loss of or injury to goods in course of transportation, see "Carriers," § 134.  
 Married woman's separate property, see "Husband and Wife," § 133.  
 Mistake, fraud and undue influence in execution of will, see "Wills," § 166.  
 Mistake in execution of bill or note, see "Bills and Notes," § 520.  
 Modification of contract, see "Contracts," § 247.  
 Negligence causing injuries from fires set by railroad company, see "Railroads," § 482.  
 Negligence causing injuries to animals on or near railroad tracks, see "Railroads," § 443.  
 Negligence causing injuries to passenger, see "Carriers," § 318.

Negligence causing injuries to persons at railroad crossings, see "Railroads," § 348.  
 Negligence causing injuries to persons on or near railroad tracks, see "Railroads," § 398.  
 Negligence causing injuries to persons on or near street railroad tracks, see "Street Railroads," § 114.  
 Negligence causing injuries to travelers on highway, see "Highways," § 211.  
 Negligence causing injuries to travelers on street, see "Municipal Corporations," § 819.  
 Negligence causing injury to person crossing track at agricultural fair, see "Agriculture," § 4.  
 Negligence causing injury to wharf, see "Wharves," § 22.  
 Negligence in operation of ferry, see "Ferries," § 33.  
 Negligence in respect to explosives, see "Explosives," § 7.  
 Negligence in use of highway, see "Highways," § 184.  
 Negligence of fellow servant, see "Master and Servant," § 279.  
 Negligence of master causing injury to servants, see "Master and Servant," § 278.  
 Negligence of physician and surgeon, see "Physicians and Surgeons," § 18.  
 Negligence of warehouseman, see "Warehousemen," § 34.  
 Nondelivery of goods by vessel, see "Shipping," § 115.  
 Notice of nonpayment or of protest of bill or note, see "Bills and Notes," § 526.  
 Operation of railroad as nuisance, see "Railroads," § 222.  
 Originality and priority of invention, see "Patents," § 91.  
 Ownership and operation of railroad, see "Railroads," § 272.  
 Ownership of crops, see "Crops," § 2.  
 Ownership of vehicle causing injury on highway, see "Highways," § 184.  
 Patentable invention, see "Patents," § 36.  
 Payment of bill or note, see "Bills and Notes," § 527.  
 Payment of mortgage or debt secured thereby, see "Mortgages," § 319.  
 Performance or breach of contract, see "Contracts," § 322.  
 Prejudice or local influence to justify removal of cause, see "Removal of Causes," § 63.  
 Presentment of bill or note for payment, see "Bills and Notes," § 526.  
 Prior knowledge or use of invention, see "Patents," § 62.  
 Promise to marry, and breach thereof, see "Breach of Marriage Promise," § 23.  
 Protest of bill or note, see "Bills and Notes," § 526.  
 Ratification of agency of husband for wife, see "Husband and Wife," § 25.  
 Ratification of agent's act, see "Principal and Agent," § 173.  
 Reduction to possession by husband of wife's property, see "Husband and Wife," § 11.

Relation of landlord and tenant, see "Landlord and Tenant," § 18.  
 Relation of master and servant, see "Master and Servant," § 277.  
 Release of mortgage, see "Mortgages," § 319.  
 Rescission of marriage settlement, see "Husband and Wife," § 33.  
 Revocation of agency of broker, see "Brokers," § 10.  
 Revocation of license in respect of real property, see "Licenses," § 58.  
 Revocation of will, see "Wills," § 306.  
 Service of process, see "Process," § 149.  
 Services rendered, see "Work and Labor," § 28.  
 Settlement of pauper, see "Paupers," § 22.  
 Survivorship, see "Death," § 6.  
 Taking contract out of statute of fraud, see "Frauds, Statute of," § 158.  
 Testamentary capacity, see "Wills," § 55.  
 Title to property sued for, see "Trespass to Try Title," § 41.  
 Transfer and ownership of bill or note, see "Bills and Notes," §§ 523, 524.  
 Transfer of mortgage, see "Mortgages," § 270.  
 Validity of mortgage, see "Mortgages," § 86.  
 Waiver or abandonment of homestead, see "Homestead," § 181.  
 Want of jurisdiction of federal court, see "Courts," § 280.

*In particular civil actions or proceedings.*

See "Assault and Battery," § 35; "Assumpsit, Action of," § 25; "Cancellation of Instruments," § 47; "Conspiracy," § 19; "Creditors' Suit," § 46; "Divorce," §§ 124-136; "Ejectment," §§ 93-96; "Entry, Writ of," § 21; "False Imprisonment," § 31; "Forcible Entry and Detainer," § 29; "Fraud," § 58; "Libel and Slander," § 112; "Malicious Prosecutions," § 64; "Negligence," §§ 134, 135; "Nuisance," § 49; "Partition," § 63; "Quieting Title," § 44; "Quo Warranto," § 55; "Reformation of Instruments," § 45; "Replevin," § 72; "Specific Performance," § 121; "Trespass," § 46; "Trespass to Try Title," § 41; "Trover and Conversion," § 40; "Work and Labor," § 28.  
 Accounting by executor or administrator, see "Executors and Administrators," § 506.  
 Against agent for accounting, see "Principal and Agent," § 78.  
 Against carrier for delay in transportation of goods, see "Carriers," § 104.  
 Against carrier for refusal to deliver goods, see "Carriers," § 94.  
 Against carriers for penalties, see "Carriers," § 20.  
 Against carriers of live stock, see "Carriers," § 228.  
 Against depositaries, see "Depositaries," § 11.  
 Against guarantors, see "Guaranty," § 91.  
 Against landlord to recover for injuries to persons not tenants, see "Landlord and Tenant," § 169.

Against master for injuries by servant, see "Master and Servant," § 330.  
 Against pawnbroker, see "Pawnbrokers," § 9.  
 Against railroad company for obstruction of highway, see "Railroads," § 246.  
 Against sureties, see "Principal and Surety," § 161.  
 Allowance of claim against estate, see "Executors and Administrators," § 221.  
 Bastardy proceedings, see "Bastards," §§ 64, 65.  
 Between heirs, see "Descent and Distribution," § 83.  
 Between parties to deed of trust, see "Mortgages," § 216.  
 By agent for compensation, see "Principal and Agent," § 89.  
 By creditors of corporations, see "Corporations," § 548.  
 By landlord for unlawful detainer, see "Landlord and Tenant," § 291.  
 By married woman to become sole trader, see "Husband and Wife," § 95.  
 By or against banks, see "Banks and Banking," § 227.  
 By or against corporations in general, see "Corporations," § 519.  
 By or against husband or wife, see "Husband and Wife," § 232.  
 By or against principal or agent, see "Factors," § 66; "Principal and Agent," § 190.  
 By or against principal or broker, see "Brokers," § 106.  
 By or against trustee in bankruptcy, see "Bankruptcy," § 303.  
 By owner of property taken for public use, see "Eminent Domain," § 300.  
 By receivers in supplementary proceedings, see "Execution," § 411.  
 Condemnation proceedings, see "Eminent Domain," § 205.  
 Deportation under Chinese exclusion act, see "Aliens," § 32.  
 Disbarment, see "Attorney and Client," § 53.  
 Discharge of bankrupt, see "Bankruptcy," § 414.  
 Election contests, see "Elections," § 295.  
 For accounting of proceeds of sale on foreclosure, see "Mortgages," § 376.  
 For alienation of affections, see "Husband and Wife," § 333.  
 For appointment of receiver, see "Corporations," § 557.  
 For breach of charter party, see "Shipping," § 58.  
 For breach of contract in general, see "Contracts," § 350.  
 For breach of contract of carriage, see "Carriers," § 276; "Shipping," § 165.  
 For breach of contract of sale, see "Sales," §§ 383, 417; "Vendor and Purchaser," § 350.  
 For breach of contract of towage, see "Towage," § 3.  
 For breach of covenant in general, see "Covenants," § 122.  
 For breach of covenant in indentures or other contract of apprenticeship, see "Apprentices," § 19.

For breach of logging contract, see "Logs and Logging," § 8.  
 For breach of marriage promise, see "Breach of Marriage Promise," § 23.  
 For breach of warranty of goods sold, see "Sales," § 441.  
 For cancellation of marriage settlement, see "Husband and Wife," § 34.  
 For causing death, see "Death," §§ 75-77.  
 For collisions, see "Collision," §§ 85, 125.  
 For compensation of broker, see "Brokers," § 86.  
 For compensation of factor, see "Factors," § 46.  
 For compensation of innkeeper, see "Innkeepers," § 12.  
 For compensation of physician or surgeon, see "Physicians and Surgeons," § 24.  
 For contempt, see "Contempt," § 60; "Injunction," § 230.  
 For conversion of logs or lumber, see "Logs and Logging," § 35.  
 For conversion of water from well, see "Waters and Water Courses," § 107.  
 For criminal conversation, see "Husband and Wife," § 348.  
 For damages for rape, see "Rape," § 66.  
 For demurrage, see "Shipping," § 184.  
 For deposits, see "Banks and Banking," § 154.  
 For dispossession by purchaser at foreclosure sale, see "Mortgages," § 544.  
 For diversion of water, see "Waters and Water Courses," § 87.  
 For dower, see "Dower," § 79.  
 For equitable relief against judgment, see "Judgment," § 461.  
 For failure to furnish passenger on vessel proper accommodations, see "Shipping," § 164.  
 For flowage of lands, see "Waters and Water Courses," § 179.  
 For infringement of patents, see "Patents," § 312.  
 For injunction, see "Injunction," § 128.  
 For injuries arising from accidents of trains, see "Railroads," § 297.  
 For injuries at railroad crossings, see "Railroads," § 348.  
 For injuries by electricity, see "Electricity," § 19.  
 For injuries by or to animals, see "Animals," §§ 44, 74, 100; "Railroads," § 443; "Livery Stable Keepers," § 12.  
 For injuries from construction of waterworks, see "Waters and Water Courses," § 195.  
 For injuries from construction or maintenance of telegraph or telephone lines, see "Telegraphs and Telephones," § 20.  
 For injuries from defects in bridges, see "Bridges," § 46.  
 For injuries from defects or obstructions in highways, see "Highways," § 211.  
 For injuries from defects or obstructions in streets, see "Municipal Corporations," § 819.  
 For injuries from escape or explosion of gas, see "Gas," § 20.  
 For injuries from fires caused by operation of railroad, see "Railroads," § 482.  
 For injuries from negligence of agricultural society, see "Agriculture," § 4.

For injuries from negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.  
 For injuries from negligent use of highway, see "Highways," § 184.  
 For injuries from negligent use of street, see "Municipal Corporations," § 706.  
 For injuries from sales of drugs or poisons, see "Druggists," § 10.  
 For injuries from sale of liquor, see "Intoxicating Liquors," § 310.  
 For injuries incident to supply or use of water, see "Waters and Water Courses," §§ 209, 263.  
 For injuries to child, see "Parent and Child," § 11.  
 For injuries to guests at hotel, see "Innkeepers," § 10.  
 For injuries to licensees and trespassers on railroad property, see "Railroads," § 282.  
 For injuries to passengers, see "Carriers," §§ 318, 346; "Ferries," § 33; "Shipping," § 166.  
 For injuries to persons hiring horses from liveryman, see "Livery Stable Keepers," § 11.  
 For injuries to persons on or near railroad tracks, see "Railroads," § 398.  
 For injuries to persons on or near street railroad tracks, see "Street Railroads," § 114.  
 For injuries to property of tenant, see "Landlord and Tenant," § 169.  
 For injuries to riparian lands from floatage of rafts and logs, see "Navigable Waters," § 39.  
 For injuries to seamen, see "Seamen," § 29.  
 For injuries to servants, see "Master and Servant," §§ 276-281.  
 For injuries to tenants or occupants, see "Landlord and Tenant," § 169.  
 For injuries to vessels at wharf, see "Wharves," § 20.  
 For injuries to wharf, see "Wharves," § 22.  
 For interference with surface water, see "Waters and Water Courses," § 126.  
 For judgment by default, see "Judgment," § 126.  
 For loss of or injuries to hired horses or vehicles, see "Livery Stable Keepers," § 12.  
 For loss of or injury to cargo, see "Shipping," § 132.  
 For loss of or injury to goods stored, see "Warehousemen," § 34.  
 For loss of or injury to passengers' baggage or effects, see "Carriers," §§ 408, 417; "Shipping," § 167.  
 For loss of or injury to property of guest, see "Innkeepers," § 11.  
 For loss of or injury to tow, see "Towage," § 15.  
 For maritime torts, see "Shipping," § 86.  
 For misdelivery or nondelivery of goods stored, see "Warehousemen," § 34.  
 For necessities furnished child, see "Parent and Child," § 3.  
 For negligence or default in transmission or delivery of telegrams, see "Telegraphs and Telephones," § 66.

For negligence or malpractice of physician or surgeon, see "Physicians and Surgeons," § 18.  
 For negligence or misconduct of broker, see "Brokers," § 38.  
 For negligent or wrongful act of factor, see "Factors," § 43.  
 For obstruction of navigation, see "Navigable Waters," § 26.  
 For penalties for failure to release mortgage, see "Mortgages," § 312.  
 For penalties for permitting animals to run at large, see "Animals," § 56.  
 For penalties for refusal or failure to transmit or deliver telegrams, see "Telegraphs and Telephones," § 78.  
 For penalties for violation of civil rights, see "Civil Rights," § 14.  
 For penalties for violation of game laws, see "Game," § 8.  
 For penalties for violation of regulations relating to production, supply, or use of gas, see "Gas," § 22.  
 For penalties in general, see "Penalties," § 33.  
 For price of goods sold, see "Sales," § 359.  
 For price of land sold, see "Vendor and Purchaser," § 315.  
 For price of logs sold, see "Logs and Logging," § 34.  
**For proceeds of goods consigned to factor, see "Factors," § 42.**  
 For rent, see "Landlord and Tenant," § 231.  
 For separate maintenance, see "Husband and Wife," § 297.  
 For torts of child, see "Parent and Child," § 13.  
 For wages, see "Master and Servant," § 80.  
 For wrongful discharge, see "Master and Servant," § 40.  
 For wrongful ejection of passengers and intruders, see "Carriers," § 381.  
 For wrongful foreclosure by exercise of power of sale in mortgage, see "Mortgages," § 379.  
 In equity, see "Equity," § 348.  
 On assigned claims, see "Assignments," § 137.  
 On bills or notes, see "Bills and Notes," §§ 516-527.  
 On bonds for payment of license taxes, see "Licenses," § 26.  
 On bonds in general, see "Bonds," § 132.  
 On bonds of depositaries, see "Depositaries," § 14.  
 On contract of suretyship, see "Principal and Surety," § 161.  
 On contract relating to water rights, see "Waters and Water Courses," § 158½.  
 On gambling contracts, see "Gaming," § 49.  
 On guaranty, see "Guaranty," § 91.  
 On insurance policies, see "Insurance," §§ 665, 819.  
 On judgment, see "Judgment," §§ 920, 944.  
 On official bonds, see "Sheriffs and Constables," § 169.  
 Probate proceedings and actions relating to wills or probate, see "Wills," §§ 300-306.  
 Relating to usury, see "Usury," § 117.

Removal of policemen, see "Municipal Corporations," § 185.  
 Summary proceedings for recovery of leased premises, see "Landlord and Tenant," § 308.  
 To abate dams, see "Waters and Water Courses," § 174.  
 To annul marriage, see "Marriage," § 60.  
 To cancel patent to public land, see "Public Lands," §§ 120-122.  
 To confirm or try tax title, see "Taxation," § 810.  
 To confirm sale on foreclosure of mortgage, see "Mortgages," § 526.  
 To determine adverse claim to mining location, see "Mines and Minerals," § 38.  
 To determine and protect water rights, see "Waters and Water Courses," § 152.  
 To determine priorities between mortgages and other liens, see "Mortgages," § 186.  
 To determine riparian rights, see "Waters and Water Courses," § 49.  
 To determine water rights, see "Waters and Water Courses," § 33.  
 To enforce decision of railroad commission, see "Carriers," § 18.  
 To enforce forfeiture of liquors, see "Intoxicating Liquors," § 250.  
 To enforce liability of stockholders for corporate debts and acts, see "Corporations," § 269.  
 To enforce lien on logs, lumber, mills, or mill products, see "Logs and Logging," § 33.  
 To enforce marriage settlement, see "Husband and Wife," § 35.  
 To enforce municipal assessment, see "Municipal Corporations," § 568.  
 To enforce payment of annuity, see "Annuities," § 6.  
 To establish and enforce trust, see "Trusts," § 372.  
 To establish and protect easements, see "Easements," § 61.  
 To establish boundaries, see "Boundaries," § 37.  
 To establish lost instrument, see "Lost Instruments," § 8.  
 To foreclose or enforce mortgage and liens, see "Mechanics' Liens," § 281; "Mortgages," §§ 463, 464; "Vendor and Purchaser," § 281.  
 To open or vacate judgment, see "Judgment," § 392.  
 To recover advances or expenses by factor, see "Factors," § 45.  
 To recover money loaned to school district, see "Schools and School Districts," § 121.  
 To recover possession of animals taken up under estray laws, see "Animals," § 59.  
 To recover price of land paid, see "Vendor and Purchaser," § 341.  
 To recover property sold, see "Sales," § 324.  
 To redeem from mortgage foreclosure, see "Mortgages," § 617.  
 To restrain diversion of water, see "Water and Water Courses," § 87.  
 To restrain execution, see "Execution," § 172.

To restrain maintenance of artificial structure interfering with waters, see "Waters and Water Courses," § 179.  
 To restrain pollution of water, see "Waters and Water Courses," §§ 77, 196.  
 To set aside fraudulent transfer, see "Fraudulent Conveyances," §§ 295-302.  
 To set aside judicial sales in general, see "Judicial Sales," §§ 43, 45.  
 To set aside sale by executor, see "Executors and Administrators," § 149.  
 To set aside sale on foreclosure of mortgage, see "Mortgages," § 529.  
 To vacate appraisalment of property on mortgage foreclosure, see "Mortgages," § 505.  
 To vacate decree in divorce suit, see "Divorce," § 167.

#### § 584. Weight and conclusiveness in general.

##### *Cross-Reference.*

Of evidence obtained on discovery, see "Discovery," § 79.

##### *Annotation.*

Conclusiveness of judicial admission as to strangers.—28 L. R. A. (N. S.) 327, note.

#### § 585. Statutory provisions.

##### *Cross-Reference.*

Act declaring what shall be conclusive evidence as invasion of province of the judiciary, see "Constitutional Law," § 55.

#### § 586. Positive and negative evidence.

##### *Cross-Reference.*

Negative evidence against circumstances, showing fraud in conveyance, see "Fraudulent Conveyances," § 295.

(a) The affirmative testimony of one credible witness as to a fact in issue must outweigh a dozen equally credible witnesses whose testimony is merely negative.—*Longley v. McGeoch*, 115 Md. 182, 80 Atl. 843.

(b) Testimony of witnesses that they did not hear the bell of an engine ring as it approached a crossing is not of such probative value as positive affirmative evidence that it was so rung; but this rule does not authorize the jury to entirely disregard the evidence of a negative character.—*Northern Cent. Ry. Co. v. State*, 100 Md. 404, 60 Atl. 19, 108 Am. St. Rep. 439.

(c) In a suit for injunction against the sale of mortgaged premises under a decree, on the ground that the mortgage, though regular on its face, was not acknowledged, as it purported to be, before a justice of the peace, the justice, being called as a witness,

testified that his signature as a witness on the original mortgage was genuine, and that he saw each of the parties sign the same, and identified his signature to the certificate, and that he took the acknowledgment of the mortgagors (husband and wife) at their house, on a certain street (naming it). The mortgagors denied that the justice was ever at their house, and the mother of the wife corroborated them. *Held*, that credit should be given to the justice, rather than to those who would repudiate their own acts.—*Ramsburg v. Campbell*, 55 Md. 227. [Cited and annotated in 41 L. R. A. (N. S.) 1178, 1180, on impeachment of certificate of acknowledgment.]

(d) The affirmative testimony of a public officer acting in the regular routine of his duty, without any motive to misrepresent, and sustained by contemporaneous entries in his own hand, is to be preferred to the negative evidence of the employees of a party controverting the fact testified to by the officer.—*Sarlouis v. Firemen's Ins. Co.*, 45 Md. 241.

#### § 587. Circumstantial evidence.

##### *Cross-References.*

See "Carriers," § 228; "Divorce," § 129; "Negligence," § 134; "Railroads," § 482; "Wills," § 166.

In actions to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 295.

#### § 588. Credibility of witnesses in general.

##### *Cross-Reference.*

See "Witnesses," §§ 311-332.

(a) A witness' testimony as to an accident upon a railroad track is not discredited by the physical facts because upon pointing out his position upon a map of the place he indicated a point from which he could not have seen the accident, it appearing that he testified that he was within a few feet of the place of the accident.—*Baltimore & O. R. Co. v. State*, 120 Md. 319, 87 Atl. 676.

(b) The testimony of a witness held unworthy of credit.—*Maryland Electric Ry. Co. v. Beaseley*, 117 Md. 270, 83 Atl. 157. [Cited and annotated in 51 L. R. A. (N. S.) 846, on photographs as evidence.]

(c) The law will not credit the statement of a person who says he stopped, looked, and listened for a train, when in the very

nature of things he must have seen it, if he had exercised these precautions, but this is different from the case where it is possible for him to have exercised these precautions, and yet failed to see the train because of some obstruction or the like.—*Heinz v. Baltimore & O. R. Co.*, 113 Md. 582, 77 Atl. 980.

### § 589. Testimony of party.

#### *Cross-Reference.*

In actions for divorce, see "Divorce," § 127.

### § 590. Testimony of interested persons.

(a) The testimony of four reputable witnesses, two of whom are without interest and two of whom testify against their own interest, must prevail over the testimony of one interested witness.—*Russell v. Carman*, 114 Md. 25, 78 Atl. 903.

### § 591. Conclusiveness of evidence on party introducing it.

(a) Defendant, who called his wife to the witness stand, held bound by her testimony on matters peculiarly within her knowledge upon which she was not successfully contradicted.—*Harrison v. Harrison*, 117 Md. 607, 84 Atl. 57.

(b) Act 1864, c. 109, § 4, does not alter the rules of evidence, except in so far as not to hold a party bound by the proof of the other party to the suit, when placed by him as a witness upon the stand; but he is permitted to rebut it by adverse testimony, or by proof of the admissions made by the party so examined.—*Mason v. Poulson*, 43 Md. 161. (See Code, art. 35, § 5.) [Cited and annotated in 22 L. R. A. (N. S.) 556, on applicability of rule preventing impeachment of one's own witness by proof of contradictory statements out of court where admissible in chief as against interest.]

(c) By agreement of parties, to avoid a full examination of accounts, an arbitrator was asked what sum would have been awarded had certain facts of account been proved. Held, that the answer of the arbitrator was competent evidence, and conclusive as to the sum due the defendant, who proposed the question, having in his answer relied upon the award of the arbitrator as a defense, and having admitted its correctness.—*Calvert v. Carter*, 18 Md. 73.

### § 592. Evidence introduced by adverse party.

(a) In an action on a policy of marine insurance, plaintiff was entitled to recover, even though the evidence was deficient with respect to the value of the cargo lost, where such deficiency was supplied by evidence introduced by defendant.—*Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 105 Md. 232, 65 Atl. 637.

### § 593. Evidence improperly admitted.

#### *Cross-Reference.*

Evidence admitted without objection or exception, see "Trial," § 105.

(a) Where evidence is let in generally without objection, and no attempt is made in the trial court to limit or confine its effect, it is in for all purposes, and it must be allowed its full force, so that in an action by a lessor against the lessee for failing to surrender the premises in as good condition as they were at the commencement of the term, the lessee contending that they were to be surrendered only in as good condition as they were when the lease was made, evidence of a collateral agreement to improve the property before the lessee entered, even if not legally admissible, must be considered in the case, and given full effect, where it was admitted without objection.—*Chesapeake Brewing Co. v. Goldberg*, 107 Md. 485, 69 Atl. 37.

### § 594. Uncontroverted evidence.

### § 595. Inferences from evidence.

(a) Where there was no positive proof as to a person's exact age, but it was shown that his wife died before 1850, and that his daughter died in 1865, aged 16, the court was warranted in fixing his age in 1893 at over 60 years.—*McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. 607.

(b) The receipt of a letter which defendant claims to have written to plaintiff relative to the subject-matter of the controversy, and the receipt of which plaintiff denies, may be inferred from the subsequent conduct and relation of the parties.—*Phelps v. George's Creek & C. R. Co.*, 60 Md. 536. [Cited and annotated in 23 L. R. A. (N. S.) 375, 386, 401, on right of one to testify as to his intent.]

### § 596. Degree of proof in general.

#### Cross-Reference.

In proceedings for removal from office, see "Officers," § 74.

#### Annotation.

Proof of contract to leave property in consideration of services or support in suit for its specific performance.—44 L. R. A. (N. S.) 743, note.

Degree of proof necessary to establish parol gift of real estate.—9 L. R. A. (N. S.) 508, note.

Degree of proof necessary to overcome denial of contract.—4 L. R. A. (N. S.) 410, note.

(a) If the right to recover depends on several distinct propositions of fact, and the party fails in either, it is a case of total failure, in the language of the law; and this may occur, not only where there is no evidence whatever as to one or more of the propositions, but where it is so slight and inconclusive that no rational, well-constructed mind can infer from it the fact which it is offered to establish.—*Corner v. Pendleton*, 8 Md. 337. [Cited and annotated in 52 L. R. A. 720, on what provable by books of account.]

### § 597. Sufficiency to support verdict or finding.

#### Cross-References.

Evidence of authority of agent, see "Principal and Agent," § 123.

In action to recover rent, see "Landlord and Tenant," § 231.

Sufficiency of evidence to support finding in action for dower, see "Dower," § 79.

Sufficiency to support verdict or finding as to agency, see "Principal and Agent," § 23.

(a) In order to determine the legal sufficiency of evidence to prove a fact, it is necessary to assume the truth of all the evidence, and add thereto every inference which may be fairly and legitimately drawn therefrom by the jury in the exercise of a reasonable intelligence.—*Miller v. Palmer*, 58 Md. 451.

(b) In an action against an alleged owner of a vessel for the value of supplies furnished therefor on December 10th, the plaintiff, to prove defendant's ownership, showed that before December 10th, a former owner executed a bill of sale of the vessel to defendant, who took out a register in his own name and afterwards effected insurance on her hull and freight, payable to himself, and

also that he gave notice to the master of the vessel to pay the freight to him. The defendant, in order to rebut the claim of ownership in him, showed that after the date of the alleged bill of sale the former owner still retained possession of the vessel, chartered her for a voyage, ordered the supplies in question, and had them charged on the books to himself. *Held*, that a verdict for the plaintiff for the value of the supplies would not be disturbed.—*Mayhew v. Graham*, 4 Gill 339.

### § 598. Preponderance of evidence.

(a) A bill by a wife to set aside a marriage contract affecting her rights to the property of the husband is not sustained by her uncorroborated testimony, which is in every material particular contradicted by the testimony of the husband.—*Classen v. Classen*, 57 Md. 510.

(b) A party claimed the goods attached under a bill of sale executed to him by the defendant in the attachment proceedings. Such bill of sale was regularly executed, acknowledged, and recorded, and the truth and fairness of its consideration was sworn to by the grantee. Testimony was then elicited from the defendant in the attachment proceedings, on his cross-examination, which tended to cast a suspicion over the transaction, and also testimony which tended to sustain its validity. The consideration paid was equal to the value of the goods. *Held*, that the testimony was not sufficient to overcome the bill of sale.—*Howard v. Oppenheimer*, 25 Md. 350.

(c) Where the evidence as to the feebleness of a grantor's intellect is conflicting, 12 witnesses testifying for and 9 against it, the admission of his grantee, his general agent, that such grantor was incapable of transacting his own business, will corroborate the affirmative of that issue, and render the evidence sufficient to control his answer denying mental incapacity.—*Brooke v. Berry*, 2 Gill 83.

### § 599. Elements of cause of action or claim.

### § 600. Matters of defense and rebuttal.

### § 601. Particular facts or issues.

#### Annotation.

Sufficiency of evidence to establish identity in action for defamation of un-

named person.—48 L. R. A. (N. S.) 369, note.

Sufficiency of evidence to prove execution of lost or destroyed will.—38 L. R. A. 441, note.

(a) The assessed valuation of property for the purposes of taxation is not controlling as a standard by which to ascertain the actual value.—*Thompson v. Williams*, 100 Md. 195, 60 Atl. 26.

(b) In an action by a deceased partner's executrix to recover the difference between the price paid and half the value of firm machinery from the purchasing surviving partner, the survivor's testimony as to such value took no account of the value incident to the continuance of an established business. A manufacturer in another line testified that his machinery sold under an assignment for creditors at about 20 per cent. of its cost. Another manufacturer, in a different line, knowing nothing of the machinery in question, testified that second-hand machinery sold for about 10 or 15 per cent. of its cost. An auctioneer said that such machinery brought about 10 per cent. of its cost. Three practical machinists, two of whom were in the same line of manufacturing as the firm, and who were all acquainted with the particular machinery, said it was worth at least 50 per cent. of its original value to any one continuing the business in the same place. *Held*, that from the evidence 50 per cent. of its cost was the fair value of the machinery.—*Welbourn v. Kleinle*, 92 Md. 114, 48 Atl. 81.

(c) Where plaintiff wished to show that a written order, entered among the proceedings of the board of directors of a bank, was rescinded by a subsequent verbal order, parol proof of the verbal order need not establish that all the steps required by the charter were taken, such as a regular meeting at the ordinary place of meeting, consisting of the requisite number of officers, etc., nor need it show the day and year on which the order was rescinded.—*Whittington v. Farmers Bank*, 5 H. & J. 489.

### EXAMINATION.\*

#### Cross-References.

Of account or numerous items as ground for compulsory reference, see "Reference," § 8.

Of accounts of public officers by grand jury, see "Grand Jury," § 27.

Of accused in extradition proceedings, see "Extradition," § 14.

Of adverse party before trial, see "Discovery," §§ 28-79.

Of alleged insane person in inquisition of lunacy, see "Insane Persons," § 21.

Of applicants for admission to practice of law, see "Attorney and Client," § 6.

Of applicants for admission to practice of medicine, see "Physicians and Surgeons," § 5.

Of applicants for appointment as policemen, see "Municipal Corporations," § 184.

Of articles of merchandise by public authorities, see "Inspection."

Of assignee for benefit of creditors on accounting, see "Assignments for Benefit of Creditors," § 396.

Of attachment defendant, see "Attachment," § 221.

Of bankrupt or others in bankruptcy proceedings, see "Bankruptcy," §§ 234-243.

Of body of person killed, see "Homicide," § 261.

Of books of assignor for benefit of creditors, see "Assignments for Benefit of Creditors," § 287.

Of claimant in proceedings to audit claim against city, see "Municipal Corporations," § 1012.

Of claims for patents, see "Patents," § 104.

Of debtor as to solvency, see "Bankruptcy," § 97.

Of debtor in creditors' suit, see "Creditors' Suit," § 49.

Of debtor in supplementary proceedings, see "Execution," §§ 374-380, 394-400.

Of defendant in bastardy proceedings, see "Bastards," § 45.

Of defendant or third persons in proceedings for enforcement of attachment against property not levied on, see "Attachment," §§ 221, 222.

Of executor or administrator on accounting, see "Executors and Administrators," § 505.

Of expert witnesses, see "Criminal Law," §§ 483-491; "Evidence," §§ 547-560.

Of garnishee, see "Garnishment," § 149.

Of goods subject to duty, see "Customs Duties," § 73.

Of guardian, see "Guardian and Ward," § 156.

Of informers and witnesses by magistrate as preliminary to issuance of warrant, see "Criminal Law," § 212.

Of insolvent debtor, see "Assignments for Benefit of Creditors," § 286.

Of insolvent or others in insolvency proceedings, see "Insolvency," § 76.

Of insured as to loss under policy, see "Insurance," § 548.

Of jurors on challenge for cause, see "Jury," § 131.

Of land titles, see "Records," § 9.

Of married woman on taking acknowledgment, see "Acknowledgment," § 37.

Of nonexpert opinion witnesses, see "Criminal Law," §§ 464-466.

\*Annotation: Words and Phrases, same title.



Of person accused of crime, see "Criminal Law," §§ 230-237; "Grand Jury," § 37.  
 Of teachers, see "Schools and School Districts," § 130.  
 Of third person in supplementary proceedings, see "Execution," §§ 385-389, 394-400.  
 Of title, see "Abstracts of Title," § 3.  
 Of witnesses in general, see "Witnesses," §§ 224-310.  
 Of witnesses in taking and filing proofs in equity, see "Equity," §§ 351-354.  
 Physical examination in action to annul marriage, see "Marriage," § 60.  
 Physical examination of party or other person in action for damages, see "Damages," § 206.  
 Physical examination of policeman in proceedings for removal, see "Municipal Corporations," § 185.  
 Post mortem, see "Coroners," § 14.  
 Post mortem, evidence of proceedings at coroner's inquest in prosecution for homicide, see "Homicide," §§ 222-227.  
 Preliminary examination of person accused of crime, see "Criminal Law," §§ 222-241, 244, 245.

### EXAMINERS.

#### Cross-References.

Public examiners of banks, see "Banks and Banking," § 17.  
 Of titles, see "Abstracts of Title," § 3.

### EXCAVATIONS.\*

#### Cross-References.

Affecting adjoining lands, see "Adjoining Landowners," § 6.  
 Construction of excavation contracts, see "Contracts," §§ 198, 231.  
 Injuries from, see "Negligence," § 42.  
 In street, liability for injuries, see "Municipal Corporations," §§ 783-785.  
 In streets, privileges of and restrictions on abutting owners, see "Municipal Corporations," § 668.  
 Liens for services rendered or materials furnished, see "Mechanics' Liens," § 28.  
 Master's liability for injuries to servant, see "Master and Servant," § 118.

### EXCEPTIONS.\*

#### Cross-References.

From general devise or bequest, see "Wills," § 584.  
 In statute of frauds, see "Frauds, Statute of," § 59.  
 In statutes, see "Statutes," § 228.  
 In statutes, allegations in indictment or information, see "Indictment and Information," § 111.  
 To assessment for public improvements, see "Municipal Corporations," § 491.  
 To report of commissioners or viewers in highway proceedings, see "Highways," § 41.

#### In contracts and conveyances.

See "Contracts," § 174; "Covenants," § 32; "Deeds," §§ 137, 139, 140; "Mort-

gages," § 141; "Vendor and Purchaser," § 68.

Creation of easement by exception in grant, see "Easements," § 14.  
 Deed of right of way to railroad, see "Railroads," § 71.  
 Policies or contracts of insurance, see "Insurance," §§ 402-467, 478.  
 Warranties, see "Sales," § 280.

#### In judicial proceedings.

See "Depositions," §§ 103-111; "Exceptions, Bill of," "Injunction," § 159; "Judgment," § 227.  
 From rule excluding witnesses, see "Criminal Law," § 665.  
 Hearing on exceptions in appellate court in first instance, see "Appeal and Error," § 319.  
 Necessity and sufficiency for purpose of review in civil cases, see "Appeal and Error," §§ 248-280; "Justices of the Peace," §§ 150, 205.  
 Necessity and sufficiency for purpose of review in criminal cases, see "Criminal Law," §§ 1048-1058.  
 Necessity and sufficiency for purpose of review of proceedings before referee in bankruptcy, see "Bankruptcy," § 228.  
 New trial as dependent on exceptions taken at trial, see "Criminal Law," §§ 912½, 918, 919, 922, 935; "New Trial," §§ 40, 63, 81.  
 On accounting between partners, see "Partnership," § 343.  
 On application for change of venue, see "Criminal Law," § 145; "Venue," § 84.  
 On challenge to jurors, see "Jury," § 142.  
 On hearing in equity, see "Equity," § 390.  
 On preliminary proceedings in criminal prosecutions, see "Criminal Law," § 245.  
 Requisites of record for purpose of review, see "Appeal and Error," §§ 501, 511.  
 Review on exceptions, see "Appeal and Error," § 6; "Criminal Law," § 1009.  
 To account of assignee or trustee for benefit of creditors, see "Assignments for Benefit of Creditors," § 395.  
 To account of executor or administrator, see "Executors and Administrators," § 504.  
 To account of guardian, see "Guardian and Ward," § 155.  
 To account of trustee, see "Trusts," § 324.  
 To allowance of exemptions to bankrupt, see "Bankruptcy," § 400.  
 To amended answer, see "Equity," § 285.  
 To answer or disclosure of garnishee, see "Garnishment," § 145.  
 To arguments and conduct of counsel, see "Criminal Law," § 728; "Trial," § 131.  
 To assessment by commissioners, appraisers or viewers in condemnation proceedings, see "Eminent Domain," § 235.  
 To award of arbitrators, see "Arbitration and Award," § 68.  
 To challenge to jurors for cause, see "Jury," § 130.  
 To challenge to panel or array of jurors, see "Jury," § 119.  
 To conduct or deliberations of jury, see "Criminal Law," § 868; "Trial," § 317.

\*Annotation: Words and Phrases, same title.

To continuance, see "Continuance," § 54; "Criminal Law," § 617.  
 To course and conduct of trial, in general, see "Criminal Law," § 660; "Trial," § 31.  
 To default judgment, see "Judgment," § 133.  
 To evidence, see "Criminal Law," §§ 697, 698; "Trial," §§ 100-105, 378.  
 To findings of court, see "Trial," § 405.  
 To findings of jury, see "Trial," § 366.  
 To impaneling of jury, see "Jury," § 150.  
 To inquest or assessment of damages, see "Damages," § 223.  
 To instructions, see "Criminal Law," §§ 838-847; "Trial," §§ 270-284.  
 To interrogatories to party, see "Discovery," § 65.  
 To mechanic's lien statement, see "Mechanics' Liens," § 160.  
 To order of reference, see "Reference," § 34.

To petition for certiorari to review justice's judgment, see "Justices of the Peace," § 202.  
 To pleadings, see "Admiralty," § 65; "Equity," §§ 249, 252, 253, 255, 257, 260; "Pleading," §§ 228, 419.  
 To report of commissioners to make partition, see "Partition," § 94.  
 To report on reference, see "Admiralty," § 86; "Equity," § 410; "Reference," § 100.  
 To rulings as to venue, see "Venue," §§ 17, 32.  
 To rulings on motion for direction of verdict, see "Trial," § 181.  
 To rulings on motion for dismissal or nonsuit, see "Trial," § 166.  
 To rulings on weight and sufficiency of evidence on trial by court, see "Trial," § 385.  
 To sureties on appeal bonds, see "Justices of the Peace," § 159.  
 To verdict or findings, see "Criminal Law," § 894; "Trial," § 366.

## EXCEPTIONS, BILL OF.

### *Scope-Note.*

[INCLUDES statements in writing of exceptions taken to rulings or other action of the court at trials of civil causes, required for correction of errors at such trials; nature and scope of bills of exceptions in general; in what cases and as to what objections such bills are available; requisites, contents, making, and filing of such bills; and proceedings to compel settlement, signing, sealing, and filing thereof.

[EXCLUDES exceptions in criminal cases (see "*Criminal Law*"); exceptions to pleadings or other proceedings in equity (see "*Equity*") or admiralty (see "*Admiralty*"); taking and noting exceptions at trials (see "*Trial*"; "*Reference*"); review of decisions relating to making bills of exceptions (see "*Appeal and Error*"); hearing of exceptions in first instance by appellate court (see "*Appeal and Error*"); necessity and use of exceptions on motions for new trial (see "*New Trial*"), or on appeals or writs of error (see "*Appeal and Error*").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

#### **I. Nature, Form, and Contents in General.**

- § 1. Nature and purpose of remedy in general.
- § 2. Statutory provisions.
- § 3. Actions and proceedings in which bill is authorized.
- § 4. Matters subject to exception.
- § 5. Right to make bill.
- § 6. Scope and contents of bill in general.
- § 7. Setting forth errors or irregularities.
- § 8. Setting forth objections, rulings, and exceptions.
- § 9. Setting forth proceedings not shown by record.
- § 10. Stating facts not shown by record.
- § 11. Incorporating evidence.
- § 12. — Necessity.

\* Annotation: Words and Phrases, same title.

**I. Nature, Form, and Contents in General—Continued.**

- § 13. — Setting forth evidence in general.
- § 14. — Stenographer's report.
- § 15. — Documentary evidence.
- § 16. — Abridgment.
- § 17. Incorporating evidence excluded.
- § 18. Incorporating instructions given.
- § 19. Incorporating instructions refused.
- § 20. Form and arrangement of bill.
- § 21. Insertion of documents.
- § 22. — In general.
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- § 24. Number of bills.
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**II. Settlement, Signing, and Filing.**

- § 31. Necessity of allowance or settlement.
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- § 44. — Allowance and filing nunc pro tunc.
- § 45. Preparation and requisites of proposed bill.
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- § 48. Notice of settlement.
- § 49. Stipulations as to allowance or settlement.
- § 50. Presentation for allowance or settlement.
- § 51. Allowance or settlement by judge or other officer.
- § 52. Resettlement.
- § 53. Compelling allowance or settlement.
- § 54. Procuring signatures or affidavits of bystanders.
- § 55. Proceedings to establish exceptions.
- § 56. Certificate, signature, and seal of judge.
- § 57. Filing.
- § 58. Service.

## II. Settlement, Signing, and Filing—Continued.

- § 59. Amendment or correction.
- § 60. Quashing or striking from files.
- § 61. Exceptions pendente lite.

### *Cross-References.*

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| <p>Act authorizing bills of exceptions to be signed and sealed by attorneys as encroachment on judiciary, see "Constitutional Law," § 52.</p> <p>As substitute for abstract of record, or brief of evidence, see "Appeal and Error," § 591.</p> <p>As substitute for transcript of record, see "Appeal and Error," § 610.</p> <p>Authentication and certification for purpose of review, see "Appeal and Error," § 613.</p> <p>Bills containing testimony, as evidence, see "Evidence," § 582.</p> <p>Conclusiveness, see "Appeal and Error," § 662.</p> <p>Conflict between bill and other parts of record, see "Appeal and Error," § 664.</p> <p>Defects or errors as affecting review or disposition of cause, see "Appeal and Error," § 637.</p> <p>Effect of failure to make, see "Appeal and Error," § 554.</p> <p>Effect of including unnecessary matter, see "Appeal and Error," § 636.</p> <p>Effect of loss, see "Appeal and Error," § 543.</p> <p>Effect of omissions, see "Appeal and Error," § 635.</p> <p>Fast bill of exceptions, see "Appeal and Error," § 350.</p> <p>Impeaching or contradicting, see "Appeal and Error," §§ 667-670.</p> <p>Inability to procure settlement and allowance of bill as ground for new trial, see "New Trial," § 5.</p> <p>In arbitration proceedings, see "Arbitration and Award," § 73.</p> <p>Including bill in case or statement of facts, see "Appeal and Error," § 559.</p> <p>Including matters in bill of exceptions which should go into record proper, see "Appeal and Error," § 713.</p> <p>Incorporation of bill of exceptions into transcript or return of record, see "Appeal and Error," § 600.</p> <p>In criminal cases, see "Criminal Law," §§ 1090-1095.</p> <p>In proceedings for review of decisions of board of equalization, see "Taxation," § 493.</p> | <p>Limitation of review by bill of exceptions, see "Appeal and Error," § 671.</p> <p>Necessity for purpose of review, see "Appeal and Error," §§ 544-555.</p> <p>Necessity that making and filing appear of record on appeal, see "Appeal and Error," § 511.</p> <p>On appeal from decisions of county board, see "Counties," § 58.</p> <p>On appeal in election registration cases, see "Elections," § 112.</p> <p>On appeal in highway proceedings, see "Highways," § 58.</p> <p>On appeal or writ of error from decision on certiorari, see "Certiorari," § 70.</p> <p>On application for new trial, see "Criminal Law," § 955; "New Trial," § 131.</p> <p>On certiorari, see "Certiorari," § 52.</p> <p>On complaint under bastardy act, see "Bastards," § 92.</p> <p>On motion for new trial in will contest, see "Wills," § 337.</p> <p>Papers referred to, as part of record, see "Appeal and Error," § 540.</p> <p>Part of record for purpose of review, see "Appeal and Error," §§ 536, 537.</p> <p>Presumptions as to making and contents, see "Appeal and Error," § 938.</p> <p>Recitals in abstract of record on appeal, see "Appeal and Error," § 581.</p> <p>Record on appeal from justice's court, see "Justices of the Peace," § 164.</p> <p>Remedy by bill of exceptions or motion to vacate judgment, see "Judgment," § 338.</p> <p>Review of discretion of lower court, see "Appeal and Error," § 985.</p> <p>Review of proceedings relating to bill, see "Appeal and Error," § 227.</p> <p>Surprise, accident, inadvertence or mistake preventing making, ground for new trial, see "New Trial," § 93.</p> <p>Taking exceptions at trial, see "Criminal Law," §§ 660, 697, 698, 728, 838-847, 868, 894; "Trial," §§ 31, 100-105, 131, 166, 181, 270-284, 317, 366, 378, 385, 405.</p> <p>Time to make objections, see "Appeal and Error," § 643.</p> <p>Use of bill of exceptions to impeach witness, see "Witnesses," § 393.</p> <p>Waiver of defects or objections, see "Appeal and Error," § 644.</p> |
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## I. NATURE, FORM, AND CONTENTS IN GENERAL.

### *Cross-Reference.*

- In criminal cases, see "Criminal Law," § 1091.

### § 1. Nature and purpose of remedy in general.

- (a) The object of a bill is to bring upon the record such matters as would not otherwise appear, and not to show facts that

are properly matters of record.—*Blake v. Pitcher*, 46 Md. 453; *Davis v. Carroll*, 71 Md. 568, 18 Atl. 965.

## § 2. Statutory provisions.

## § 3. Actions and proceedings in which bill is authorized.

(a) Orphans' courts are not courts of common-law jurisdiction, and not within the provisions of the statute of Westminster; and therefore, in controversies before them, parties are not entitled to a bill of exceptions.—*Mayhew v. Soper*, 10 G. & J. 366. (See Alex. Brit. Stat. [Coe's ed.] 165; *Barth v. Rosenfeld*, 36 Md. 604. Compare Code, art. 5, § 5; *Waters v. Waters*, 26 Md. 53.)

(b) Evidence given on a motion to set aside a sheriff's return may form the subject of a bill, though such motion was tried upon oral proof.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

## § 4. Matters subject to exception.

(a) A ruling on a demurrer is not a subject of exceptions.—*Blake v. Pitcher*, 46 Md. 453.

(b) The improper refusal of a judge of the Circuit Court to sign a bill of exceptions cannot be corrected by appeal to the Court of Appeals.—*Marsh v. Hand*, 35 Md. 123; *Carey v. Merryman*, 46 Md. 89; *Donohue v. Shedrick*, Id. 226.

(c) The refusal of the court to sign a bill of exceptions is not the subject of exception.—*Donohue v. Shedrick*, 46 Md. 226.

(d) The allowance of an amendment to a declaration, provided it be within the power of the court granting leave to make it, is not the subject of an exception.—*Scarlett v. Academy of Music*, 43 Md. 203.

(e) Any decision or declaration by the trial court on the law of a case, made in the progress of its trial, and by which the jury are influenced and the counsel controlled, is subject to exception.—*Sowerwein v. Jones*, 7 G. & J. 335.

(f) A bill of exceptions may be taken to the opinion of the court on any question decided relative to the practice adopted therein.—*Briscoe v. Ward*, 1 H. & J. 165.

## § 5. Right to make bill.

## § 6. Scope and contents of bill in general.

### Cross-Reference.

Insertion of affidavits, motions and other documents, see post, §§ 21-23.

(a) Only one question of law should be presented in a bill of exceptions.—*Acker, Merrall & Condit Co. v. McGaw*, 106 Md. 536, 68 Atl. 17.

## § 7. Setting forth errors or irregularities.

(a) A bill of exceptions that, after swearing the jury, the court allowed an amendment by adding an additional party, to which defendant excepted, is insufficient to raise the objection that the jury was not resworn after the amendment was made.—*Thillman v. Neal*, 88 Md. 525, 42 Atl. 242.

## § 8. Setting forth objections, rulings, and exceptions.

### Cross-References.

Necessity, see "Appeal and Error," §§ 498-502.

Necessity of bringing up evidence by bill of exceptions, see "Appeal and Error," § 548.

Presentation by bill or by record proper, see "Appeal and Error," § 549.

(a) Rulings on several prayers may be treated as a single act properly covered by one bill of exceptions, but exceptions to other rulings, such as rulings striking testimony, included in the same bill, will not be considered.—*Baltimore & O. R. Co. v. Rueter*, 114 Md. 687, 80 Atl. 220.

(b) A bill of exceptions purporting to present an objection to the argument of counsel, but which does not state any ruling thereon, will be disregarded.—*Annapolis Gas & E. L. Co. v. Fredericks*, 112 Md. 449, 77 Atl. 53.

(c) A bill of exceptions embracing several distinct questions to a witness, and showing by note, after each question, that it was objected to, objections sustained and exception noted, and at the conclusion of the bill recites: "And to the ruling of the court on the objections to the questions asked said witness, in sustaining the objections and refusing to permit the witness to answer them or any of them, the defendant duly excepted and prays the court to sign," etc.—is insufficient, since the ruling on each question should form the subject of a separate ex-

ception.—*Junkins v. Sullivan*, 110 Md. 539, 73 Atl. 264.

(d) Where a certificate to a bill of exceptions shows that a special exception was taken to an instruction, and passed on by the court, such exception was sufficient to be considered on appeal, as it was not necessary that it be made in writing, or that it should form a separate bill of exceptions.—*Moses v. Allen*, 91 Md. 42, 46 Atl. 323.

### § 9. Setting forth proceedings not shown by record.

(a) Facts, not appearing of record, can only be presented on appeal by bill of exceptions or some equivalent.—*Wilkin Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879.

(b) The object of a bill is to bring upon the record such matters as would not otherwise appear, and not to show facts that are properly matters of record.—*Blake v. Pitcher*, 46 Md. 453; *Davis v. Carroll*, 71 Md. 568, 18 Atl. 965.

### § 10. Stating facts not shown by record.

*Cross-Reference.*

See ante, § 9.

### §§ 11-16. Incorporating evidence.

*Cross-Reference.*

Questions considered as dependent on certification of evidence or facts proved, see "Appeal and Error," § 839.

#### *Stenographer's Report.*

Insertion in skeleton bill, see post, § 23.

Mode of insertion in bill in general, see post, § 22.

Filing longhand manuscript, requisites of record to show, see "Appeal and Error," § 515.

Mandamus to compel stenographer to furnish, see "Mandamus," § 3.

(a) On exception to a refusal of a prayer for instructions, it is sufficient to state the facts which the evidence tends to prove, without setting out the evidence.—*Blake v. Pitcher*, 46 Md. 453.

(b) A bill recited that certain depositions and exhibits attached thereto were admitted over defendant's objection, but the bill did not embody the depositions nor the exhibits. The same were, however, set out in the transcript of the record, and the record contained no averment that they were not the same as those referred to in the exceptions. *Held*, that the depositions and exhibits were suffi-

ciently identified to support the exceptions.—*Blair v. Blair*, 39 Md. 556.

§§ 17-19. (See Analysis.)

### § 20. Form and arrangement of bill.

(a) It is improper to include rulings on essentially distinct propositions of law in one exception.—*Harris v. Hipsley*, 122 Md. 418, 89 Atl. 852.

(b) A bill of exceptions will not be considered by the Court of Appeals where it contains several exceptions.—*Citizens' Mut. Fire Ins. Co. v. Conowingo Bridge Co.*, 116 Md. 422, 82 Atl. 372.

(c) In an action against a carrier for failure to furnish cars the requisition for cars admitted in evidence was contained in the first bill of exceptions, complaining of the rulings on admission of evidence. There was no reference in the second bill of exceptions, complaining of a prayer given by the court, to the first bill of exceptions. *Held*, that the court, in passing on the correctness of the prayer, could consider the requisition for cars admitted in evidence and contained in the first bill of exceptions.—*Di Giorgio Importing & Steamship Co. v. Pennsylvania R. Co.*, 104 Md. 693, 65 Atl. 425.

(d) Distinct rulings on the admissibility of evidence, and an objection to an instruction taking a case from the jury, should be embodied in different bills of exceptions.—*Tall v. Baltimore Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120.

(e) A bill of exceptions to the granting of a prayer to direct a verdict for plaintiff, which states that, "plaintiff having rested his case, the defendant offered the following prayer," which shows that it was offered in reference to the insufficiency of plaintiff's proof, sufficiently connects the bill with another bill, which contains the material evidence in the case, to enable the appellate court to consider the latter in connection with it.—*Rowe v. Baltimore & O. R. Co.*, 82 Md. 493, 33 Atl. 761.

(f) When an unsigned bill of exceptions is connected with the one succeeding its recitals of fact form part of the latter.—*Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361.

(g) Where, on appeal, several bills of exceptions are filed, they must be considered

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

wholly distinct from each other, unless they contain sufficient words of connection.—*Armstrong v. Thruston*, 11 Md. 148.

(h) Exceptions in chancery must be signed by a solicitor of the court.—*Cross v. Cohen*, 3 Gill 257.

(i) There is no difference between a statement in a bill of exceptions that certain facts were proved, and that evidence was offered of them.—*Riggin v. Patapsco Ins. Co.*, 7 H. & J. 279, 16 Am. Dec. 302.

## §§ 21-23. Insertion of documents.

### Cross-References.

Necessity of filing stenographer's report in clerk's office before insertion, see ante, § 14; "Appeal and Error," § 515.

## § 24. Number of bills.

### Cross-Reference.

See ante, §§ 8, 20.

(a) Each ruling on evidence must be presented by a separate bill of exceptions.—*Hagerstown Brewing Co. v. Gates*, 117 Md. 348, 83 Atl. 570.

(b) Rulings on several prayers may be treated as a single act, and properly covered by one bill of exceptions.—*Baltimore & O. R. Co. v. Rueter*, 114 Md. 687, 80 Atl. 220.

(c) Where plaintiff's and defendant's prayers were all submitted at the same time, they should have been embodied in one exception.—*Shawnee Fire Ins. Co. v. Pontfield*, 110 Md. 353, 72 Atl. 835.

## §§ 25-29. (See Analysis.)

## § 30. Exceptions pendente lite.

### Cross-References.

Settlement, signing, and filing, see post, § 61.

Necessity of assignment of errors, see "Appeal and Error," § 719.

## II. SETTLEMENT, SIGNING, AND FILING.

### Cross-References.

Death of trial judge before allowance, as ground for vacating judgment, see "Judgment," § 343.

Decisions that judge may settle bill of exceptions after expiration of term of office as stare decisis, see "Courts," § 90.

Following state statutes and practice in federal courts, see "Courts," § 356.

In criminal cases, see "Criminal Law," § 1092.

Review of discretion of trial court in relation to settlement and allowance of bill, see "Appeal and Error," § 985.

Rules of court as to time for preparation, see "Courts," § 80.

Stay of main action pending filing of bill of exceptions to ruling on plea in abatement of attachment, see "Action," § 68.

## § 31. Necessity of allowance or settlement.

## § 32. Authority to allow or settle.

### Cross-References.

Authority of clerk to certify bill, see post, § 56.

Authority to amend, see post, § 59.

Compelling allowance after expiration of judge's term of office, see post, § 53.

Exceptions pendente lite, see post, § 61.

Stipulation of counsel, see post, § 49.

To extend time for presentation, allowance, and filing, see post, § 40.

### Annotation.

Authority of judge pro tem, as to bill of exceptions.—42 L. R. A. (N. S.) 616, note.

(a) Rules of the inferior court, set out in a bill of exceptions, but not certified by the judge or otherwise, cannot be regarded in the Court of Appeals.—*Rutherford v. Pope*, 15 Md. 579.

## §§ 33, 34. (See Analysis.)

## § 35. Time for presentation, allowance, and filing.

### Cross-References.

Exceptions pendente lite, see post, § 61.

Failure to comply with requirements as to time as defense to mandamus, see post, § 53.

For amendment or correction of bill, see post, § 59.

For amendment or correction of proposed bill, see post, § 47.

For procuring signatures of bystanders, see post, § 54.

For resettlement, see post, § 52.

For service, see post, § 58.

After transfer of cause, see "Appeal and Error," § 441.

As part of record for purpose of review, see "Appeal and Error," § 537.

Computation of time, see "Time," §§ 9, 10.

Presumptions on appeal or writ of error, see "Appeal and Error," § 938.

Showing timely making and filing in record, see "Appeal and Error," § 511.

## § 36.— In general.

(a) The time within which an exception taken to the ruling of a court before the retirement of the jury may be drawn up and presented to the court depends on the practice of the court, and the judicial discretion of the judge, whose ruling cannot be revised on appeal.—*Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 623; *Roloson v. Carson*, 8 Md. 208.

**§ 37.— At or after trial.***Cross-Reference.*

See ante, § 36.

(a) Where a bill is signed at the term in which the trial is had, and shows that the exceptions were taken at the time of the several decisions of the court, it is sufficient.—*State v. Kent County Com'rs*, 83 Md. 377, 35 Atl. 62.

(b) An exception to the record evidence offered in reply to a plea of nul tiel record need not be formally signed before judgment rendered on the plea, nor need any prayer be submitted on the subject, in order to permit a review of the finding on that issue on appeal.—*State v. Jenkins*, 70 Md. 472, 17 Atl. 392.

(c) When the trial closes, a bill of exceptions should be at once prepared and settled, in anticipation of the formal entry of judgment, and with a view to preserve the exceptor's right of appeal.—*Bond v. Citizens Nat. Bank*, 65 Md. 498, 4 Atl. 893. [Cited and annotated in 28 L. R. A. 625, on entry or record necessary to complete judgment or order.]

**§ 38.— During or after term.***Cross-References.*

See ante, § 36; post, §§ 39, 40.

(a) Under rule 32 of the Circuit Court for Howard County, an appeal held properly dismissed for appellant's failure to have the bills of exception submitted or signed during the trial term.—*Sieling v. Brunner*, 117 Md. 682, 83 Atl. 1032.

(b) Presentation of bills of exception to the court after the general business of the term is over, and it has ceased to hold regular sessions, though it is still holding occasional special sessions for special business, does not comply with a rule of the trial court that in every case, unless otherwise expressly allowed by the court, the bill of exceptions shall be prepared and submitted to the court "during the sittings of the term" at which such exception shall be taken.—*Livers v. Ardinger*, 90 Md. 36, 44 Atl. 1042.

(c) A bill of exceptions should be settled and signed during the term of court at which the trial is had, unless the time is extended by special order or by consent.—*Hooker v. Sawyer*, 56 Md. 468; *City of Westminster v. Shipley*, 68 Md. 610, 13 Atl. 365.

(d) Where no order has been granted extending the time for filing a bill of exceptions beyond the expiration of the term, the judge can sign exceptions presented to him after the term only with consent of both parties.—*Thomas v. Ford*, 63 Md. 346, 52 Am. Rep. 513.

**§ 39.— Time prescribed or allowed.***Cross-Reference.*

See ante, § 36.

(a) The presentation of a bill of exceptions at a session of the Circuit Court held for a special purpose after the cases on the regular docket have been disposed of is not a compliance with rule 32 of Circuit Court of Howard County, requiring bills of exception to be submitted during the sittings of the term.—*Boyd v. Kellog*, 121 Md. 42, 88 Atl. 30.

(b) The Court of Appeals cannot repeal or modify a rule of a Circuit Court governing the submission of the bill of exceptions.—*Boyd v. Kellog*, 121 Md. 42, 88 Atl. 30.

(c) Where a bill of exceptions is not signed within 30 days from rendition of the verdict, the questions thereby presented cannot be reviewed on appeal.—*E. J. Codd Co. v. Parker*, 97 Md. 319, 55 Atl. 623.

**§ 40.— Extension of time.***Cross-References.*

See ante, § 38.

For service, see post, § 58.

Mandamus to compel extension, see post, § 53.

Review of discretion of court, see "Appeal and Error," § 956.

(a) The court cannot, after the time for the submission for the term of the bill of exceptions has expired, grant an extension of the time.—*Boyd v. Kellog*, 121 Md. 42, 88 Atl. 30.

(b) Though a bill of exceptions must be signed by the judge who tried the case and who allowed the exceptions, another judge of the court may, when the presiding judge cannot be reached, extend the time for the filing of a bill of exceptions.—*United Rys. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75.

(c) Where the time for filing a bill of exceptions was extended until 30 days after the motion for a new trial was heard and determined by the court, an entry reciting "new trial to be granted unless plaintiffs agree to a reduction of the verdict" was not



a complete determination, and the 30 days did not begin to run until the motion for new trial was actually overruled.—*H. J. McGrath Co. v. Marchant*, 117 Md. 472, 83 Atl. 912.

(d) An order extending the time to file a bill of exceptions *held* to take effect immediately, and to extend the time to a specified date without reference to the terms employed in designating the day to which the time was extended.—*Gross v. Wood*, 117 Md. 362, 83 Atl. 337, 341, Ann. Cas. 1914A, 30; *Wood v. Rosenheim*, Id.

(e) Under the ordinary practice, and in the absence of any rule of court, an exception to a ruling of the court must be taken at the time the ruling is made; but it is not necessary to prepare a bill of exceptions or have it signed until after the trial at some convenient time during the term, unless otherwise specially ordered by the court, which may by order passed during the term extend the time beyond its expiration.—*Carter v. Maryland & P. R. Co.*, 112 Md. 599, 77 Atl. 301.

(f) The trial court may grant successive extensions of the time for the preparation and signing of the bill of exceptions, where the first extension is made before the expiration of the term, and where each subsequent extension is granted before the expiration of the next preceding one.—*Carter v. Maryland & P. R. Co.*, 112 Md. 599, 77 Atl. 301.

(g) A bill of exceptions may be prepared and signed after the expiration of the term by consent of the parties to the action.—*Carter v. Maryland & P. R. Co.*, 112 Md. 599, 77 Atl. 301.

(h) Where the time for signing a bill of exceptions was extended by the court because of a change in the legal department of the city government, and an agreement that the time for signing the bill was extended to allow the defendant time to examine the same was attached to one of the orders, the appeal will not be dismissed for failure to sign the exceptions within the required time.—*Cahill v. City of Baltimore*, 93 Md. 233, 48 Atl. 705.

(i) Under Pub. Loc. Laws, City of Baltimore, art. 4, § 170, providing that bills of exceptions "may be signed" at any time

within thirty days after the rendition of the verdict, etc., "but not thereafter, unless the time for signing the same shall have been previously extended by order of the court, or by consent of parties," etc., the court has power to grant several extensions of time for signing and sealing a bill of exceptions, provided the first extension be granted within said 30 days, and that each succeeding extension be made within the time granted in the previous extension.—*Edelhoff v. Horner-Miller Straw Goods Mfg. Co.*, 86 Md. 595, 39 Atl. 314. (See Balto. City Code, Charter, § 316.)

(j) Pub. Loc. Laws, City of Baltimore, art. 4, § 170, provides that a bill of exceptions may be signed within 30 days, but not thereafter, unless the time for signing said bill shall have been "previously extended" by order of court. *Held*, that where such an order has been issued extending the time "to" a certain day, this must be regarded as inclusive of the day named, and an order issued on such a day for a still further extension is valid.—*Gottlieb v. Fred. W. Wolf Co.*, 75 Md. 126, 23 Atl. 198. (See Balto. City Code, Charter, § 316.) [*Cited and annotated in 49 L. R. A. 202, 232, on first and last days in computing time.*]

(k) An order allowing an appellant a specified length of time within which to file a bill of exceptions, made on the first day of the term succeeding the term at which the case was tried, but before the adjournment of such preceding term, and a filing of the bill of exceptions within the time prescribed by the order, constitutes a compliance with the rule of court providing that, unless otherwise expressly allowed by the court, a bill of exceptions shall be prepared and submitted to the court during the term at which it was taken.—*Schulze v. Fox*, 53 Md. 37.

#### § 41.— Compliance with requirements.

##### *Cross-References.*

Authority to allow or settle, see ante, § 32.  
Sufficiency of presentation, see post, § 50.

(a) Where an appellant tenders his bill of exceptions to the judge within the time limited for its preparation, it is a sufficient compliance with the order, although the judge does not sign it within the specified time.—*Cochrane v. Little*, 71 Md. 323, 18 Atl. 698.

**§ 42.—Waiver of objections to delay.**

(a) Where appellee's counsel, when the bills of exceptions were presented after the expiration of the term at which the judgment was rendered made changes in them, was present in court when they were signed, participated with appellant's counsel in discussing them before the judge, who allowed further changes and made no objection to the signing, they cannot complain in the Court of Appeals that the exceptions were signed too late.—*Williams v. United States Fidelity & Guaranty Co.*, 105 Md. 490, 66 Atl. 495.

(b) Act 1886, c. 184, § 173, provides that "bills of exceptions may be signed in any cause pending in any of said courts, at any time within thirty days from the rendition of the verdict \* \* \* or the findings of the court, \* \* \* but not thereafter unless the time for signing said bill of exceptions shall have been previously extended by order of court or consent of parties." *Held*, that failure to act within the time prescribed was a mere irregularity, which could be waived so that, by consent of the parties, the judge could thereafter sign the bill of exception, though within the time limited there had been no order of the court, or consent of parties, extending the time.—*Murphy v. McGuire*, 73 Md. xv, memorandum case, 20 Atl. 726, full report. (See Balto. City Code, Charter, § 316.)

**§ 43.—Presentation and allowance after expiration of time.**

(a) The fact that a bill of exceptions was not signed in time is not a ground for dismissal of the appeal, if the delay occurred through no fault of the appellant or his attorney.—*Horn v. Buck*, 48 Md. 358.

(b) A bill must be signed within the time fixed by law, or the order of court, or agreement of the parties; and, if not done within the proper time, the bill may be stricken from the record.—*Wheeler v. Briscoe*, 44 Md. 308.

**§ 44.—Allowance and filing nunc pro tunc.****Cross-Reference.**

Allowance of extension nunc pro tunc, see ante, § 40.

**§§ 45-48. (See Analysis.)****§ 49. Stipulations as to allowance or settlement.****Cross-Reference.**

Extension of time for presentation, allowance, or settlement by stipulation, see ante, § 40.

(a) An agreement that a judge whose term of office has expired may sign and seal a bill of exceptions is of no effect, and a new trial should be granted.—*State v. Weiskittle*, 61 Md. 48. [Cited and annotated in 25 L. R. A. (N. S.) 866, on disposition of appeal where without fault of appellant record is lost or incomplete.]

**§ 50. Presentation for allowance or settlement.****§ 51. Allowance or settlement by judge or other officer.****Cross-References.**

Amendment or correction by judge at time of signature where signed after expiration of time, see ante, § 41.

Necessity for allowance or settlement, see ante, § 31.

Prayer for general relief as authorizing writ requiring judge to seal bill of exceptions, see "Equity," § 427.

(a) The correctness of a bill of exceptions must be determined by the trial judge, where the parties are unable to agree.—*Gross v. Wood*, 117 Md. 362, 83 Atl. 337, 341, Ann. Cas. 1914A, 30; *Wood v. Rosenheim*, Id.

**§ 52. Resettlement.****§ 53. Compelling allowance or settlement.****Cross-Reference.**

Appeal from order of disallowance as dependent on existence of other remedy, see "Appeal and Error," § 10.

(a) A compulsory writ, requiring the judge to sign the bill of exceptions, must be specifically prayed in a proper proceeding for that purpose as against the judge, and cannot be granted upon a bill against the other parties to the cause and under the prayer for general relief.—*Ruppertsberger v. Clark*, 53 Md. 402.

(b) Where a judge before whom a case is tried refuses to sign and seal a bill of exceptions tendered in time under the rules of the court, the party aggrieved by such refusal may have a compulsory writ from the court of chancery commanding the judge to sign and seal the bill of exceptions.—*Marsh v. Hand*, 35 Md. 123.

### § 54. Procuring signatures or affidavits of bystanders.

#### Cross-Reference.

Absence of judge trying case, see ante, § 32.

### § 55. Proceedings to establish exceptions.

#### Cross-References.

Certificate of clerk as to filing, see post, § 57.

Certificate to bill proved before referee, see post, § 56.

### § 56. Certificate, signature, and seal of judge.

#### Cross-References.

Signatures of parties and counsel, see ante, § 20.

Stipulations as to signature, see ante, § 49.

Time for signing, see ante, §§ 36-44.

Authentication and certification to appellate court, see "Appeal and Error," § 613.

(a) A bill of exceptions which is not signed by the court cannot be considered on appeal.—*Goodman v. Saperstein*, 115 Md. 678, 81 Atl. 695.

(b) The bill must be signed by the trial judge.—*Jones v. State*, 101 Md. 510, 61 Atl. 222.

(c) A bill of exceptions must have a seal.—*Davis v. Wilson*, 2 H. & J. 345; *Lancaster v. Herbert*, 74 Md. 334, 22 Atl. 139.

(d) Each distinct exception which embraces an independent proposition of law must be signed and sealed by the trial court before it can be considered by the appellate court.—*Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711.

(e) When there are papers in the record purporting to be exceptions, but merely signed by the attorneys, and not signed or sealed by the judge, the correctness of the law of the court's instructions is open for review upon the exceptions taken, but not the legal sufficiency of the evidence upon which the instructions are based.—*Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

(f) Exceptions must be signed as well as noted by the judge.—*Hopkins v. Kent*, 17 Md. 113.

(g) The first exception was not signed, but the second, which was signed, referred to the first as stating all the necessary facts. Held, that the defect was thereby cured.—*Hopkins v. Kent*, 17 Md. 113.

(h) Rules of the inferior court, set out in a bill of exceptions, but not certified by the judge or otherwise, cannot be regarded in the Court of Appeals.—*Rutherford v. Pope*, 15 Md. 579.

(i) Each distinct exception taken in the court below which embraces an independent proposition of law should be signed and sealed by the court below before it can be regarded as a valid exception.—*Ellicott v. Martin*, 6 Md. 509, 61 Am. Dec. 327.

### § 57. Filing.

#### Cross-References.

Statement as to filing in certificate of judge, see ante, § 56.

Time for filing, see ante, §§ 36-44.

### § 58. Service.

### § 59. Amendment or correction.

#### Cross-References.

At time of signature where signed after time has expired, see ante, § 41.

Proposed bill, see ante, § 46.

After transmission of record, see "Appeal and Error," §§ 642-661.

Remitting to lower court for amendment or correction, see "Appeal and Error," § 657.

Stipulations for amendment in appellate court, see "Appeal and Error," § 646.

Time for amendment on appeal, see "Appeal and Error," § 643.

### § 60. Quashing or striking from files.

#### Cross-References.

Effect on appeal or other proceedings for review, see "Appeal and Error," § 555.

Striking from record in appellate court, see "Appeal and Error," § 655.

### § 61. Exceptions pendente lite.

#### Cross-References.

In criminal prosecutions, see "Criminal Law," § 1092.

Necessity of timely exception, see "Appeal and Error," § 272.

Relief against failure to file exceptions pendente lite, see "Appeal and Error," § 279.

Right to withdraw record or bill of exceptions, and file bill of exceptions below as exceptions pendente lite, see "Appeal and Error," § 776.

### EXCESSIVE BAIL.\*

#### Cross-References.

In civil actions, see "Bail," § 7.

In criminal prosecutions, see "Bail," § 52.

### EXCESSIVE DAMAGES.\*

#### Cross-References.

See "Damages," §§ 127-140.

Ground for new trial, see "New Trial," § 76.

\*Annotation: Words and Phrases, same title.

**EXCESSIVE FINES.\****Cross-Reference.*

See "Criminal Law," §§ 1208, 1214.

**EXCESSIVE FORCE.***Cross-Reference.*

Removal of persons on passenger train, see "Carriers," § 365.

**EXCESSIVE PUNISHMENT.\****Cross-References.*

See "Criminal Law," § 1213; "Larceny," § 88; "Obstructing Justice," § 21; "Rape," § 64; "Receiving Stolen Goods," § 10; "Robbery," § 30.

For carrying weapons, see "Weapons," § 17.

**EXCESSIVE TAXATION.\****Cross-Reference.*

See "Taxation," § 56.

**EXCHANGE.\****Cross-References.*

Bills of, see "Bills and Notes."

Provision for, as affecting negotiability of bill or note, see "Bills and Notes," § 159.

Purchase and sale of exchange, see "Banks and Banking," §§ 188, 192.

**EXCHANGE BROKERS.\****Cross-Reference.*

See "Brokers."

**EXCHANGE OF PROPERTY.\****Scope-Note.*

[INCLUDES mutual transfers of ownership of property by way of interchange without fixed price or valuation; contracts for such transfers, executory or executed; rights and liabilities of parties to such transfers or contracts; and remedies relating thereto.

[EXCLUDES conveyances of land by way of exchange (see "Deeds").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.*

- § 1. Nature and elements in general.
- § 2. Exchange of real property.
- § 3. — Requisites and validity.
- § 4. — Construction of contract.
- § 5. — Modification or rescission.
- § 6. — Performance of contract.
- § 7. — Rights and liabilities of parties.
- § 8. — Remedies.
- § 9. Exchange of personal property.
- § 10. — In general.
- § 11. — Rescission.
- § 12. — Warranties.
- § 13. — Remedies.
- § 14. — Conditional exchange.

*Cross-References.*

Actionable deceit, see "Fraud," §§ 1-67.

Actions for rescission of written contracts of exchange, see "Cancellation of Instruments."

Authority of agent to exchange, see "Principal and Agent," §§ 63, 103.

By county, see "Counties," § 104.

By husband and wife, of wife's property, see "Husband and Wife," § 15.

Evidence of value of property, see "Evidence," § 113.

Exchange of paper as consideration for bill or note, see "Bills and Notes," § 95.

Exemption of property exchanged for homestead, see "Homestead," § 77.

Exempt property, see "Homestead," § 112.

Parol or extrinsic evidence of fraud in contract, see "Evidence," § 434.

Parol or extrinsic evidence of prior or contemporaneous agreements, see "Evidence," §§ 441, 442.

Parol or extrinsic evidence to contradict or vary contract, see "Evidence," § 400.

Rights, duties and liabilities of brokers as to exchanges of property, see "Brokers."

Sale of land for fixed amount payable in other property, see "Vendor and Purchaser."

Usurious contracts, see "Usury," §§ 31, 32.

\*Annotation: Words and Phrases, same title.

# § 1. Nature and elements in general.

## §§ 2-8. Exchange of real property.

### Cross-References.

Application of statute of frauds in general, see "Frauds, Statute of," § 69.

Contract by agent without written authority, see "Frauds, Statute of," § 116.

Effect of part performance of oral contract, see "Frauds, Statute of," § 129.

Limitations, see "Limitation of Actions," § 95.

Testimony as to transactions with persons since deceased, see "Witnesses," § 175.

(a) The father of plaintiff and defendant willed certain land to each, subject to his widow's life estate, and to the former an amount of money greater than that to the latter. The parties thereafter exchanged their properties. Plaintiff asserts that she did so because of being unduly influenced and worried by her sister and her then husband, and being advised that no deed would affect her title if made during her mother's life. The defendant alleged that the property she exchanged was more valuable than that of the plaintiff. Plaintiff's testimony failed to show in what manner she had been over-persuaded, and witnesses of the execution of the deeds failed to testify to anything that would have the effect alleged. Her then husband took plaintiff voluntarily to her mother's home, where all the family had assembled, to execute the deed. Her husband thereafter died, and she married her present husband some 13 years prior to bringing suit, at which time witnesses to the transaction were dead. *Held*, that a decree dismissing a bill to have the deeds of exchange set aside was proper.—*Tifel v. Jenkins*, 93 Md. 744, 49 Atl. 840.

(b) A written agreement for the exchange

of real property provided that the ground rent, taxes, etc., on the property conveyed by one of the parties must be paid by him "up to the passing of the papers." *Held*, that this must be construed to mean up to the execution and delivery of formal conveyances transferring title to the property free from all liens save those excepted in the agreement.—*Linthicum v. Thomas*, 59 Md. 574.

## §§ 9-14. Exchange of personal property.

### Cross-References.

Exchange of real for personal property, see ante, §§ 3-8.

Jurisdiction of federal court of suit to rescind exchange of goods for patent as raising federal question, see "Courts," § 290.

### Annotation.

Measure of damages for fraud in exchange of property.—38 L. R. A. (N. S.) 465, note.

(a) In replevin for a mare exchanged by plaintiff for another, which was represented by the defendant to be gentle and safe, evidence as to the nature of the defendant's mare in these particulars was admissible.—*Herzberg v. Sachse*, 60 Md. 426.

(b) In an exchange of horses with warranty of soundness and the privilege of returning after trial, the horse received by plaintiff was found unsound, and in a few days was returned by him with a demand for the horse given to defendant in exchange. *Held*, that the refusal of defendant to restore the horse received from plaintiff was a conversion which rendered him liable to plaintiff for the value thereof.—*Miller v. Grove*, 18 Md. 242. [Cited and annotated in 27 L. R. A. (N. S.) 921, on right to reject goods for breach of warranty.]

## EXCHANGES.\*

### Scope-Note.

[INCLUDES bodies formed by the incorporation or association of persons engaged in business of the same nature for the purpose of facilitating and regulating the transaction of such business among the members.

[EXCLUDES matters relating to corporations or unincorporated associations in general (see "Corporations"; "Associations"); liability of seats or memberships in exchanges to levy of execution (see "Execution"); and arbitration of differences between members of exchanges (see "Arbitration and Award").

[For complete list of matters excluded, see cross-references, post.]

\*Annotation: Words and Phrases, same title.

*Analysis.*

- § 1. Nature and status in general.
- § 2. Statutory provisions.
- § 3. Incorporation and organization.
- § 4. Constitution, by-laws, and rules.
- § 5. Membership in general.
- § 6. Stock.
- § 7. Property in seat or membership, and transfer thereof.
- § 8. Dues, fines, and assessments.
- § 9. Mutual dealings and liabilities of members.
- § 10. Officers and committees.
- § 12. Rights and liabilities as to persons not members.
- § 13. Quotations of prices and transactions.
- § 14. Actions by or against exchanges.
- § 15. Dissolution.

*Cross-References.*

Assignment of interest in fund of exchange, see "Assignments," §§ 7, 88.  
 Brokers, members of exchange as, see "Brokers," § 8.  
 Brokers' rights, duties, and liabilities in general, see "Brokers."  
 Brokers' transactions as affected by constitution and rules, see "Brokers," § 21.  
 Conspiracy to depress value of stock dealt in on stock exchange, see "Conspiracy," § 30.  
 Criminal responsibility for spreading false rumors affecting value of stock, see "Fraud," § 68.  
 Liability of membership, or seat, in exchange to transfer tax, see "Taxation," § 866.  
 Membership in exchange or board of trade as assets of bankrupt vesting in trustee, see "Bankruptcy," § 143.  
 Right of person not a member of exchange

to restrain enforcement of combination between members, see "Monopolies," § 24.  
 Right to subject seat in stock exchange on supplementary proceedings, see "Execution," § 364.  
 Seat in exchange as firm property, see "Partnership," § 67.  
 Taxation of seat in stock exchange, see "Taxation," §§ 67, 95.  
 Telegraph company's contracts to furnish board of trade quotations, see "Telegraphs and Telephones," § 32.  
 Telegraph company's liability for failure or refusal to furnish quotations, see "Telegraphs and Telephones," § 44.  
*Constitution, by-laws, and rules.*  
 As affecting broker's transactions with client, see "Brokers," § 21.  
 Explaining ambiguous provision in stock exchange constitution by evidence of usage, see "Customs and Usages," § 15.

*Annotation.*

Property right in market quotation.—7 L. R. A. (N. S.) 889, note.  
 Review of decisions of exchanges against members.—49 L. R. A. 358, 361, 364, note.

Validity of rule of board of trade requiring submission of disputes to arbitration.—2 L. R. A. (N. S.) 672, note.

§§ 1-6. (See Analysis.)

**§ 7. Property in seat or membership, and transfer thereof.**

(a) The constitution of a stock exchange provided that every member on the day of his admission should sign the constitution of the exchange and pledge himself to abide by the same and all subsequent amendments on penalty of forfeiture of his seat, and also declared that the seat of a member might be sold by the exchange, and the proceeds applied to the member's contracts, debts, or obligations with or to other members of the exchange, to the exclusion of other creditors of the member. *Held*, that, where complain-

ant furnished the money with which to purchase a seat in the exchange in the name of his partner, complainant was not entitled to restrain a sale thereof, for the payment of his partner's individual debts to other members of the exchange in accordance with such provisions of the constitution, on the ground that his partner held the title to the seat in trust for complainant.—*Zell v. Baltimore Stock Exch.*, 102 Md. 489, 62 Atl. 808, 4 L. R. A. (N. S.) 435.

§§ 8-10. (See Analysis.)

**EXCISE.\***

*Cross-References.*

Duties, see "Internal Revenue."

\*Annotation: Words and Phrases, same title.

Imposition of excise duties as regulation of commerce, see "Commerce," §§ 76-78.  
 Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."  
 Taxes in general, see "Taxation," § 53.

### EXCISE COMMISSIONERS.

#### Cross-References.

See "Intoxicating Liquors," § 61.  
 Act establishing board of excise commissioners as special or local law, see "Statutes," § 94.

### EXCITEMENT.\*

#### Cross-References.

Confessions made while excited, see "Criminal Law," §§ 525, 530.  
 Public excitement as ground for continuance, see "Criminal Law," § 591.

### EXCLAMATIONS.\*

#### Cross-References.

As part of *res gestæ*, see "Criminal Law," § 367; "Evidence," § 127.

### EXCLUSION.\*

#### Cross-References.

From possession, element of adverse possession, see "Adverse Possession," §§ 34-38.  
 Of aliens in general, see "Aliens," §§ 46-51.  
 Of Chinese, see "Aliens," §§ 18-38.  
 Of nonmailable matter from mails, see "Post Office," § 14.  
 Of witnesses, see "Reference," § 65.

### EXCLUSION ACTS.

#### Cross-Reference.

See "Aliens," §§ 19-22.

### EXCLUSIVE FRANCHISES.\*

#### Cross-Reference.

See "Waters and Water Courses," § 192.

### EXCLUSIVE JURISDICTION.\*

#### Cross-Reference.

Of courts in general, see "Courts," §§ 472-526.

### EXCLUSIVE PRIVILEGES.\*

#### Cross-References.

See "Franchises," § 4; "Monopolies," §§ 1-7.  
 Constitutional prohibition of grant of special privileges, or immunities, see "Constitutional Law," § 205.  
 Ferry franchise, see "Ferries," § 16.  
 Grants by carriers, see "Carriers," § 14.  
 Grants of rights in streets, see "Municipal Corporations," § 686; "Street Railroads," § 29.  
 Grants to turnpike companies, see "Turnpikes and Toll Roads," § 9.  
 Power of city to grant for removal of garbage, see "Municipal Corporations," § 607.  
 To gas companies, see "Gas," § 6.  
 To maintain hospital, see "Hospitals," § 1.

### EXCLUSIVE REMEDIES.

#### Cross-References.

See "Action," § 35; "Quo Warranto," § 5.  
 To enforce mortgage, see "Mortgages," § 390.

### EXCULPATORY STATEMENTS.

#### Cross-Reference.

As evidence of guilty knowledge, see "Criminal Law," § 851.

### EXCURSIONS.

#### Cross-Reference.

Use of boat as bailment, see "Bailment," § 5.

### EXCURSION TICKETS.

#### Cross-Reference.

See "Carriers," § 258.

### EXCUSABLE HOMICIDE.\*

#### Cross-Reference.

See "Homicide," §§ 101-126.

### EXCUSE.\*

#### Cross-References.

For default, see "Judgment," § 143.  
 For default or delay in payment of price of goods, see "Sales," § 195.  
 For default or delay in payment of price of land, see "Vendor and Purchaser," § 186.  
 For delay in commencing action, as affecting limitation, see "Limitation of Actions," § 138.  
 For delay in performance of contract, see "Contracts," § 300.  
 For delay or defects in redemption from tax sale, see "Taxation," § 717.  
 For failure to file appeal bond, see "Criminal Law," § 1076.  
 For failure to interpose defense as affecting right to equitable relief against judgment, see "Judgment," §§ 432-438.  
 For failure to present claim against estate of decedent, see "Executors and Administrators," § 232.  
 For laches in bringing suit, see "Equity," §§ 75-83.  
 For nonpayment of insurance premium or assessment, see "Insurance," §§ 362, 754.  
 For nonpayment of taxes, see "Taxation," § 534.  
 For nonperformance of condition in deed, see "Deeds," § 163.  
 For nonperformance of condition in will, see "Wills," § 663.  
 For nonperformance of services, see "Master and Servant," § 59.  
 For nonperformance or defects in performance of contract, see "Contracts," § 303.  
 For violation of injunction, see "Injunction," §§ 225-227.  
 From service as juror, see "Grand Jury," § 11.  
 Pleading matter in excuse, see "Pleading," § 134.

### EXECUTED REMAINDERS.\*

#### Cross-References.

Creation, see "Deeds," § 133; "Wills," §§ 628-638.  
 Requisites and validity, see "Remainders," § 3.

### EXECUTED TRUSTS.\*

#### Cross-Reference.

See "Trusts," § 114.

\*Annotation: Words and Phrases, same title.

## EXECUTION.\*

*Scope-Note.*

[INCLUDES enforcement of judgments and orders in civil actions and proceedings in general, by final process, against property or against the person; nature of such process in general and of different forms of writs of execution; property subject to execution in general; issuance, requisites, and validity of executions, and correction and amendment thereof; levy or service, and lien of executions; quashing or setting aside executions, affidavits of illegality, restraining enforcement or stay of execution, discharge of poor debtors, and other relief from executions; claims of third persons to property levied on, and trial of right of property; sales under execution, redemption of property sold, or conveyance thereof by officer to purchaser; return of executions, satisfaction and discharge thereof, and distribution of proceeds; proceedings supplementary to execution; and liabilities of persons other than officers for wrongful procuring, issuance, levy, etc., of executions.

[EXCLUDES executions against particular classes of persons (see "*Infants*"; "*Executors and Administrators*"; and other specific heads); executions in particular forms of action, or on particular causes of action, or in proceedings other than actions (see specific heads); enforcement of decrees and orders, other than for payment of money, in suits in equity (see "*Receivers*"; "*Sequestration*"; "*Judicial Sales*"; "*Assistance, Writ of*,"; "*Contempt*"), or admiralty (see "*Admiralty*"), or in proceedings under insolvent acts (see "*Insolvency*"), or bankrupt acts (see "*Bankruptcy*"); execution of sentence in criminal cases (see "*Criminal Law*"; "*Prisons*"; and title of particular classes of crimes); executions on judgment of justices of the peace (see "*Justices of the Peace*"); property exempt from execution, and protection of rights of exemption (see "*Exemptions*"; "*Homestead*"); suits in aid of executions (see "*Creditors' Suit*"), and levy on and proceedings to reach property conveyed in fraud of creditors (see "*Fraudulent Conveyances*"); revival of judgment for purpose of issuing execution (see "*Judgment*"); supersedeas of execution (see "*Supersedeas*"); stay of execution pending appeal or error (see "*Appeal and Error*"), and pending proceedings under insolvent acts (see "*Insolvency*"), or bankrupt acts (see "*Bankruptcy*"); and duties and liabilities of officers in respect of issuance, levy, and return of executions, (see "*Clerks of Courts*"; "*Sheriffs and Constables*"; and titles of other specific officers).

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Nature and Essentials in General.**

- § 1. Nature of final process in general.
- § 2. Assignability of writ.
- § 3. Constitutional and statutory provisions.
- § 4. Actions and proceedings in which execution is authorized.
- § 5. Judgment, decree, or order.
- § 6. — Necessity in general.
- § 7. — Nature and form.
- § 8. — Validity.
- § 9. — Rendition and entry.
- § 10. — Transcript of judgment of inferior court or justice of the peace filed in the Superior Court.
- § 11. Effect of motion for new trial or rehearing.
- § 12. Effect of opening, vacating or modifying judgment.
- § 13. Effect of agreement for stay.
- § 14. Effect of payment or satisfaction of judgment.

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\*Annotation: Words and Phrases, same title.



**I. Nature and Essentials in General—Continued.**

- § 15. Particular forms of execution.
- § 16. Existence of or resort to other remedy.
- § 17. Persons entitled to execution.
- § 18. Persons against whom execution may issue.
- § 19. Simultaneous and successive executions.

**II. Property Subject to Execution.**

- § 20. Personal property in general.
- § 21. Real property in general.
- § 22. Public property and institutions.
- § 23. Interests in public lands.
- § 24. Crops.
- § 25. Fixtures.
- § 26. Rights under patents and copyrights.
- § 27. Franchises and privileges.
- § 28. Corporate property used for public purpose.
- § 29. Corporate stock.
- § 30. Membership or seat in exchange.
- § 31. Particular estates or interests.
- § 32. — Personal property.
- § 33. — Real property.
- § 34. Property leased.
- § 35. Property pledged.
- § 36. Property mortgaged or otherwise incumbered.
- § 37. — Personal property.
- § 38. — Real property.
- § 39. Rights or interests secured by liens.
- § 40. Equitable estates or interests in general.
- § 41. Trust estates.
- § 42. Interests under contracts in general.
- § 43. Interests under insurance policies.
- § 44. Interests of heirs or distributees.
- § 45. Interests of devisees or legatees.
- § 46. Money of debtor.
- § 47. Rights of action in general.
- § 48. Instruments and securities for payment of money.
- § 49. Judgments.
- § 50. Ownership or possession of property.
- § 51. — In general.
- § 52. — Adverse possession or claim.
- § 53. — Property or rights conveyed or assigned.
- § 54. — Property in custody of agent or depository.
- § 55. Property in custody of the law.
- § 56. Joint or several property.
- § 57. Salaries of public officers or employees.
- § 58. Property whose sale is prohibited.

**III. Issuance, Form, and Requisites of Writ.**

- § 59. Jurisdiction to issue in general.
- § 60. Authority of particular courts and officers.

**III. Issuance, Form, and Requisites of Writ—Continued.**

- § 61. Issuance on transcript of judgment of inferior court or justice of the peace.
- § 62. — In general.
- § 63. — Previous issue and return of execution in lower court.
- § 64. Counties to which execution may issue.
- § 65. — In general.
- § 66. — Docketing or filing transcript of judgment.
- § 67. Officer to whom writ may be directed.
- § 68. Death of creditor before issue of writ.
- § 69. Death of debtor before issue of writ.
- § 70. Notice and demand.
- § 71. Leave of court.
- § 72. — In general.
- § 73. — Lapse of time.
- § 74. Order for issuance.
- § 75. Time for issuance.
- § 76. Præcipe or direction to issue.
- § 77. Issuance and record thereof.
- § 78. Form and requisites in general.
- § 79. Name in which writ should run.
- § 80. Direction to particular officer or county.
- § 81. Description of and recitals as to parties.
- § 82. Recital of judgment.
- § 83. Statement of amount.
- § 84. Conformity to judgment.
- § 85. Command to levy and make amount.
- § 86. Directions as to property to be taken.
- § 87. — In general.
- § 88. — Personal or real property.
- § 89. — Property attached.
- § 90. Directions for return.
- § 91. Teste.
- § 92. Date.
- § 93. Signature.
- § 94. Seal.
- § 95. Indorsements.
- § 96. Delivery to and receipt by sheriff.
- § 97. Amendment.
- § 98. Renewal and reissue.
- § 99. Alias and pluries writs.
- § 100. Variance.
- § 101. Alteration.
- § 102. Defects, objections, and waiver.
- § 103. Collateral attack.
- § 104. Presumption of validity.
- § 105. Effect of invalidity.

**IV. Lien, Levy or Extent, and Custody of Property.**

- § 106. Nature of lien.
- § 107. Creation and existence of lien.
- § 108. — In general.
- § 109. — As dependent on levy.
- § 110. Commencement of lien.
- § 111. Property or interests affected, and extent of lien.
- § 112. Priorities between executions.
- § 113. Priorities between executions and other liens or claims.
- § 114. Proceedings for determination of priority.
- § 115. Transfers of property pending or subject to execution.
- § 116. Duration of lien.
- § 117. Death of creditor after issue of writ.
- § 118. Death of debtor after issue of writ.
- § 119. Effect of arrest of debtor under execution against the person.
- § 120. Effect of payment or satisfaction of judgment after issue of writ.
- § 121. Control of writ and directions to officer.
- § 122. Necessity for levy.
- § 123. Authority to levy.
- § 124. Powers of officer in making levy.
- § 125. Time for levy.
- § 126. Mode and sufficiency of levy.
- § 127. — In general.
- § 128. — Demand and selection of property.
- § 129. — Personal property in general.
- § 130. — Particular interests in personal property.
- § 131. — Corporate stock.
- § 132. — Rights of action in general.
- § 133. — Exhaustion of personalty before levy on realty.
- § 134. — Real property and interests therein.
- § 135. Levy on property taken under other process.
- § 136. Successive levies under same writ.
- § 137. Notice of levy.
- § 138. Indorsement or entry of levy.
- § 139. — In general.
- § 140. — Description of property.
- § 141. Inventory and appraisalment.
- § 142. Amount of property taken, and excessive levy.
- § 143. Irregularities and objections as to levy, and waiver.
- § 144. Quashing or setting aside levy.
- § 145. Operation and effect of levy in general.
- § 146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.
- § 147. Restoration of levy or lien.
- § 148. Rights of officer as to property taken.
- § 149. Custody and care of property.
- § 150. Delivery of property to bailee or receiptor.
- § 151. Delivery of property on forthcoming or delivery bond.
- § 152. — In general.

**IV. Lien, Levy or Extent, and Custody of Property—Continued.**

- § 153. — Requisites and sufficiency of bonds.
- § 154. — Liabilities on bonds.
- § 155. — Actions on bonds.
- § 156. Expenses of keeping property, and compensation of custodian.
- § 157. Delivery of property to creditor in satisfaction.

**V. Stay, Quashing, Vacating, and Relief Against Execution.**

- § 158. Stay of execution.
- § 159. Quashing or vacating writ.
- § 160. — In general.
- § 161. — Grounds.
- § 162. — Jurisdiction.
- § 163. — Proceedings and determination.
- § 164. Affidavit of illegality.
- § 165. — In general.
- § 166. — Grounds.
- § 167. — Form and requisites.
- § 168. — Proceedings and determination.
- § 169. Injunction.
- § 170. — In general.
- § 171. — Grounds.
- § 172. — Actions to restrain execution.
- § 173. Voluntary withdrawal or countermand.
- § 174. Effect of stay or suspension.
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- See "Attachment"; "Chattel Mortgages," §§ 170, 173, 179-202; "Garnishment"; "Judicial Sales."
- Acknowledgment of conveyance by deputy sheriff in his own name, see "Acknowledgment," § 26.
- Admissibility of deed on execution sale in trespass to try title, see "Trespass to Try Title," § 40.
- Affecting decedent's estate, see "Executors and Administrators," §§ 39, 40, 329, 439, 534.
- Assignment of growing crop as affecting liability of leasehold to execution, see "Landlord and Tenant," § 38.
- Attacking fraudulent conveyance, see "Fraudulent Conveyances," §§ 31, 110, 140, 179, 181, 223, 230, 241, 259, 267.
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- Indian lands, entry on to levy execution, see "Indians," § 32; sale of improvements, see "Indians," § 20.
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- Joinder of sheriff and person claiming adversely to plaintiff in action to obtain deed at execution sale, see "Parties," § 25.
- Judgment on note given in gambling transaction as sufficient to support execution, see "Gaming," § 19.
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- Liability of bail for stay of execution for deficiency on foreclosure, see "Mortgages," § 561.
- Liability on bond in proceedings to enjoin execution, see "Injunction," § 252.
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- Notice of execution sale to subsequent purchaser from judgment debtor, see "Vendor and Purchaser," §§ 229, 231.
- Officer; duties and liabilities as to execution in general, see "Sheriffs and Constables," §§ 7, 11, 20, 45, 47, 48, 88, 98, 106, 108, 109, 113, 118-121, 123, 124, 139.
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- Priorities between execution and judgment, see "Judgment," § 785.
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 Right of execution purchaser to purchase property at tax sale, see "Taxation," § 674.  
 Right of guardian to purchase at execution sale of ward's property, see "Guardian and Ward," § 62.  
 Rights of assignee of bill of lading against execution creditor, see "Carriers," § 58.  
 Rights of execution purchaser against mortgage, see "Mortgages," §§ 427, 434, 528.  
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 Tax execution, see "Taxation," §§ 577, 578, 580, 651, 732.  
 Tenancy, distress warrant for rent, see "Landlord and Tenant," §§ 232, 269, 270.  
 Tender of payment of execution by surety on debtor's recognizance, see "Tender," §§ 9, 18.  
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 Title under execution sale as defense in action for waste, see "Waste," § 11.  
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 Validity of sale of land as against replevin bail by vendor, see "Vendor and Purchaser," § 213.  
 Validity of transfer of right of inheritance as against execution creditor, see "Descent and Distribution," § 84.  
 Waiver of tort by officer as to property in his custody and suit on contract, see "Action," § 28.  
 Wrongful execution as constituting slander of title, see "Libel and Slander," §§ 130, 135.  
 Wrongful levy on wife's separate property, see "Husband and Wife," § 210.

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See "Corporations," §§ 123, 136, 252, 347, 523, 542, 617, 676; "Counties," § 226; "Executors and Administrators," § 454; "Husband and Wife," §§ 241, 270; "Infants," § 114; "Insane Persons," § 101; "Municipal Corporations," § 1038; "Partnership," §§ 220, 221; "Railroads," §§ 32, 177, 450; "Receivers," § 187; "Schools and School Districts," § 125; "Towns," § 82.  
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 Banks, see "Banks and Banking," § 280½.  
 Insurance companies, see "Insurance," § 673.  
 Married women, see "Husband and Wife," § 241.  
 Necessity of execution against corporation to fix liability for corporate debts and acts, see "Corporations," §§ 252, 347.  
 Stockholders, see "Corporations," §§ 256, 275.  
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 Surviving partners or representatives of deceased partners, see "Partnership," § 258.  
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*In particular actions or proceedings.*

See "Creditors' Suit," § 55; "Detinue," § 26; "Ejectment," §§ 119, 120; "Forcible Entry and Detainer," §§ 40, 41; "Garnishment," §§ 189, 190; "Replevin," §§ 112-114.  
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 By owner of property taken for public use, see "Eminent Domain," §§ 312-314.  
 Enforcement of award or judgment in condemnation proceedings, see "Eminent Domain," § 249.  
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 Enforcement of taxes, see "Municipal Corporations," § 978.  
 Establishment and enforcement of trust, see "Trusts," § 375.  
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 For divorce, to enforce payment of alimony, see "Divorce," §§ 263, 264, 271.  
 For injuries to animals on or near railroad tracks, see "Railroads," § 450.  
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 In equity, see "Equity," § 438.  
 In justices' courts, see "Justices of the Peace," § 135.  
 On bonds in general, see "Bonds," § 147.  
 On contract of suretyship, see "Principal and Surety," § 164.  
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 On insurance policies, see "Insurance," §§ 673, 830-832.  
 Relating to usury, see "Usury," § 123.  
 Summary proceedings for enforcement of bonds of county officers, see "Counties," § 100.  
 To enforce liability of stockholders for corporate debts and acts, see "Corporations," § 275.

## I. NATURE AND ESSENTIALS IN GENERAL.

### § 1. Nature of final process in general.

(a) An attachment on a judgment issued under act 1715, c. 40, § 7, is an execution, and is to be governed by the same rules.—*Baldwin v. Wright*, 3 Gill 241; *Griffith v. Etna Fire Ins. Co.*, 7 Md. 102. (See Code, art. 9, §§ 10, 11, 29, 30; art. 17, §§ 7, 28, et seq.; art. 26, § 20; art. 52, §§ 40-42, 56, et seq., 73; art. 75, § 89; art. 83, §§ 1, et seq. As affecting corporations, see Code, art. 9, §§ 2, 18; art. 16, § 128; art. 23, §§ 50, 68-71, 87; *Id.* [vol. 3], art. 23, § 97A; act 1916, c. 596, § 1, sub-sec. 2, § 14, sub-sec. 87.)

### § 2. Assignability of writ.

### § 3. Constitutional and statutory provisions.

#### *Cross-References.*

See ante, § 1.

Retroactive effect of statute, see "Statutes," § 267.

To enforce payment of fine, see "Fines," § 6.  
 To enforce recognizance, see "Recognizances," § 10.

To foreclose mortgage, see "Chattel Mortgages," § 283; "Mortgages," § 499.

To redeem from mortgage foreclosure, see "Mortgages," § 621.

#### *Of written instruments.*

See "Assignments for Benefit of Creditors," §§ 62, 63; "Bills and Notes," §§ 54-71; "Bonds," §§ 12-14, 20; "Covenants," § 6; "Deeds," § 44; "Guaranty," §§ 11, 12; "Mortgages," §§ 55-75; "Patents," §§ 117, 198; "Subscriptions," § 3; "Wills," §§ 108-129, 133, 143-150.

Award of arbitrators, see "Arbitration and Award," § 53.

Bonds or undertakings on appeal or writ of error, see "Appeal and Error," §§ 385, 469.

Contracts for employment of teachers, see "Schools and School Districts," § 135.

Contracts of sale, see "Sales," §§ 23, 29, 462.

Contracts of suretyship, see "Principal and Surety," §§ 19-24.

Declaration of homestead, see "Homestead," § 44.

Deed of trust, see "Trusts," § 22.

Deed to purchaser at execution sale, see "Execution," § 313.

Instrument constituting election under will, see "Wills," § 793.

Municipal bonds, see "Municipal Corporations," § 927.

On Sunday, see "Sunday," § 13.

Satisfaction of mortgage, see "Mortgages," § 313.

Tax deeds, see "Taxation," § 765.

(a) Where a judgment or decree was rendered on the first Monday of July, 1860, and execution issued thereon on January 29, 1861, the proceedings must be regulated by the Code.—*Eakle v. Smith*, 24 Md. 339. (See Code, art. 26, § 20.)

(b) The Constitution of the United States did not repeal the act 1716, c. 16, relating to the execution of a fieri facias, as to antecedent debts.—*Donaldson v. Harvey*, 3 H. & McH. 12.

### § 4. Actions and proceedings in which execution is authorized.

#### *Cross-Reference.*

Execution against the person, see post, § 423.

### §§ 5-10. Judgment, decree, or order.

#### *Cross-References.*

Attack on judgment by claimant of property, see post, § 182.

Conformity of writ to judgment, see post, § 84.

Execution against the person, see post, § 425.

Recital of judgment in writ, see post, § 82.  
Variance between judgment and writ, see post, § 83.

Dormant judgment on foreclosure of mortgage, see "Mortgages," § 499.

Necessity for revival of dormant judgment to support execution, see "Judgment," § 859.

(a) An execution cannot issue on the mere verdict of a jury, even after the expiration of the term at which it was rendered.—*Truett v. Legg*, 32 Md. 147.

(b) The Code 1860, art. 18, § 5, requires the clerk of the court in which the judgment is rendered to send with the writ of execution, when issued to another county, a copy of the docket entries in the case. Where it did not appear from such entries that there was any entry of any interlocutory judgment before the inquisition found by the jury, or of a final judgment rendered on such inquisition, as required by Code 1860, art. 75, § 62, it was *held* that the original fieri facias was improvidently issued, and, there being no judgment on which the writ of attachment, subsequently issued, could be based, the writ was properly quashed.—*Griffith v. Lynch*, 21 Md. 575. (See Code 1911, art. 17, § 7; art. 75, § 89.)

(c) Where plaintiff has recovered judgment and a confirmation of an attachment issued against the land of a nonresident, he is not entitled to execution thereon until the expiration of a year and a day from the issuance of the writ, unless he gives a bond to refund in case defendant appears within that time and shows that plaintiff's claim had been paid or barred in whole or in part, as authorized by act 1715, c. 40.—*Walters v. Munroe*, 17 Md. 501. (See Code, art. 9, §§ 12, 19.)

(d) A judgment in a case against two defendants, showing on its face that it was confessed by one of them, is void as to the other, and all proceedings under it are coram non, and the ratification by the County Court of a sale of such other defendant's property thereunder passes no title.—*Koechlept v. Hook*, 10 Md. 173, 69 Am. Dec. 133.

(e) Plaintiff recovered judgment against defendant for such sum as the clerk should ascertain to be due. Thereafter the clerk

filed an award that a certain sum was due, but providing, with plaintiff's consent, that further credits should be allowed, if shown by defendants. After execution was issued, but before the sheriff's return, the parties referred the whole matter to arbitrators a second time. They made a second award, which was lost. In the meantime the clerk filed an additional award, directing a certain credit on the execution. This credit the sheriff gave, made the balance due on the execution, and returned the writ accordingly. Plaintiff then moved to quash the return, and to direct the issuance of an alias fi. fa. for the whole amount of the clerk's first awards. *Held*, that, though the return should be quashed because the clerk had no power over the judgment after the second submission to arbitrators, defendant could avail himself of his equities by motion against the fi. fa., or to have the credits entered according to the award, and hence, until the controversy as to the credits was ended, plaintiff was not entitled to an alias writ.—*Shafer v. Shafer*, 6 Md. 518.

(f) A decree by which defendant was directed to bring a certain sum of money into court was, on appeal, affirmed. Complainant afterwards filed a petition in the lower court for a fi. fa., which was refused, and the papers were referred to an auditor to state an account. An appeal was then taken by complainant. *Held*, that complainant was not entitled to a fi. fa. until there was a decree awarding a certain sum and directing its payment to him.—*Owings v. Worthington*, 4 Md. 260.

§§ 11-15. (See Analysis).

## § 16. Existence of or resort to other remedy.

(a) Where a judgment was obtained and entered against a firm, and no execution issued thereon, but a scire facias proceeding instituted, an execution under the original judgment will not issue after the rendition of the judgment of fiat in the scire facias.—*Wright v. Ryland*, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702.

## § 17. Persons entitled to execution.

*Cross-Reference.*

See post, § 18.

### § 18. Persons against whom execution may issue.

#### Cross-Reference.

Execution against the person, see post, §§ 427, 429, 430.

(a) Under act Nov., 1793, c. 30, authorizing summary proceedings by execution for debts due the Bank of Columbia, executions must issue severally against the drawer and indorsers of a note, though only one satisfaction may be had, since the liability is a several one.—*Bank of Columbia v. Ross*, 4 H. & McH. 456.

### § 19. Simultaneous and successive executions.

#### Cross-References.

Alias and pluries writs, see post, § 99.

Issue of new execution as abandonment of levy, see post, § 146.

Successive levies under same writ, see post, § 136.

Keeping judgment lien alive by successive executions, see "Judgment," § 795.

## II. PROPERTY SUBJECT TO EXECUTION.

#### Cross-References.

Directions in writ as to property to be taken, see post, §§ 87-89.

Property affected by lien or levy, see post, § 111.

Property which may be reached by supplementary proceedings, see post, §§ 364-368.

As affecting title of trustee in bankruptcy to assets of bankrupt, see "Bankruptcy," § 143.

Creditors' suits to reach property not subject to execution, see "Creditors' Suit."

Enforcement of personal judgment for debt secured against property conveyed as security, see "Mortgages," § 218.

In justice's court, see "Justices of the Peace," § 135.

Leasehold as subject to execution after assignment of crop, see "Landlord and Tenant," § 78.

Property of convict, see "Convicts," § 3.

Rights of creditors in respect to commingled property, see "Confusion of Goods," § 11.

Separate property of married woman for debts of husband, see "Husband and Wife," § 149.

### § 20. Personal property in general.

#### Cross-References.

Counties to which execution may issue, see post, §§ 65, 66.

Mode of levying, see post, § 129.

(a) Where a mortgage is given to secure a debt, the right of possession is in the mortgagor until condition broken, and, if the

mortgagee enters before, he has no rights of control; and an execution against the mortgagor will lie as against growing crops, or anything else not covered by the mortgage.—*Chelton v. Green*, 65 Md. 272, 4 Atl. 271.

### § 21. Real property in general.

#### Cross-References.

Counties to which execution may issue, see post, §§ 65, 66.

Mode of levying, see post, §§ 133, 134.

(a) Real estate was not liable to be taken and sold on execution at the suit of a citizen, until made so by statute; but it was always liable at the suit of the state, which was a lien thereon from its institution.—*Jones v. Jones*, 1 Bland 443, 18 Am. Dec. 327. (See Code, art. 9, § 10.) [Cited and annotated in 29 L. R. A. 243, 248, on priority of state or United States in payment; in 38 L. R. A. 250, on priority of judgment over conveyance made after beginning of term; in 61 L. R. A. 385, on effect of death after judgment on remedy by execution.]

### § 22. Public property and institutions.

#### Cross-References.

See "Counties," § 326; "Municipal Corporations," § 1038; "Towns," § 82.

(a) Property held by a municipal corporation is held for the public use and for the benefit of the public, subject to municipal jurisdiction, and is not subject to sale on execution.—*Darling v. City of Baltimore*, 51 Md. 1. [Cited and annotated in 30 L. R. A. 103, on injunction against execution sales or other proceedings under final process; in 31 L. R. A. 33, on negligence as cause for, and as bar to, injunctions against judgments; in 9 L. R. A. (N. S.) 524, on enjoining judgment for loss of defenses through attorney's negligence or unskillfulness.]

### § 23. Interests in public lands.

### § 24. Crops.

#### Cross-References.

See post, § 127.

Mode of levying, see post, § 129.

Ownership of crop as between landlord and tenant, see "Landlord and Tenant," § 139.

(a) An execution levy by a sheriff on a growing crop of peaches belonging to the judgment debtor is not unlawful unless the levy is excessive.—*Arnold v. Fowler*, 94 Md. 497, 89 Am. St. Rep. 444.

(b) A growing crop of peaches is fructus industriales subject to the levy of an execution.—*State v. Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849, 71 Am. St. Rep. 452. [Cited and annotated in 16 L. R. A. (N. S.) 1048, on mode of levy on growing crop.]

(c) Where a mortgage is given to secure a debt, the right of possession is in the mortgagor until condition broken, and, if the mortgagee enters before, he has no rights of control; and an execution against the mortgagor will lie as against growing crops, or anything else not covered by the mortgage.—*Chelton v. Green*, 65 Md. 272, 4 Atl. 271.

(d) An undivided interest of the debtor in the growing crop of wheat cannot be seized and sold under execution.—*Martin v. Jewell*, 37 Md. 530. [Cited and annotated in 30 L. R. A. 129, on injunction against execution sales or other proceedings under final process.]

#### § 25. Fixtures.

*Cross-Reference.*

What constitutes fixtures, see "Fixtures," § 28.

#### § 26. Rights under patents and copyrights.

#### § 27. Franchises and privileges.

(a) The right acquired by purchase of market stalls, a right to occupy particular stalls for purposes of the market only, and which is sold by the city under power conferred by the Legislature, is subject to lien of execution.—*Green v. Western Nat. Bank*, 86 Md. 279, 38 Atl. 131.

#### § 28. Corporate property used for public purpose.

*Cross-Reference.*

Property of railroad company in general, see "Railroads," §§ 32, 177.

(a) Land of a railroad company, forming part of its right of way, and on which it has laid its track, which is necessary to its operation, cannot be sold under execution.—*McColgan v. Baltimore Belt R. Co.*, 85 Md. 519, 36 Atl. 1026. [Cited and annotated in 31 L. R. A. (N. S.) 638, on execution or judicial sale of corporate franchise or property necessary to its enjoyment.]

(b) The property of a corporation organized to operate a canal, which is of practical use in its operation, such as its wharf and

parcels of land connected therewith, is exempt from levy and sale under execution, although it is not absolutely indispensable to the operation of the canal.—*Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737. [Cited and annotated in 25 L. R. A. 139, on validity of sale of realty by railroad; in 30 L. R. A. 104, on injunction against execution sales or other proceedings under final process; in 31 L. R. A. (N. S.) 636, 638, on execution or judicial sale of corporate franchise or property necessary to its enjoyment.]

#### § 29. Corporate stock.

*Cross-Reference.*

Mode of levying, see post, § 131.

#### § 30. Membership or seat in exchange.

#### §§ 31-33. Particular estates or interests.

*Cross-References.*

See post, § 56.

Interests of devisees or legatees, see post, § 45.

Estates by entirety, see "Husband and Wife," § 14.

(a) Though act 1841, c. 161, prohibits the sale of a wife's property for her husband's debts during her life, after her death his life estate in such property is subject to levy of an execution issued on a judgment against him rendered before its passage, since such act merely operated as a stay of execution till her death, and does not destroy or suspend the lien of the judgment.—*Anderson v. Tydings*, 8 Md. 427. 63 Am. Dec. 708. (See Code, art. 45, § 1.) [Cited and annotated in 23 L. R. A. 649, on what expectant and contingent interests in property are subject to attachment or execution; in 30 L. R. A. 140, on injunction against execution sales or other proceedings under final process.]

#### § 34. Property leased.

#### § 35. Property pledged.

(a) Where property has been consigned to one who had acquired a lien as consignee and pledgee, an execution sued out against him cannot be legally levied on such property.—*Harding v. Stevenson*, 6 H. & J. 264. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

#### § 36. Property mortgaged or otherwise incumbered.



### § 37.— Personal property.

#### Cross-Reference.

Rights and remedies of creditors on ground of invalidity of mortgage, see "Chattel Mortgages," §§ 179-202.

### § 38.— Real property.

(a) Existence of a mortgage whereby legal title to the mortgaged property is in the mortgagee, with only an equity of redemption in a judgment debtor, does not defeat the lien of execution, though the aid of equity is necessary for its enforcement.—*Green v. Western Nat. Bank*, 86 Md. 279, 38 Atl. 131.

(b) The interest which a mortgagor has in lands mortgaged by him may be taken in execution under a fieri facias.—*Ford v. Philpot*, 5 H. & J. 312.

### § 39. Rights or interests secured by liens.

(a) Where property has been consigned to A., who has acquired a lien on it only as consignee or pawnee, an execution against him cannot be legally levied on such property.—*Harding v. Stevenson*, 6 H. & J. 264. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

### § 40. Equitable estates or interests in general.

#### Cross-References.

See post, § 278.

Trust estates, see post, § 41.

Enforcement in federal courts of state statute authorizing levy on equitable interests, see "Courts," § 371.

(a) An equitable interest in land may be seized and sold on execution.—*Hopkins v. Stump*, 2 H. & J. 301; *Miller v. Allison*, 8 G. & J. 35; *McMechen v. Marman*, Id. 57; *Deakins v. Rex*, 60 Md. 593. (See *Campbell v. Morris*, 3 H. & McH. 535; *Ford v. Philpot*, 5 H. & J. 312; *Harding v. Stevenson*, 6 H. & J. 264; *Coombs v. Jordan*, 3 Bland 284; *Cockey v. Leister*, 12 Md. 124; *Shryock v. Morris*, 75 Md. 72; Code, art. 83, § 1.)

(b) The debtor's equitable interest in personal property cannot at law be seized and sold under an execution.—*Harris v. Alcock*, 10 G. & J. 226, 32 Am. Dec. 158; *Chapman v. Same*, Id.; *Myers v. Amey*, 21 Md. 302; *Shryock v. Morris*, 75 Md. 72.

(c) A debtor's equitable estate in personal property cannot be seized and sold under a fi. fa.; but a creditor may file his bill and obtain a decree for a sale of the property absolutely, and pay off the incumbrances, and then satisfy his own claim.—*Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170.

### § 41. Trust estates.

#### Cross-References.

Liability for debt of trustee, see "Trusts," § 136½.

Remedies of creditors of cestui que trust, see "Trusts," § 151.

(a) Property was conveyed in trust for the benefit of the grantor and his family, free from liability for any of his debts or contracts, with power to the trustee, if he deemed proper, to apply the rents and income to the support of the grantor and family, and upon the death of the grantor, the estate to pass as directed by his will, or, in default of will, by descent, "it being the intent of the grantor to convey the legal title in trust, the grantor reserving control of the investments, and the right to collect rents and profits conformably with the trust hereby created." Held, that whenever property is subject to alienation by the owner, it is subject to his debts; and as the equitable life-estate in this case remained in the grantor, with power of alienation at his death, by will, the provision in the deed that the property should be free from liability for the debts, contracts, or engagements of the grantor is void and without effect, and it may be subjected by the creditors of the grantor.—*Warner v. Rice*, 66 Md. 436, 8 Atl. 84.

(b) The trustee of real estate of the wife and children of a judgment debtor executed a lease of the trust property to the debtor, reserving the rent, and containing a covenant of re-entry for nonpayment of rent, and a covenant that, in case the rent should be in arrears for the space of six months, the lease should be void. Subsequently the trustee was removed, and the judgment debtor appointed in his stead, and, together with the wife and children, resided on the property without making payment of rent. Held, that the debtor had no title in the property subject to execution.—*Cooke v. Brice*, 20 Md. 397.

## § 42. Interests under contracts in general.

### Cross-References.

See ante, § 23.

Sufficiency of sale as to creditors, see "Sales," §§ 222, 230; "Vendor and Purchaser," §§ 213, 216, 239.

§§ 43-45. (See Analysis).

## § 46. Money of debtor.

(a) Money may be taken in execution, if in the possession of the defendant.—*Harding v. Stevenson*, 6 H. & J. 264. [Cited and annotated in 37 L. R. A. 474, on effect of insolvency statutes on mortgage or sale preferring creditors.]

## § 47. Rights of action in general.

(a) Choses in action are not subject to sale on execution.—*Harding v. Stevenson*, 6 H. & J. 264. [Cited and annotated, see supra, § 46.] *Watkins v. Dorsett*, 1 Bland 530. [Cited and annotated in 63 L. R. A. 691, on equitable remedy to subject choses in action to judgment after return of no property found.]

## § 48. Instruments and securities for payment of money.

(a) Where railroad mortgage bonds of foreign corporations in the custody of a third person for the owner and registered in the names of the infant children of the owner are attached by creditors of the owner and a judgment of condemnation is entered against the bonds, a writ of fieri facias may be issued, and the bonds sold after the cancellation of their registration.—*De Bearn v. De Galard De Brassac De Bearn*, 115 Md. 668, 81 Atl. 223, 227; *Chaumet v. Same*, Id., memorandum case.

## § 49. Judgments.

## §§ 50-54. Ownership or possession of property.

### Cross-References.

Champerous judicial sales, see "Champerous and Maintenance," § 7.

Duties of carrier in case of levy in transit, see "Carriers," § 75.

Ownership of crop as between landlord and tenant, see "Landlord and Tenant," § 139.

Rights and remedies of creditors against mortgaged chattels on ground of invalidity of mortgage, see "Chattel Mortgages," §§ 179-202.

### Property conveyed.

Property sold under prior irregular proceedings, see post, § 275.

Interest of transferee of insolvent corporation, see "Corporations," § 542.

Property held by fraudulent grantee, see "Fraudulent Conveyances," §§ 179, 230.

Requisites and sufficiency of pledge of corporate stock, see "Corporations," § 123.

Sufficiency of sale as to creditors, see "Sales," §§ 222, 230; "Vendor and Purchaser," §§ 213, 216, 239.

Transfer of bill of lading, see "Carriers," § 58.

Transfer of shares, see "Corporations," § 136.

Validity of transfer of right of inheritance, see "Descent and Distribution," § 84.

(a) The property of a corporation organized to operate a canal, which is of practical use in its operation, such as its wharf and parcels of land connected therewith, is exempt from levy and sale under execution, although it is not absolutely indispensable to the operation of the canal.—*Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737. [Cited and annotated in 25 L. R. A. 139, on validity of sale of realty by railroad; in 30 L. R. A. 104, on injunction against execution sales or other proceedings under final process; in 31 L. R. A. (N. S.) 636, 638, on execution or judicial sale of corporate franchise or property necessary to its enjoyment.]

(b) Property held by a municipal corporation is held for the public use and for the benefit of the public, subject to municipal jurisdiction, and is not subject to sale on execution.—*Darling v. City of Baltimore*, 51 Md. 1. [Cited and annotated in 30 L. R. A. 103, on injunction against execution sales or other proceedings under final process; in 31 L. R. A. 33, on negligence as cause for, and as bar to injunctions against judgments; in 9 L. R. A. (N. S.) 524, on enjoining judgment for loss of defenses through attorney's negligence or unskillfulness.]

## § 55. Property in custody of the law.

### Cross-References.

Concurrent and conflicting jurisdiction of state and federal courts, see "Courts," §§ 497, 500.

Property assigned for benefit of creditors, see "Assignments for Benefit of Creditors," § 194.

Property in custody under execution as subject to attachment, see "Attachment," § 64.

Property in hands of receiver, see "Receivers," § 78.

**§ 56. Joint or several property.***Cross-Reference.*

Mode and sufficiency of levy, see post, § 134.

(a) Joint property in possession of one of the owners may be seized and sold under execution against him only, and a purchaser thereunder succeeds to all his interest in such property.—*McElderry v. Flannagan*, 1 H. & G. 308. [Cited and annotated in 41 L. R. A. (N. S.) 396, 397, on effect of second lease before expiration of prior lease to third party.]

§§ 57, 58. (See Analysis).

**III. ISSUANCE, FORM, AND REQUISITES OF WRIT.***Cross-References.*

Defects ground for vacating sale, see post, § 248.

Execution against the person, see post, §§ 435-439.

Invalid writ ground of action for damages, see post, § 457.

Necessity of issuance and return of execution against property to authorize execution against the person, see post, § 426.

Quashing or vacating writ, see post, §§ 161, 175.

Return, see post, §§ 330-347.

Wrongful issuance ground of action for damages, see post, § 456.

Conformity to evidence of findings of court as to issuance, see "Trial," § 396.

In justices' courts, see "Justices of the Peace," § 135.

Mandamus to compel issuance, see "Mandamus," §§ 3, 4, 55.

Necessity for revival of dormant judgment, see "Judgment," § 859.

Prohibiting issuance, see "Prohibition," § 5.

Writ as protection to officer, see "Sheriffs and Constables," § 98.

**§ 59. Jurisdiction to issue in general.***Cross-Reference.*

Execution against the person, see post, § 431.

**§ 60. Authority of particular courts and officers.****§§ 61-63. Issuance on transcript of judgment of inferior court or justice of the peace.***Cross-References.*

Issuance from justice court and return to court of record as creating lien, see post, § 108.

Necessity and sufficiency of transcript, see ante, § 10.

Time for issuance, see post, § 75.

Issuance pending appeal, see "Justices of the Peace," § 162.

(a) Under act 1715, c. 40, § 7, providing that any person having a judgment in any court of the province may take out an attachment by way of execution, the Court of Common Pleas may issue an attachment on a judgment rendered by it on appeal from a magistrate's decision, as such judgment thereby becomes its own judgment; the attachment being an execution.—*Griffith v. Etna Fire Ins. Co.*, 7 Md. 102. (See Code, art. 9, § 10.)

**§ 64. Counties to which execution may issue.***Cross-Reference.*

Necessity of entering execution on docket of other county, see post, § 77.

**§ 65.— In general.***Cross-Reference.*

Property subject to execution in general, see ante, §§ 20, 21.

(a) Where a suit is instituted in one county, and removed, on defendant's application, to another, where plaintiff recovers judgment, he may have his writ of fi. fa. thereon directed to the sheriff of the county where the suit was brought, although there has been no return of nulla bona in the county where the judgment was rendered, and neither plaintiff nor his attorney of record has filed an affidavit that he is unable to find property there.—*Browning v. Loraw*, 58 Md. 524.

(b) If a defendant removes from a county in which judgment is rendered against him, execution may issue from the court of such county to the sheriff of the county where the defendant resides. On the return of nulla bona on a fi. fa. issued in the county where judgment is rendered, the clerk of the court of that county may issue execution to any other county.—*Harden v. Moores*, 7 H. & J. 4.

**§ 66.— Docketing or filing transcript of judgment.**

(a) The fact that the copy of the docket entries sent with the writ of execution to another county does not contain all the entries which ought to appear of record is no reason why the execution should be quashed, provided the copy shows that there was a subsisting judgment, and that upon it the execution properly issued.—*Mitchell v. Chesnut*, 31 Md. 521.

**§ 67. Officer to whom writ may be directed.**

*Cross-Reference.*

See post, § 80.

**§ 68. Death of creditor before issue of writ.**

*Cross-References.*

Death of creditor after issue of writ, see post, § 117.

Execution as remedy for attacking fraudulent transfer by creditor dying before issuance of writ, see "Fraudulent Conveyances," § 230.

Jurisdiction of creditors' suit under statute authorizing execution, see "Creditors' Suit," § 22.

*Annotation.*

Effect of the death of one of the parties after judgment upon the remedy by execution.—61 L. R. A. 353, note.

**§ 69. Death of debtor before issue of writ.**

*Cross-References.*

See ante, § 65; post, § 275.

Death of debtor after issue of writ, see post, § 118.

Notice to representative before issuing execution, see post, § 70.

As affecting equitable action to enforce satisfaction of judgment, see "Creditors' Suit," § 16.

As affecting lien to sustain action to set aside fraudulent transfer, see "Fraudulent Conveyances," § 241.

*Annotation.*

Effect of death of sole judgment debtor.—61 L. R. A. 362, note.

**§§ 70-73. (See Analysis).**

**§ 74. Order for issuance.**

*Cross-References.*

Conclusiveness of order on motion, see "Judgment," § 569.

Order for issuance of execution as revivor of judgment, see "Judgment," § 867.

**§ 75. Time for issuance.**

*Cross-References.*

Exclusion of first or last day, see "Time," § 9.

Pleading limitations, see "Limitation of Actions," § 182.

(a) Where there is a judgment by default in an action upon a bond with a collateral condition, there must be breaches suggested, and the damages assessed as directed by St. 8 & 9 Wm. III. c. 11, before an execution can issue against the defendant; and, if it is sooner issued, it will, on motion, be quashed.—*Wilmer v. Harris*, 5 H. & J. 1. (See Alex. Brit. Stat. [Coe's ed.] 823.)

**§§ 76, 77. (See Analysis).**

**§ 78. Form and requisites in general.**

(a) When an attachment by way of execution is issued within three years from the date of the judgment, a clause of sci. fa. in the writ as to the defendant in the judgment, and notice to him, are not necessary.—*First Nat. Bank v. Weckler*, 52 Md. 30.

**§ 79. Name in which writ should run.**

*Cross-Reference.*

Enforcement of assigned judgment by execution in name of assignor, see "Judgment," § 846.

**§ 80. Direction to particular officer or county.**

(a) Where a levy of attachment was made by the then sheriff, and thereafter a fi. fa. was issued on the judgment, directed to the same person, who was not at such time sheriff, the writ will be quashed, where the acting sheriff was in no wise disqualified.—*Johnson v. Foran*, 58 Md. 148.

**§ 81. Description of and recitals as to parties.**

(a) In a special scire facias against tenants, the plaintiff must name all such tenants holding lands subject to the lien of the judgment.—*Thomas v. Farmers' Bank*, 46 Md. 43.

(b) The proceedings under a fieri facias were held void where it appeared that the judgment had been assigned to one of the sureties on the bond, on which the judgment was obtained, for a sum less than the debt, and where, after the assignment, the execution issued in the name of the assignee.—*Morgan v. Davis*, 2 H. & McH. 9.

**§ 82. Recital of judgment.**

*Cross-Reference.*

See post, § 275.

(a) Where a judgment in rem upon an attachment is described in the execution issued upon it as a judgment in personam, and the same error was committed in the venditioni exponas, the writ of execution is void, and cannot be amended.—*Deakins v. Rex*, 60 Md. 593.

(b) Where, on the rendition of a verdict, a motion for a new trial is made, which is not overruled until a succeeding term, when

judgment is rendered, an attachment on the judgment properly describes it as having been rendered at the later term.—*First Nat. Bank v. Weckler*, 52 Md. 30.

(c) A misrecital in the writ of fieri facias of the judgment on which it is founded does not render it inadmissible as evidence for the party who purchased under it.—*Miles v. Knott*, 12 G. & J. 442.

### § 83. Statement of amount.

*Cross-Reference.*

Vacation to extent of excess in amount, see post, § 163.

(a) The mere fact that an execution has issued for more than is due on the judgment does not per se avoid it. Its validity is to be tested by the intent with which it was issued. If that is fraudulent, it is void; if otherwise, it will be available to the plaintiff to the extent of the amount remaining due on the judgment.—*Harris v. Alcock*, 10 G. & J. 226, 32 Am. Dec. 158; *Chapman v. Same*, Id.

### § 84. Conformity to judgment.

*Cross-Reference.*

See ante, §§ 81-83.

### § 85. Command to levy and make amount.

(a) The interest on an interest-bearing judgment may be levied under an execution on the judgment.—*Gwinn v. Whitaker*, 1 H. & J. 754.

### §§ 86-89. Directions as to property to be taken.

(a) Where property is sold under execution on judgment of condemnation in attachment, an insufficient description of the property in the execution as one law office and lot of ground on which it stands is not cured by the officer's return to the writ of attachment that he laid it in the hands of a person named; it not appearing that the lot was in the latter's possession.—*Dorsey's Lessee v. Dorsey*, 28 Md. 388.

§§ 90-96. (See Analysis).

### § 97. Amendment.

*Cross-References.*

Execution against the person, see post, § 436.

Jurisdiction of Court of Appeals to allow amendment, see "Courts," § 204.

(a) Where the record of judgment showed that the damages were to be released upon

the payment of the debt with interest and costs, and the recital in the venditioni exponas was for so much debt, damages, and costs, omitting the conditional release, held, that the writ was voidable, but not void, and the court had inherent power to amend the same.—*Hall v. Clagett*, 63 Md. 57.

(b) The recital in an attachment on judgment issued out of the same court in which the judgment was recovered and remained of record, that the judgment had been recovered at a court begun and held on the second Monday of March instead of the second Monday of February, is a mere clerical error, which it is the duty of the court to correct by ordering the writ to be amended.—*First Nat. Bank v. Weckler*, 52 Md. 30.

### § 98. Renewal and reissue.

*Cross-Reference.*

Execution against the person, see post, § 437.

(a) Under Code 1860, art. 18, § 5, after a fieri facias issued to another county is returned nulla bona, the court to which such fi. fa. is issued may then issue a writ of attachment, instead of a second fi. fa., upon the judgment on which the execution was issued.—*Griffith v. Lynch*, 21 Md. 575. (See Code 1911, art. 17, § 7.)

(b) A second execution cannot issue until a previous one has been returned.—*Waters v. Caton*, 1 H. & McH. 407.

### § 99. Alias and pluries writs.

*Cross-References.*

See ante, §§ 14, 98; post, §§ 163, 286.

Execution against the person, see post, § 438.

Simultaneous and successive executions, see ante, § 19.

### § 100. Variance.

*Cross-Reference.*

See ante, § 81.

### § 101. Alteration.

### § 102. Defects, objections, and waiver.

*Cross-References.*

Defects affecting title of purchaser at sale, see post, § 275.

Defects ground for vacating sale, see post, § 248.

Execution against the person, see post, § 439.

Issuance out of time, see ante, § 75.

### § 103. Collateral attack.

(a) The question of irregularity in the issuing of a writ of execution can never be

discussed collaterally in another suit.—*Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519. [Cited and annotated in 21 L. R. A. 39, on purchaser at judicial sale as bona fide purchaser; in 61 L. R. A. 364, 393, on effect of death after judgment on remedy by execution.]

(b) A fi. fa. which is not merely irregular and voidable, but absolutely void, may be so declared, even when attacked collaterally.—*Candler v. Fisher*, 11 Md. 332.

§§ 104, 105. (See Analysis).

#### IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

##### Cross-References.

Defects affecting title of purchaser at sale, see post, § 275.

Wrongful or excessive levy ground of action for damages, see post, § 459.

Duties of officers in general, see "Sheriffs and Constables," § 88; making levy on exempt property, see "Exemptions," § 14; "Homestead," § 190.

Effect of debtor's bankruptcy, see "Bankruptcy," §§ 196, 198-203, 433.

Effect of debtor's insolvency, see "Insolvency," §§ 69, 71.

Fees of officer for levy and return, see "Sheriffs and Constables," § 45.

Following state statutes and practice in federal courts, see "Courts," § 355.

In justices' court, see "Justices of the Peace," § 135.

Levy on exempt property as denial or infringement of right of exemption, see "Exemptions," § 133; "Homestead," § 186.

Liability of officer for acts in connection with levy, see "Sheriffs and Constables," §§ 106, 108, 109.

Mandamus to compel levy, see "Mandamus," § 3.

Resisting levy, see "Obstructing Justice," § 3.

Rights of execution creditor in foreclosure proceedings, see "Mortgages," §§ 369, 410, 436.

Service or levy of distress warrant, see "Landlord and Tenant," § 270.

§§ 106-109. (See Analysis).

##### § 110. Commencement of lien.

(a) The issuing and levying of a fieri facias secures for the creditor a priority or lien on the debtor's equitable interest in personal property covered by a mortgage, and this lien dates from the time the execution was placed in the officer's hands.—*Furlong v. Edwards*, 3 Md. 99.

(b) Neither an indorsement of the time of the delivery of a fi. fa. to the sheriff, nor

evidence of the time, is necessary to give title to the purchaser of property sold under the writ, except against purchasers from the owner.—*Hanson v. Barnes*, 3 G. & J. 359, 22 Am. Dec. 322. [Cited and annotated in 38 L. R. A. 249, on priority of judgment over conveyance made after beginning of term; in 61 L. R. A. 382, on effect of death after judgment on remedy by execution.]

##### § 111. Property or interests affected, and extent of lien.

##### Cross-Reference.

Levy on joint property, see ante, § 56.

##### § 112. Priorities between executions.

##### Cross-References.

See post, § 125.

Distribution of proceeds among different judgments or executions, see post, § 326.

(a) A purchaser under a senior judgment is entitled to hold the land under his purchase, in preference to a purchaser under a junior judgment, although the execution in the latter case was the first issued.—*Hall v. Jones*, 21 Md. 439. [Cited and annotated in 37 L. R. A. (N. S.) 1205, on right of one advancing purchase price to subrogation to vendor's lien.]

(b) Where a fi. fa. on a junior judgment is levied on an equitable interest in lands, and subsequently a fi. fa. on a senior judgment comes into the sheriff's hands, the senior judgment must be first satisfied.—*Miller v. Allison*, 8 G. & J. 35. [Cited and annotated in 38 L. R. A. 249, on priority of judgment over conveyance made after beginning of term.]

(c) A judgment was obtained against defendant in 1817, and subsequently another judgment was obtained against him on which a fi. fa. was issued and returned. The return was laid "as per schedule annexed; \* \* \* residue of defendant's property secreted." A third judgment was obtained against defendant, on which a ca. sa. was issued and served, after which defendant was discharged under the insolvent law of the District of Columbia, and after such discharge he executed a deed of trust of all his property to a third party. The judgment creditor of the first judgment, after process of sci. fa., obtained a fi. fa., which was levied on property returned in the second judgment

creditor's fi. fa. as secreted. The trustees brought replevin for such property against the sheriff, and it was sold by consent, the proceeds to go to the party entitled in priority. *Held*, that the second judgment creditor was entitled to such priority, as the judgment debtor was bound by his judgment from the time of the delivery of his execution to the sheriff, and his lien was not disturbed by the sheriff's return on the execution, but continued to attach to the property after its transfer to such trustee.—*Selby v. Magruder*, 6 H. & J. 454.

### § 113. Priorities between executions and other liens or claims.

#### Cross-References.

See ante, § 112; post, § 266.  
Enforcement of claims or liens prior or superior to execution, see post, § 179.  
Rights of purchasers pending execution, see post, § 115.  
Title of purchaser at sale as against prior liens, see post, § 268.  
Between execution and attachment liens, see "Attachment," § 180.  
Between execution and judgment, see "Judgment," § 785.  
Between execution and laborer's lien, see "Master and Servant," § 82.  
Between execution and lien for rent, see "Landlord and Tenant," § 248.  
Between execution and mechanics' liens, see "Mechanics' Liens," § 201.  
Between execution and mortgage, see "Chattel Mortgages," § 138; "Mortgages," §§ 151, 154, 171.  
Between execution and mortgage by electric company, see "Electricity," § 8.  
Between execution and vendor's liens, see "Vendor and Purchaser," § 260.  
Between execution and widow's allowance, see "Executors and Administrators," § 182.  
Effect of appointment of receiver, see "Receivers," § 77.  
Execution lien prior to assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 337.  
Rights of assignee of bill of lading, see "Carriers," § 58.  
Subrogation of surety paying purchase price to priority of vendor's lien, see "Subrogation," § 7.

(a) Property of C., which was subject to mortgage to M., was, after judgment against B. and issue of execution thereon, sold by the administrators of C., and purchased by B. in the name of G. The mortgage was then released, being satisfied, partly with means of B., and the residue with part of a loan of \$1,200 obtained from G. by B.; such part being, at direction of B., paid by check of G. At the same time, G. executed agree-

ment to sell to B. for \$1,200. *Held*, that the rights of G. in the property were subject to the lien of the execution, and that he could not be subrogated to rights under the released mortgage.—*Green v. Western Nat. Bank*, 86 Md. 279, 38 Atl. 131.

(b) Plaintiffs, residents of the District of Columbia, sold goods to defendant, a citizen of Maryland, for which the latter gave his note, executed in the latter state. A judgment was recovered on the note in such state, and an attachment was issued before, and was levied on assets of defendant after, his application for the benefit of the insolvent laws of such state. *Held*, that defendant's discharge under such insolvent laws did not impair plaintiff's rights as nonresident creditors on their judgment to obtain by attachment or execution thereon a preference over domestic judgment creditors.—*Owens v. Bowie*, 2 Md. 457.

### § 114. Proceedings for determination of priority.

### § 115. Transfers of property pending or subject to execution.

#### Cross-References.

Prior transfers, see ante, § 53.  
Right of purchaser to maintain statutory proceeding for trial of right to property, see post, § 181.  
Of homestead, see "Homestead," § 128.

(a) An execution issued within three years after rendition of judgment may be levied on lands conveyed by the judgment debtor after the judgment, as well as those still belonging to him.—*Warfield v. Brewer*, 4 Gill 265.

(b) If defendant, after a judgment has been rendered against him, sells and conveys his lands, bona fide, for a valuable consideration, a writ of fieri facias cannot afterwards be laid thereon, unless a scire facias has been sued out on the judgment, and notice given to the vendee as terre tenant.—*Arnott v. Nicholls*, 1 H. & J. 471; *McElderry v. Smith*, 2 H. & J. 72.

### § 116. Duration of lien.

### § 117. Death of creditor after issue of writ.

#### Cross-Reference.

Before issue, see ante, § 68.

(a) A fi. fa. cannot be enforced in the name of a deceased plaintiff where the fact of his

death at the date of the writ is relied on against its validity, at the return of the process.—*Trail v. Snouffer*, 6 Md. 308. [Cited and annotated in 49 L. R. A. 160, 171, on effect of judgment against dead person; in 61 L. R. A. 354, on effect of death after judgment on remedy by execution.]

### § 118. Death of debtor after issue of writ.

#### Cross-References.

Before issue, see ante, § 69.

Indorsement of death, see ante, § 95.

(a) Where judgments at law on which executions have issued and been levied on lands are enjoined, after the dissolution of the injunction, nothing more is necessary to authorize the sheriff to sell than writs of venditioni exponas. The lands are to be regarded as in custodia legis, and the death of defendant in the judgments after execution had issued and been levied does not render a scire facias necessary against his heirs or terre-tenants.—*Boyd v. Harris*, 1 Md. Ch. 466. [Cited and annotated in 30 L. R. A. 140, on injunction against execution sales or other proceedings under final process; in 61 L. R. A. 385, on effect of death after judgment on remedy by execution.]

(b) A lien obtained by a valid levy in execution is not destroyed by the death of defendant in execution pending the sale.—*Jones v. Jones*, 1 Bland 443, 18 Am. Dec. 327. [Cited and annotated in 29 L. R. A. 243, 248, on priority of state or United States in payment; in 38 L. R. A. 250, on priority of judgment over conveyance made after beginning of term; in 61 L. R. A. 385 on effect of death after judgment on remedy by execution.]

(c) Under 5 Geo. II, c. 7, providing that the land of a judgment debtor shall be liable to levy and sale under execution, the same as personal property, where an execution defendant died before the levy of the execution, but after it had been placed in the hands of the sheriff, the contention that the land was only secondarily liable, and that a levy was void without proof that personal assets had been exhausted, was without merit, since the land had become liable, before defendant's death, by the delivery of the execution to the sheriff.—*Hanson v. Barnes*, 3 G. & J. 359, 22 Am. Dec. 322.

(See Alex. Brit. Stat. [Coe's ed.] 964.) [Cited and annotated in 38 L. R. A. 249, on priority of judgment over conveyance made after beginning of term; in 61 L. R. A. 382, on effect of death after judgment on remedy by execution.]

(d) The death of defendant before a levy on a fi. fa. which was in the hands of the sheriff prior to such death does not abate the writ, so as to render a sci. fa. against the terre-tenants necessary. The sale under fi. fa. thus issued and levied passes title to the purchaser.—*Hanson v. Barnes*, 3 G. & J. 359, 22 Am. Dec. 322. [Cited and annotated, see supra.]

### § 119. Effect of arrest of debtor under execution against the person.

#### Cross-Reference.

See post, § 354.

### § 120. Effect of payment or satisfaction of judgment after issue of writ.

#### Cross-References.

Before issue of writ, see ante, § 14.

Ground for quashing writ, see post, § 161.

Partial payment as ground for affidavit of illegality, see post, § 168.

Payment as ground for staying execution, see post, § 158.

### §§ 121-124. (See Analysis).

### § 125. Time for levy.

(a) Though a levy cannot be made after the return day, a levy begun before the return day may be completed by a sale after it.—*Gaither v. Martin*, 3 Md. 146.

### § 126. Mode and sufficiency of levy.

### § 127.— In general.

(a) In the levy of an execution on a growing crop, a proper notification to the party and indorsement on the return are sufficient, without manual possession by the officer.—*State v. Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849, 71 Am. St. Rep. 452. [Cited and annotated in 16 L. R. A. (N. S.) 1048, on mode of levy on growing crop.]

### § 128.— Demand and selection of property.

### § 129.— Personal property in general.

(a) A levy of a fi. fa. is void when the officer merely made a schedule of the goods from his own knowledge, and the creditor's description of them, and did not see or take possession of them, or serve the writ on the



judgment debtor.—*Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104.

**§ 130.— Particular interests in personal property.**

**§ 131.— Corporate stock.**

**§ 132.— Rights of action in general.**

**§ 133.— Exhaustion of personalty before levy on realty. .**

*Cross-Reference.*

Irregularities affecting validity of sale, see post, § 275.

(a) Under 5 Geo. II, c. 7, providing that the land of a judgment debtor shall be liable to levy and sale under execution, the same as personal property, the land of a judgment debtor may be taken under execution, and the creditor has his election whether he shall proceed against the debtor's realty or personalty.—*Hanson v. Barnes*, 3 G. & J. 359, 22 Am. Dec. 322. (See Alex. Brit. Stat. [Coe's ed.] 964.) [Cited and annotated, see supra, § 118.]

**§ 134.— Real property and interests therein.**

(a) To enable the sheriff to sell land and vest a valid title in the purchaser, a seizure is indispensable, and without a valid seizure the purchaser acquires no title.—*Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519. [Cited and annotated in 21 L. R. A. 39, on purchaser at judicial sale as bona fide purchaser; in 61 L. R. A. 364, 393, on effect of death after judgment on remedy by execution.]

(b) The principle is well established that, to enable the sheriff to sell land and vest a valid title in the purchaser, a seizure is indispensable, and without a valid seizure the purchaser acquires no title.—*Waters v. Duvall*, 11 G. & J. 37, 38 Am. Dec. 693. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

(c) It is not necessary for plaintiff to prove a seizure of the land by the sheriff for the purpose of supporting his title.—*Estep v. Weems*, 6 G. & J. 303.

**§ 135. Levy on property taken under other process.**

*Cross-Reference.*

Property held by another officer under process as subject to levy, see ante, § 55.

**§ 136. Successive levies under same writ.**

*Cross-Reference.*

Alias and pluries writs, see ante, § 99.

**§ 137. Notice of levy.**

(a) The officer levying an execution is not required to notify the debtor of the execution and levy.—*State v. Boulden*, 57 Md. 314.

**§ 138. Indorsement or entry of levy.**

*Cross-Reference.*

Effect as evidence in claim case, see post, § 194.

**§ 139.— In general.**

**§ 140.— Description of property.**

*Cross-References.*

Effect of insufficient description on sale, see post, § 275.

In deed, see post, § 312.

In return, see post, § 336.

(a) A levy on "part of a tract of land called P., containing," etc., "more or less, which is now in the possession of D.," on a fieri facias against D., is sufficient to identify the property.—*Murphy v. Cord*, 12 G. & J. 182.

**§ 141. Inventory and appraisement.**

*Cross-References.*

Effect of irregularities on title of purchaser, see post, § 275.

Failure to appraise as abandonment, see post, § 146.

Irregularities as ground for setting aside sale, see post, § 243.

Irregularity as ground of objection to confirmation, see post, § 242.

Right of appraiser to purchase at sale, see post, § 228.

Appraisal of property on levy of mortgage execution, see "Mortgages," § 499.

**§ 142. Amount of property taken, and excessive levy.**

*Cross-References.*

Affidavit of illegality as remedy for excessive levy, see post, § 166.

Effect on title of purchaser, see post, § 275.

Excessive levy, ground of action for damages, see post, § 459.

**§ 143. Irregularities and objections as to levy, and waiver.**

*Cross-References.*

Affecting title of purchaser, see post, § 275.

Ground for vacating sale, see post, § 248.

**§ 144. Quashing or setting aside levy.**

*Cross-References.*

See post, § 247.

Quashing or vacating writ, see post, §§ 161-163, 175.

### § 145. Operation and effect of levy in general.

#### Cross-References.

Contest of prior attachment by execution creditor, see "Attachment," § 291.

Estoppel to deny title of judgment debtor, see "Estoppel," § 68.

(a) By the issue, levy, and return of a fi. fa., the creditor acquires in equity, from the time the writ is placed in the sheriff's hands, a priority of right as to his debtor's equitable estate in personalty, and a court of equity will permit him to redeem a prior incumbrance thereon, or grant a decree for a sale.—*Myers v. Amey*, 21 Md. 302.

### § 146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.

#### Cross-References.

Effect of postponement of sale, see post, § 223.

Effect of dissolution of corporation defendant, see "Corporations," § 617.

Liability of officer for releasing levy, see "Sheriffs and Constables," § 118.

### § 147. Restoration of levy or lien.

### § 148. Rights of officer as to property taken.

#### Cross-References.

See ante, § 129.

Custody and care of property, see post, § 149.

Right to damages for wrongful replevy by claimant, see post, § 186.

Waiver of tort and suit on contract, see "Action," § 28.

(a) The courts will not disturb the possession of goods held by a sheriff upon execution, except on some ground affecting the validity of the judgment or the regularity of the process by virtue of which the seizure was made.—*Boyd v. Harris*, 1 Md. Ch. 466. [Cited and annotated in 30 L. R. A. 140, on injunction against execution sales or other proceedings under final process; in 61 L. R. A. 385, on effect of death after judgment on remedy by execution.]

### § 149. Custody and care of property.

#### Cross-References.

After sale, see post, § 268.

Compensation of officer, see "Sheriffs and Constables," § 47.

Liability of sheriff or constable for loss of or injuries to property, see "Sheriffs and Constables," §§ 119, 121.

Title to support action for conversion, see "Trove and Conversion," § 16.

### §§ 150-157. (See Analysis).

## V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

#### Cross-References.

Appellate jurisdiction of suits to set aside or vacate executions as dependent on whether title to land is involved, see "Courts," § 231.

Consideration for agreement to stay, see "Contracts," § 64.

In justices' courts, see "Justices of the Peace," § 135.

Mandamus to compel release of levy, see "Mandamus," § 3.

Stay of execution on order for alimony, see "Divorce," § 263.

### § 158. Stay of execution.

#### Cross-References.

See post, § 171.

Agreement for stay as affecting right to execution, see ante, § 13.

Damages and costs on quashing or setting aside, see post, § 176.

Effect, see post, § 174.

Effect of quashing or setting aside, see post, § 175.

Liabilities on bonds, see post, § 177.

As consideration for mortgage, see "Mortgages," § 25.

As remedy to protect homestead, see "Homestead," § 207.

Bankruptcy of execution debtor operating as stay, see "Bankruptcy," § 205.

Effect of discharge in bankruptcy, see "Bankruptcy," § 433.

Liability of bail for deficiency on foreclosure, see "Mortgages," § 561.

Pending proceedings to assess compensation for property taken for public use, see "Eminent Domain," § 314.

Right of sureties to subrogation, see "Subrogation," § 7.

Validity of sale of land as against replevin bail of vendor, see "Vendor and Purchaser," § 213.

(a) A statute (Code 1860, art. 10, § 30), which gives any plaintiff who has obtained a judgment the right to issue an attachment thereon, instead of any other execution, places attachments on judgments on the same footing as other executions. Therefore, when a stay of execution has been granted, such attachment cannot be issued until the stay has expired; nor is this rule changed by act 1862, c. 262, § 16.—*Goldsbrough v. Green*, 32 Md. 91. (See Code 1911, art. 9, § 29; art. 26, § 20.)

### § 159. Quashing or vacating writ.

#### Cross-References.

Effect, see post, § 175.

Execution against the person, see post, § 443.

Opening of vacating sale, see post, §§ 247-255.

Quashing or setting aside levy, see ante, § 144.

Correction of errors in judgment on motion to quash execution, see "Judgment," § 297.

### § 160.— In general.

### § 161.— Grounds.

(a) The validity of a judgment of a court of competent jurisdiction will not be considered on a motion to quash a writ of fieri facias issued thereunder.—*Jones v. George*, 80 Md. 294, 30 Atl. 635. [Cited and annotated in 37 L. R. A. (N. S.) 1163, on service of notice in proceedings to revive judgment.]

(b) On a motion to quash an execution, errors and irregularities in the rendition of the judgment cannot be inquired into.—*Hall v. Claggett*, 63 Md. 57.

(c) Every court has power to watch over the execution of its judgments, and, where its process has been irregularly or fraudulently executed, to quash it.—*Schultze v. State*, 43 Md. 295.

(d) A motion to quash is not an appropriate method of bringing under review errors existing in the judgment on which the execution issued, unless such judgment be utterly void.—*Schultze v. State*, 43 Md. 295.

(e) The question of irregularities in taking and forfeiting a recognizance cannot be tried on motion to quash an execution issued thereon.—*Schultze v. State*, 43 Md. 295.

(f) Where separate judgments were obtained against two joint and several obligors, and one of them, after paying a portion of the judgment against him, by arrangement with the judgment creditor and for his use, had an execution issued and levied on the property of the other, it was error to quash the same, though it was shown that its issue was induced by the desire to obtain reimbursement for the portion of the judgment so paid, since the right of the judgment creditor to the balance due him was prejudiced thereby.—*Hollingsworth v. Floyd*, 2 H. & G. 87. [Cited and annotated in 68 L. R. A. 524, 529, 530, 554, 573, 577, on extinction of judgments against principals by sureties' payment.]

### § 162.— Jurisdiction.

### § 163.— Proceedings and determination.

(a) On a motion to quash an execution, questions cannot be presented that might have arisen on such appeal, and the refusal of the court to hear questions is the exercise of a discretion from which no appeal can be taken.—*Union Nat. Bank v. Shriver*, 68 Md. 435, 13 Atl. 332; *Same v. Benford*, 68 Md. xiv, 13 Atl. 334, memorandum case.

(b) On a motion to quash an execution, the proper practice is for the court to require the proof in support of such motion to be in the form of affidavits; and the court's refusal, in the exercise of its discretion, to permit the introduction of oral testimony is not error.—*Union Nat. Bank v. Shriver*, 68 Md. 435, 13 Atl. 332; *Same v. Benford*, 68 Md. xiv, 13 Atl. 334, memorandum case.

(c) In March, 1825, a fi. fa. was sued out, which the sheriff returned at the return day. In July, a vendi. issued, founded on that return. That being returned not executed, another vendi. was issued, which was returned to April term, 1827, executed, and the proceeds of the sale of the property paid to the plaintiff's attorney. At April term, 1828, the defendant in the execution moved to quash the last vendi. and the return thereto for various alleged irregularities. Held, that the motion was too late.—*Waters v. Peach*, 3 G. & J. 408.

### §§ 164-168. Affidavit of illegality.

#### Cross-Reference.

Mandamus to compel acceptance, see "Mandamus," § 55.

### § 169. Injunction.

#### Cross-References.

Appellate jurisdiction of proceedings to restrain further executions as involving freehold, see "Courts," § 219.

As remedy to protect exemptions, see "Exemptions," § 140; "Homestead," §§ 208-218.

Liability on injunction bond, see "Injunction," § 252.

Power of federal court to enjoin proceedings in another federal court, see "Courts," § 526.

#### Annotation.

Injunction against execution.—30 L. R. A. 98, note.

### § 170.— In general.

(a) Where an injunction to restrain the execution sale of goods is issued at the suit of an alleged purchaser from the judgment

debtor, and the defendant files a petition alleging that the value of the goods will depreciate if not sold, the court may order the sheriff to sell the goods and hold the proceeds to await the termination of the injunction suit.—*Wenzel v. Milbury*, 93 Md. 427, 49 Atl. 618.

(b) Sale of land under execution in an action at law may be enjoined without a bond given in the injunction proceedings.—*Stewart v. Yates*, 3 Bland 615, note; *Cross v. Mullikin*, 3 Bland 616, note.

### § 171.—Grounds.

#### *Cross-References.*

See ante, § 170.

By claimant of property, see post, § 182.

(a) Since, by act 1834, c. 241, act 1838, c. 396, and act 1844, c. 281, and mortgages executed as thereby required, all the property, of every kind and description, then owned, or that might be thereafter acquired, by the Chesapeake & Ohio Canal Company, was and is pledged and bound for the debts due from it to the state, subject only to the liens and pledge of tolls and revenues in favor of holders of bonds issued under the last-named act, and to the priority given to bonds issued under act 1878, c. 58, a court of equity will enjoin an execution issued on judgments against the company.—*Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737. [Cited and annotated in 25 L. R. A. 139, on validity of sale of realty by railroad; in 30 L. R. A. 104, on injunction against execution sales or other proceedings under final process; in 31 L. R. A. (N. S.) 636, 638, on execution or judicial sale of corporate franchise or property necessary to its enjoyment.]

(b) A judgment creditor, being about to sell upon execution land conveyed by the debtor in fraud of creditors, as the creditor claims, and intending to buy it in at the sale and try the question of fraud in an action of ejectment, will not be enjoined from selling at the suit of the debtor's grantee, who seeks to try the question of fraud upon the application for an injunction.—*Welde v. Scotten*, 59 Md. 72. [Cited and annotated in 30 L. R. A. 114, on injunction against execution sales or other proceedings under final process.]

(c) A suit will not lie to stay execution on the ground that complainant was entitled to have additional credits entered on the judgment, his remedy being by motion in the court where the judgment was recovered for a rule on the judgment creditor to show cause why such credits should not be allowed, and upon such rule the execution should be stayed until the facts are ascertained.—*Gorsuch v. Thomas*, 57 Md. 334. [Cited and annotated in 30 L. R. A. 566, on injunction against judgment for matters subsequent to rendition; in 31 L. R. A. 771, on injunction against judgments for defenses existing prior to rendition; in 32 L. R. A. 323, 328, on equitable jurisdiction as to injunctions against judgments.]

(d) Where an execution against A. is levied on property claimed by a married woman other than A.'s wife, equity will not enjoin a sale under the levy. A married woman in such a case has as complete a remedy at law as a feme sole.—*Frazier v. White*, 49 Md. 1. [Cited and annotated in 30 L. R. A. 118, 135, on injunction against execution sales or other proceedings under final process.]

(e) Where, among the elements of apprehended damage, irremediable at law, the bill showed that an impending seizure of the complainant's stock in trade would utterly destroy his credit and business as a merchant, and deprive him of the means of support, the injunction was granted.—*McCreery v. Sutherland*, 23 Md. 471, 87 Am. Dec. 578. [Cited and annotated in 30 L. R. A. 119, on injunction against execution sales or other proceedings under final process.]

(f) A bill for injunction will not lie against an officer for the wrongful levy of an execution, where it appears that the officer is abundantly able to meet the liability incurred by such wrongful taking; the aggrieved party in such case having an adequate remedy at law.—*Chappell v. Cox*, 18 Md. 513. [Cited and annotated in 30 L. R. A. 106, 116, on injunction against execution sales or other proceedings under final process; in 32 L. R. A. 326, 327, on equitable jurisdiction as to injunctions against judgments; in 46 L. R. A. 491, 492, on levy on partnership property for partner's debt.]

(g) A bill for an injunction to restrain the proceedings upon an execution levied upon

goods in a store claimed by the complainant, under title from the party against whom the execution issued, not showing that the property is of such a character that its loss cannot be adequately compensated by damages at law, will not warrant the granting of the injunction.—*Lewis v. Levy*, 16 Md. 85. [Cited and annotated in 30 L. R. A. 116, 135, on injunction against execution sales or other proceedings under final process.] *Freeland v. Reynolds*, 16 Md. 416. [Cited and annotated in 30 L. R. A. 116, 135, on injunction against execution sales or other proceedings under final process.]

(h) When it appears that a decree of the Court of Appeals has been satisfied, either by a payment in money or money's equivalent, and when, notwithstanding such satisfaction, the party who obtained the decree is proceeding to enforce it by execution, this court may, and it is its duty to, prevent by injunction so manifest a wrong.—*McClellan v. Crook*, 4 Md. Ch. 398. [Cited and annotated in 30 L. R. A. 563, on injunction against judgment for matters subsequent to rendition.]

(i) An injunction may be granted to stay execution at law in some cases, without requiring an injunction bond to be given.—*In re Cape Sable Co.*, 3 Bland 606. [Cited and annotated in 30 L. R. A. 240, on injunction against judgments by confession.]

(j) To entitle a party who has purchased slaves of a judgment debtor a short time before the judgments were rendered to an injunction to restrain the levy of execution issued upon the judgments on the slaves, he must make out a clear and undisputed title, or a purchase for a fair and bona fide consideration, above suspicion or doubt in relation to its fairness.—*Warnick v. Michael*, 11 G. & J. 153.

(k) A party holding a lien on lands based on a conveyance to trustees for his security is not entitled to an injunction to prevent a judgment creditor of the grantor, whose judgment is subordinate to the lien, from enforcing his judgment by the sale of the lands on execution. The execution would operate only on the equitable interest of the judgment debtor, and would leave the prior lien in the same condition, both at law and in equity, as if no sale had been made.—

*Union Bank v. Poultney*, 8 G. & J. 324. [Cited and annotated in 30 L. R. A. 128, on injunction against execution sales or other proceedings under final process.]

## § 172.—Actions to restrain execution.

### Cross-References.

See ante, §§ 170, 171.

In case of fraudulent conveyance, see "Fraudulent Conveyances," §§ 259, 267. Jurisdiction and authority of courts in general, see "Courts," §§ 121, 122, 480, 507, 508.

Removal from state to federal court, see "Removal of Causes," §§ 11, 63.

(a) Where an alleged purchaser of goods obtains an injunction restraining their sale under an execution against the seller, but the bill does not show that a portion of the goods levied on were conveyed by the bill of sale to the purchaser, the injunction restraining the sale thereof will be dissolved.—*Wenzel v. Milbury*, 93 Md. 427, 49 Atl. 618.

(b) A bill by an alleged purchaser of goods to enjoin their sale under an execution against the seller, which does not show that the sale to plaintiff was prior to defendant's judgment claim, is not sufficient to authorize an injunction.—*Wenzel v. Milbury*, 93 Md. 427, 49 Atl. 618.

(c) A bill for an injunction to restrain execution of a judgment did not allege fraud on the part of the plaintiff in the judgment, but merely that the deputy sheriff served the summons on the defendant out of his bailiwick, and, being informed of defendant's residence out of his bailiwick, failed to make the return of non est as he had promised to do. The bill also admitted the defendant's indebtedness for a part of the amount for which the judgment was recovered, but did not state how much, nor offer to pay it. Held, that these allegations were not sufficient to authorize the granting of an injunction.—*Gardner v. Jenkins*, 14 Md. 58. [Cited and annotated in 31 L. R. A. 203, on injunction against judgment for want of jurisdiction or invalidity; in 33 L. R. A. 92, on power of officials to act, as determined by place of performance.]

(d) Where a judgment debtor paid the judgment creditor a part of the amount, and agreed to convey to him a certain lot of land, for which the creditor was to give him a release of the judgment, and it appeared that the debtor had no legal interest in the lot of

land, it was held that he was not entitled to an injunction to stay proceedings for enforcing the judgment, except as to the amount which he had paid.—*Gurley v. Hiteshue*, 5 Gill 217. [Cited and annotated in 30 L. R. A. 563, 566, on injunction against judgment for matters subsequent to rendition.]

**§ 173. Voluntary withdrawal or countermand.**

**§ 174. Effect of stay or suspension.**

*Cross-References.*

Stay in general, see ante, § 158.

On officer's right to compensation, see "Sheriffs and Constables," § 45.

**§ 175. Effect of quashing or setting aside.**

**§ 176. Damages and costs on quashing or setting aside.**

*Cross-Reference.*

Stay in general, see ante, § 158.

**§ 177. Liabilities on bonds.**

*Cross-Reference.*

Injunction against execution on bond, see ante, § 171.

(a) An execution upon a supersedeas may be restrained, upon a bill in equity filed by the superseders, where it appears that the entry of the supersedeas does not contain the date of confessing it, as required by act 1825, c. 223, § 2.—*Dilley v. Shipley*, 4 Gill 48. (See Code, art. 17, § 28; art. 52, § 56.) [Cited and annotated in 30 L. R. A. 237, on injunction against judgments by confession.] (See *Bowes v. Isaacs*, 33 Md. 535; *Smith v. Bowes*, 38 Md. 463.)

**VI. CLAIMS BY THIRD PERSONS.**

*Cross-References.*

Right to injunction, see ante, § 171.

To property sought to be reached by supplementary proceedings, see post, § 414.

Against execution on foreclosure judgment, see "Mortgages," § 499.

Claim case as *lis pendens*, see "*Lis Pendens*," § 3.

In justices' courts, see "*Justices of the Peace*," § 135.

Restraining threatened claim, see "*Injunction*," § 27.

Right of fraudulent grantee as to property levied on by grantor's creditors, see "*Fraudulent Conveyances*," § 181.

**§ 178. Intervention in general.**

**§ 179. Claims or liens prior or superior to execution.**

(a) A third person, whose goods have been wrongfully levied on as the property of the

execution debtor, cannot maintain replevin against the sheriff to recover such goods.—*Cromwell v. Owings*, 7 H. & J. 55. [Cited and annotated in 8 L. R. A. (N. S.) 216, on right to maintain replevin for recovery of property replevied.]

**§§ 180-184.** (See Analysis).

**§ 185. Security by claimant for possession.**

*Cross-References.*

Effect of bond as waiver of irregularities in levy, see ante, § 143.

Liabilities on bonds, see post, §§ 207-210.

Competency of surety to become surety on certiorari bond in same case, see "*Certiorari*," § 43.

Contract to indemnify officer as against public policy, see "*Contracts*," § 131.

Discharge of principal in bankruptcy, see "*Bankruptcy*," § 431.

Validity as common law obligation of void statutory bond of claimant, see "*Bonds*," § 35.

(a) Under Code 1904, art. 9, § 47, authorizing the filing of a petition by one claiming personal property on which an attachment or execution is levied, setting forth the character of his claim to the property, and making it the duty of the clerk to docket a suit against both, the plaintiff and defendant in such attachment or execution, etc., and § 48, providing that the property attached shall be discharged from the levy and surrendered to such claimant on the filing of a bond by the latter, the giving of the bond does not constitute a condition precedent to the claimant's right to have the question of the right of property and amount of damages he may have sustained determined on his petition under such § 47, but is necessary only when immediate possession of the property is desired.—*Albert v. Freas*, 103 Md. 583, 64 Atl. 282. (See Code 1911, art. 9, § 47.)

**§ 186. Actions by claimant for recovery of possession.**

*Cross-References.*

By mortgagee, see "*Chattel Mortgages*," § 173.

Intervention by execution debtor in action by claimant against sheriff for possession, see "*Parties*," § 40.

Property taken under execution as subject to replevin in general, see "*Replevin*," § 5.

(a) A third person, whose goods have been wrongfully levied on as the property of the execution debtor, cannot maintain replevin against the sheriff to recover such goods.—

*Cromwell v. Owings*, 7 H. & J. 55. [Cited and annotated in 8 L. R. A. (N. S.) 216, on right to maintain replevin for recovery of property replevied.]

**§ 187. Proceedings for establishment and determination of claims.**

*Cross-Reference.*

Mandamus to compel trial of right to property, see "Mandamus," § 3.

§§ 188-191.— (See Analysis).

**§ 192.— Pleading.**

(a) Under act 1888, c. 547 (Code 1904, art. 75, §§ 86, 88), allowing equitable defenses at law, a defense available at law cannot be set up as an equitable plea, and hence in attachment proceedings a demurrer was properly sustained to an equitable plea by a judgment creditor setting up, in answer to a petition by a claimant to property levied on by virtue of the judgment, that such claimant by her conduct had led the judgment creditor to believe that the property in dispute belonged to the judgment debtor, in pursuance of which belief such creditor had rendered services to the debtor.—*Albert v. Freas*, 103 Md. 583, 64 Atl. 282. (See Code 1911, art. 75, §§ 86, 88.)

§§ 193-196.— (See Analysis).

**§ 197.— Instructions.**

(a) Where, in answer to a petition by a claimant of property levied on by virtue of a judgment, defendant, the judgment creditor, set up that such claimant by her conduct had led defendant to believe that the property levied on belonged to the judgment debtor, and that in reliance on such belief defendant rendered services for such debtor, an instruction that if the jury believed that claimant purchased the property involved with her own money, that she permitted her husband, the judgment debtor, to use the same in connection with his business of cutting and sawing lumber, that she was not a party to the contract under which he cut and sawed the lumber for a certain company, and that defendant was employed by claimant's husband, in whom the title to the property was never vested, they should find for claimant, even though defendant gave credit to the debtor by reason of the latter's having possession and use of the property, provided claimant said or did nothing to lead defend-

ant to believe that the property belonged to her husband, was as favorable as defendant could expect.—*Albert v. Freas*, 103 Md. 583, 64 Atl. 282.

**§ 198.— Verdict and findings.**

(a) In proceedings against a judgment creditor by a claimant of property levied on under the judgment, a finding in favor of the claimant on the question of the right of property was sufficient, and a further finding against defendant judgment creditor was unnecessary.—*Albert v. Freas*, 103 Md. 583, 64 Atl. 282.

§§ 199-203.— (See Analysis).

**§ 204. Operation and effect of determination.**

*Cross-References.*

Effect of interposition of claim on lien of execution, see ante, § 146.

Finding property subject as bar to action of trover, see "Judgment," § 590.

§§ 205-212. (See Analysis).

**VII. SALE.**

*Cross-References.*

Injunction against sale, see ante, §§ 170-172.

Amendment of decree after sale and confirmation, see "Judgment," § 297.

Amount for which property sold as evidence of value, see "Evidence," § 113.

As barring dower, see "Dower," § 46.

As breach of condition in mortgage, see "Mortgages," § 299.

Authority of attorney to control sale, see "Attorney and Client," § 95.

Effect of sale on execution as discharge of mortgage, see "Mortgages," § 308.

Fees of officer for making sale, see "Sheriffs and Constables," § 48; "United States Marshals," § 11.

In justices' courts, see "Justices of the Peace," § 135.

Laws impairing obligation of contracts, see "Constitutional Law," § 182.

Liability of sheriff or constable for irregular or invalid sale, see "Sheriffs and Constables," § 120.

Mandamus to compel sale, see "Mandamus," §§ 3, 56.

On execution on decree for alimony, see "Divorce," § 263.

Practice in federal courts, see "Courts," § 355.

Protection of exemptions, see "Exemptions," § 133; "Homestead," § 187.

Purchase at execution sale for benefit of debtor fraudulent as to creditors, see "Fraudulent Conveyances," § 110.

Remedy by replevin against purchaser as bar to equitable relief against judgment, see "Judgment," § 407.

Sale of property of officer making sale with execution debtor's property, see "Auctions and Auctioneers," § 8.  
 Sale under attachment before judgment, see "Attachment," §§ 195-202.

#### (A) MANNER, CONDUCT, VALIDITY AND CONFIRMING OR VACATING.

##### *Cross-References.*

Defects affecting title of purchaser, see post, § 275.  
 Necessity of admeasurement and assignment of dower before sale under execution, see "Dower," § 60.  
 Necessity of change of possession as affecting validity as to creditors, see "Fraudulent Conveyances," § 140.  
 Sale as within statute of frauds, see "Frauds, Statute of," § 78.

#### § 213. Nature and requisites in general.

##### *Cross-References.*

Deposit of copy of appraisement with court as prerequisite to sale, see ante, § 141.  
 Necessity for notice of abandonment of levy on part of property, see ante, § 146.

#### § 214. Statutory provisions.

##### *Cross-References.*

See ante, § 1.  
 Decisions of state courts as to construction of statutes as authority in federal courts, see "Courts," § 366.

(a) Under Code 1860, art. 83, § 13, making the ratification by the court of a sale under execution conclusive evidence only of the notice of sale required and the manner of making the sale, an order of ratification, containing a precise description of a lot of ground, which it recites had been seized and sold by the constable, does not cure a description of the property in the execution, return, and schedules of the officer, which is void for uncertainty.—*Dorsey's Lessee v. Dorsey*, 28 Md. 388. (See Code 1911, art. 52, §§ 40-42, 56.)

(b) Under act 1831, c. 290, the court to which return is made of a sale of real estate upon execution on a magistrate's judgment has power merely to confirm the sale or set it aside, but not to substitute another bidder at the sale for the person returned as purchaser.—*Kinnear v. Lee*, 28 Md. 488. (See Code, art. 52, §§ 40-42, 56.)

#### § 215. Authority to sell.

##### *Cross-Reference.*

Order for sale on justice court execution returned to court of record as creating lien, see ante, § 108.

#### § 216.— In general.

#### § 217.— Venditioni exponas.

##### *Cross-Reference.*

See ante, § 78.

(a) Under the rule that a sheriff who begins an execution must end it, though his term of office expires in the meantime, when he has returned the fi. fa. "Unsold for want of buyers," the vend. ex. must issue to him, and not to his successor. The vend. ex. confers no new power. It is only to effectuate the fi. fa.—*Busey v. Tuck*, 47 Md. 171.

(b) A vendi. confers no power on the sheriff which he did not possess under the fi. fa. It only commands him to do what he could have done under the latter writ. The fi. fa. is the effective writ, and the sheriff may sell under it, after a levy and without a vendi.; and the return to the latter relates to, and in legal effect becomes part of, the return to the former.—*Manahan v. Sammon*, 3 Md. 463.

(c) Where a sheriff seizes property under a fi. fa., and returns it unsold for want of buyers, and goes out of office, the venditioni exponas must issue to him, and not to his successor; and, if issued to his successor, all his acts under it are void.—*Purl v. Duvall*, 5 H. & J. 69, 9 Am. Dec. 490.

#### § 218. Powers of officer in making sale.

##### *Cross-Reference.*

Sale by de facto deputy sheriff, see "Sheriffs and Constables," § 20.

#### § 219. Mode of sale.

#### § 220. Place of sale.

(a) The sale of real property under execution need not necessarily be made on the premises.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

#### § 221. Time of sale.

(a) The time of sale under execution is a matter within the discretion of the sheriff, and the sale will not be vacated if ordinary prudence be shown in the exercise of the discretion.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

#### § 222. Notice of sale.

##### *Cross-References.*

See ante, § 137.

Defective notice as rendering sale subject to collateral attack, see post, § 258.



Effect of confirmation as curing defects, see post, § 242.

Effect of defects or irregularities on title of purchaser, see post, § 275.

Insufficient notice in connection with inadequacy of price as ground for setting aside sale, see post, § 251.

Insufficient or defective notice as ground for vacating sale, see post, § 249.

Authority to designate newspaper to publish notice, see "Newspapers," § 1.

Character of newspaper in which notice is to be published, see "Newspapers," § 3.

Computation of time, see "Time," §§ 6, 9.

Rule of court as to contents of notice of sale, see "Courts," § 80.

(a) Where an execution is levied on a peach crop or other perishable goods, the provision of Code 1888, art. 83; § 3, that 10 days' notice of sale shall be given, does not apply, but the sheriff should obtain from the court authority for an immediate sale.—*Arnold v. Fowler*, 94 Md. 497, 51 Atl. 299, 89 Am. St. Rep. 444. (See Code 1911, art. 83, § 3.)

(b) Where evidence had been admitted tending to prove that a levy had been made under a fi. fa., and a list of the property taken, there is no error in admitting an advertisement by the sheriff as proof that the property alleged to have been levied on had been advertised for sale.—*Gaither v. Martin*, 3 Md. 146.

(c) A sale under a fi. fa. will be set aside on motion, where notice of the sale was not set up at two or more public places in the county, besides the court house.—*Moreland v. Bowling*, 3 Gill 500.

(d) Where town lots in a "place of business and commerce," taken under an execution, are sold by the sheriff greatly below their value, the circumstance that no notice of the sale was set up nearer than 18 miles to the property would induce the court to set aside the sale.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

(e) Unless the contrary appears, it will be presumed that a sheriff, in making a judicial sale, gave all the notices required by law.—*Hanson v. Barnes*, 3 G. & J. 359, 22 Am. Dec. 322. [Cited and annotated in 61 L. R. A. 382, on effect of death after judgment on remedy by execution.]

(f) A general description in the advertisement of sale is sufficient.—*Berry v. Griffith*, 2 H. & G. 337, 18 Am. Dec. 309. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

## § 223. Postponement.

## § 224. Sale in parcels.

### Cross-References.

Effect of confirmation as curing irregularities, see post, § 242.

Failure to offer in parcels in connection with inadequacy of price as ground for vacating sale, see post, § 251.

Failure to sell in parcels as subjecting sale to collateral attack, see post, § 258.

Failure to sell in parcels, ground for vacating sale, see post, § 249.

(a) The widow of the judgment defendant, in her action of dower against the purchaser of one of two tracts of land sold to satisfy the judgment, cannot avail herself of the objection that the two tracts, not being contiguous, were sold in mass, instead of separately.—*Trustees of Poor of Queen Anne's County v. Pratt*, 10 Md. 5. [Cited and annotated in 18 L. R. A. 78, on power of husband, or his creditors, to defeat wife's dower right.]

(b) An objection to a sheriff's sale that two tracts not contiguous were sold in mass, instead of separately, cannot be taken advantage of by the widow of defendant in the judgment in an action at law, against the alienee of the purchaser at such sale, for her dower out of one of such tracts.—*Trustees of Poor of Queen Anne's County v. Pratt*, 10 Md. 5. [Cited and annotated, see supra.]

(c) Property in its nature divisible must be sold in parcels.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

(d) A sheriff, who has in his hands executions upon various judgments older and younger than a mortgage, cannot, without consent of the mortgagee, after a levy upon distinct parcels of real property, sell them in mass, under the execution upon the older judgment, for one-fifth of their value, and thus secure to the purchaser the property sold discharged from the mortgage. Such proceeding, whether so intended or not, is a fraud upon the rights of the mortgagee.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

(e) A sheriff may divide and sell a part of the premises levied upon and advertised; and, where that will satisfy the debt, he ought to sell no more.—*Berry v. Griffith*, 2 H. & G. 337, 18 Am. Dec. 309. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

§§ 225-227. (See Analysis).

§ 228. Persons who may purchase.

*Cross-References.*

Purchase by unauthorized person, ground for setting aside sale, see post, § 249.

Guardian, see "Guardian and Ward," § 62.

Purchase by trustee for benefit of creditors, see "Assignments for Benefit of Creditors," § 280.

Right of attorney to purchase client's property, see "Attorney and Client," § 125.

(a) A sale of land, made by a sheriff under execution to his own agent, is not necessarily void at law; but it is voidable for fraud in fact, and the question of fraud should be left to the jury.—*Isaac v. Clarke*, 2 Gill 1. [Cited and annotated in 20 L. R. A. 506, on right of auctioneer or officer conducting sale to bid.]

§§ 229-231. Bids.

*Cross-Reference.*

See ante, § 228.

§§ 232-234. Payment of bid.

§§ 235-239. Failure to comply with bid.

(a) Where a sheriff sold land on an execution, and gave time to the purchaser, and the debtor paid the balance of the debt over and above the bid, the bidder did not pay for the land, the sheriff advertised a resale, and the debtor brought a bill in equity for an injunction, it was held that the plaintiff was not bound for the act of the sheriff in giving time, which could not be inquired into under this bill; that the bid, without payment, did not discharge the debt pro tanto; and that, payment not being made within a reasonable time, a resale might lawfully be made.—*Hardesty v. Wilson*, 2 Gill 481, 41 Am. Dec. 439.

§ 240. Entry and record of sale.

§ 241. Certificate of sale.

*Cross-Reference.*

Taxation, see "Taxation," § 74.

§ 242. Confirmation.

*Cross-References.*

Failure to have sale confirmed as affecting title of purchaser, see post, § 275.

Objection to confirmation or petition to set aside sale as proper mode of objecting, see post, § 256.

Mandamus to compel confirmation, see "Mandamus," § 4.

(a) Under Code 1860, art. 83, § 13, making the ratification by the court of a sale under

execution conclusive evidence only of the notice of sale required and the manner of making the sale, an order of ratification, containing a precise description of a lot of ground, which it recites had been seized and sold by the constable, does not cure a description of the property in the execution, return, and schedules of the officer, which is void for uncertainty.—*Dorsey's Lessee v. Dorsey*, 28 Md. 388. (See Code 1911, art. 52, §§ 40-42, 56.)

(b) Under act 1831, c. 290, the court to which return is made of a sale of real estate upon execution on a magistrate's judgment has power merely to confirm the sale or set it aside, but not to substitute another bidder at the sale for the person returned as purchaser.—*Kinnear v. Lee*, 28 Md. 488. (See Code, art. 52, §§ 40-42, 56.)

§ 243. Persons who may question validity of sale.

§ 244.—In general.

(a) An execution sale subject to taxes, at which the amount of the taxes was made known, cannot be set aside by the defaulting taxpayer.—*Hall v. Claggett*, 63 Md. 57.

(b) Where the defendant against whom a decree for the payment of money has been passed subsequently sold his land, which was afterwards seized and sold under execution on a decree, the defendant, as well as his vendee, while the execution proceedings are in fieri, has such an interest in the sale as will entitle him to the protection of the court, if it was made without authority, or under such circumstances as necessarily involve a sacrifice.—*Eakle v. Smith*, 24 Md. 339.

(c) A corporation cannot shield its property from execution on the plea that it is mortgaged to the state; this right is only available to the mortgagee.—*Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646. [Cited and annotated in 30 L. R. A. 105, on injunction against execution sales or other proceedings under final process; in 30 L. R. A. 361, on injunction against judgments in garnishment proceedings; in 30 L. R. A. 706, on injunction against judgments for errors and irregularities; in 31 L. R. A. 205, on injunction against judgment for want of jurisdiction or invalidity.]

**§ 245.—Waiver and estoppel.***Cross-Reference.*

See post, § 256.

(a) Parties having permitted themselves to be returned under a scire facias as heirs and terre-tenants, and a fiat having been rendered against them as such, and the land sold under execution thereon, cannot object to the sale on the ground that they had no interest in the land.—*Cushwa v. Cushwa*, 5 Md. 55.

**§ 246. Opening or vacating.***Cross-Reference.*

Vacating judgment by default as vacating sale, see "Judgment," § 174.

**§ 247.—Grounds in general.**

(a) Where a petition was filed, asking that a sale made by the sheriff under execution (the defendant having died after the levy) should be vacated, and the property resold by a trustee appointed under a decree in a creditors' suit, to which the judgment creditor was not a party, the court refused to grant the relief asked for, and said that it was neither warranted by authority nor any principle of law or equity.—*Boyd v. Harris*, 1 Md. Ch. 466. [Cited and annotated in 30 L. R. A. 140, on injunction against execution sales or other proceedings under final process; in 61 L. R. A. 385, on effect of death after judgment on remedy by execution.]

(b) After a sale of land made by a sheriff, certified in his return to a writ of vendi, objected to in the county court upon a motion for a writ of hab. fac. pos. to put the purchaser into possession, granted and affirmed upon appeal, the legality of the sale in that cause is no longer an open question.—*Penn v. Isherwood*, 5 Gill 206.

**§ 248.—Defects or irregularities in execution or levy.***Cross-Reference.*

Affecting title of purchaser, see post, § 275.

**§ 249.—Irregularities or misconduct affecting sale.***Cross-References.*

Affecting title of purchaser, see post, § 275.

In connection with inadequacy of price, see post, § 251.

**§ 250.—Inadequacy of price.***Cross-References.*

See post, § 256.

As affecting bona fides of purchaser, see post, § 271.

As subjecting sale, to collateral attack, see post, § 258.

In connection with other objections, see post, § 251.

(a) A judgment for \$4,689.86 was revived by a scire facias against the heirs and terre-tenants of the debtor, and under a fi. fa. thereon certain lands were sold for \$2,000. This sale was set aside, and under a new fi. fa. the same lands were sold to the plaintiffs in the judgment for \$50. These lands were all the property liable to the judgment, and an ejectment was pending between the parties, involving the title thereto. Held, that under these circumstances the last sale ought not to be set aside for inadequacy of price.—*Cushwa v. Cushwa*, 5 Md. 55.

**§ 251.—Inadequacy of price in connection with other objections.***Cross-Reference.*

Inadequacy of price alone, see ante, § 250.

(a) A sale of real property by a sheriff, under execution, for one-fifth of its value, furnishes intrinsic evidence of irregularity, impropriety, or unfairness of the sale; and when taken in connection with any want of ordinary prudence and judgment, on the part of the officer, in the selection of the time and place, or giving notice of the sale, is sufficient to vacate it on motion.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

**§§ 252-255.—(See Analysis).****§ 256. Actions to set aside sale.***Cross-References.*

Appellate jurisdiction of proceedings to set aside sale as dependent on whether title to land is involved, see "Courts," § 231.

Evidence as to extent of damage, see "Damages," § 188.

Limitations, see "Limitation of Actions," § 100.

Parties to proceedings for equitable relief against judgment, see "Judgment," § 457.

(a) An execution sale subject to taxes, at which the amount of the taxes was made known, cannot be set aside by the defaulting taxpayer.—*Hall v. Clagett*, 63 Md. 57.

(b) Where town lots in a "place of business and commerce," taken under an execution,

are sold by the sheriff greatly below their value, the circumstance that no notice of the sale was set up nearer than 18 miles to the property would induce the court to set aside the sale.—*Nesbitt v. Dallam*, 7 G. & J. 494, 28 Am. Dec. 236.

### § 257. Effect of setting aside sale.

### § 258. Collateral attack on sale.

(a) A venditioni exponas which is not merely irregular and voidable, but absolutely void, may be so declared, even when attacked collaterally.—*Candler v. Fisher*, 11 Md. 332.

(b) An objection to a sheriff's sale that two tracts not contiguous were sold in mass, instead of separately, cannot be taken advantage of by the widow of defendant in the judgment in an action at law, against the alienee of the purchaser at such sale, for her dower out of one of such tracts.—*Trustees of Poor of Queen Anne's County v. Pratt*, 10 Md. 5. [Cited and annotated in 18 L. R. A. 78, on power of husband, or his creditors, to defeat wife's dower right.]

(c) Where the plaintiff in ejectment claimed title under a sheriff's sale, and in proof of his title showed a judgment fieri facias venditioni, describing the land sold with sufficient certainty, and a deed from the sheriff who made the sale, no error or defect in the schedule made at the time of the levy under the fi. fa. can be relied on to defeat the sale.—*Estep v. Weems*, 6 G. & J. 303.

### § 259. Presumption of validity.

#### (B) TITLE AND RIGHTS OF PURCHASER.

#### Cross-References.

As affected by return or defects therein, see post, § 345.

As color of title, see "Adverse Possession," § 74.

As defense in action for waste, see "Waste," § 11.

At sale on execution on decree for alimony, see "Divorce," § 263.

Defenses available against execution purchaser of note, see "Bills and Notes," § 315.

Interest of purchasers to attack mortgage sale, see "Mortgages," § 528.

Notice of sale to subsequent purchasers from judgment debtor, see "Vendor and Purchaser," § 229.

Priority of purchaser at tax sale, see "Taxation," § 732.

Purchase at execution sale as waiver of lien, see "Liens," § 16.

Purchaser as party to foreclosure proceedings, see "Mortgages," §§ 427-434.

Resisting delivery to purchaser, see "Obstructing Justice," § 7.

Retention of possession as invalidating sale as against creditors, see "Fraudulent Conveyances," § 140.

Right of execution purchaser or former owner to purchase property at tax sale, see "Taxation," § 674.

Right of purchaser to attack fraudulent transfer by debtor, see "Fraudulent Conveyances," § 223.

Rights under certificate as assets of purchaser's estate, see "Executors and Administrators," § 39.

Right to distrain property of tenant sold on execution and left in tenant's possession, see "Landlord and Tenant," § 269.

Right to redeem from foreclosure sale, see "Mortgages," § 594.

Sale of part of tract without an exit as carrying right of way over remainder, see "Easements," § 18.

Title as basis for sale by administrator, see "Executors and Administrators," § 329.

### § 260. Nature and effect of transfer in general.

#### Cross-Reference.

Decisions of state courts as authority in federal courts, see "Courts," § 367.

(a) Where land is sold under several executions, of which only one is valid, the purchaser under the valid execution will take title.—*Deakins v. Rex*, 60 Md. 593.

(b) A purchaser at execution sale has the same right, on assignment of dower to the widow of the execution debtor, to have the improved value of the estate arising from his labor excluded which he would have been entitled to if the land had been directly conveyed to him by the execution debtor.—*Price v. Hobbs*, 47 Md. 359. [Cited and annotated in 52 L. R. A. (N. S.) 543, 556, on dower in land subject to purchase money, mortgage or lien; in 21 L. R. A. 183, on right to mesne profits or damages for detention of dower; in 13 L. R. A. (N. S.) 726, on equitable lien under agreement for support in consideration of conveyance.]

§ 261. (Omitted from the classification used herein.)

### § 262. Property passing by sale.

#### Cross-References.

Estate or interest acquired, see post, §§ 264-266.

What constitutes fixtures, see "Fixtures," § 28.

**§ 263. Estate or interest acquired.**

**§ 264.— In general.**

(a) A purchaser at an execution sale only acquires such title as the debtor had at rendition of judgment.—*Hammer v. Westphal*, 120 Md. 15, 87 Atl. 488. [Cited and annotated in 52 L. R. A. (N. S.) 962, on right of vendor whose title is defective to specific performance upon condition of compensation or indemnity.]

(b) The purchaser at an execution sale acquires the right, title, and interest of the debtor.—*Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364.

(c) The husband of a devisee for life purchased the interest of one of the remaindermen, and afterwards were sold, on an execution against the husband, "all the right, title, interest, and estate of the said A. [the husband] of, in, and to all that tract or parcel of land on which the said A. lately resided, and heretofore devised to B. [the wife] by C." Held, that the sale passed the whole of the interest of the defendant in the land, as well that purchased of the remainder-man as the interest acquired through his marriage.—*Balch v. Zentmeyer*, 11 G. & J. 267.

(d) Where joint property in the possession of one of the owners is seized and sold under a fieri facias against him only, the purchaser's right will be complete only to the extent of the interest of the tenant against whom the execution issued.—*McElderry v. Flannagan*, 1 H. & G. 303. [Cited and annotated in 41 L. R. A. (N. S.) 396, 397, on effect of second lease before expiration of prior lease to third party.]

**§ 265.— Particular estates or interests of debtor.**

(a) A disclaimer of title by a grantee in a deed to two as tenants in common held, under the circumstances, not to affect the title of the purchaser at a sheriff's sale. He succeeds to the rights of the judgment creditor under whose execution he purchased; nor is his title affected by the debtor's conveyance subsequent to the judgment lien.—*Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339.

**§ 266.— Time as of which title vests in purchaser.**

*Cross-Reference.*

Operation of conveyance by relation back, see post, § 321.

**§ 267. Rights passing as incidents.**

*Cross-Reference.*

Right to attack fraudulent conveyance, see "Fraudulent Conveyances," § 223.

**§ 268. Liens or incumbrances on property.**

*Cross-References.*

Deducting liens on appraisement, see ante, § 141.

Part payment on mortgage debt tolling limitations, see "Limitation of Actions," § 155.

Right of purchaser to subrogation, see "Subrogation," § 16.

**§ 269. Equities against debtor.**

*Cross-References.*

See ante, § 264.

Notice of equities, see post, § 272.

**§§ 270-274. Bona fide purchasers.**

(a) If the purchaser of land at a sheriff's sale was innocent, it is immaterial whether there was or was not fraud on the part of others.—*Spindler v. Atkinson*, 3 Md. 409; 56 Am. Dec. 755. [Cited and annotated in 21 L. R. A. 50, on purchaser at judicial sale as bona fide purchaser; in 67 L. R. A. 871, 891, 900, on effect of legal title of conveyance in fraud of creditors.]

**§ 275. Effect of defects or irregularities in execution, levy, or sale.**

*Cross-References.*

Affecting grantee from purchaser, see post, § 290.

Ground for setting aside sale, see ante, §§ 248, 249.

Irregularities in levy and waiver thereof in general, see ante, § 143.

Validity of judgment, see ante, § 8.

(a) A purchaser of goods at an execution sale void by the laws has no title thereto, although the levy and sale were made in another state, in the absence of proof that they were regular, under some special law or practice of such state.—*Horsey v. Knowles*, 74 Md. 602, 22 Atl. 1104.

(b) A purchaser of property sold by a sheriff under an execution may deduce his title from any part of the official proceedings of the sheriff; and if there be in any of them evidence showing with certainty,

and by a sufficient description, the actual seizure of the property sold, the sale will be effective, and the title of the purchaser valid in that respect.—*Wright v. Orrell*, 19 Md. 151.

(c) Execution was issued upon a judgment more than three years from its date, and after the death of the defendant, and without revival by sci, fa., under which the land of the deceased defendant was levied on, and sold at sheriff's sale, and purchased by the plaintiff in the judgment. Many years afterwards the defendant's heir at law, who was an infant at the time of the execution and sale, brought ejectment for the land. *Held*, that the execution so issued was voidable, and not absolutely void, and the purchaser, therefore, acquired a valid title to the land.—*Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519. [Cited and annotated in 21 L. R. A. 39, on purchaser at judicial sale as bona fide purchaser; in 61 L. R. A. 364, 393, on effect of death after judgment on remedy by execution.]

(d) A purchaser of property sold on a fi. fa. regular on its face, and issued on a judgment rendered in an action wherein the court had jurisdiction of the parties and the subject-matter, takes a good title, though there were irregularities in the proceedings.—*Ranoul v. Griffie*, 3 Md. 54.

(e) A title would pass to a purchaser under an execution issued upon a supersedeas judgment, more than three years after its date, the writ being only voidable.—*Miles v. Knott*, 12 G. & J. 442.

#### § 276. Effect of modification, vacation, or reversal of judgment.

##### Cross-References.

Ground for setting aside sale, see ante, § 247.

Effect of appeal from judgment in justice's court, see "Justices of the Peace," § 162.

Vacation of judgment by default as vacating all subsequent proceedings including sale, see "Judgment," § 174.

(a) A subsequent reversal of a judgment under which an execution sale was had does not divest the title of the execution purchaser, unless he is plaintiff in execution.—*Barney v. Patterson*, 6 H. & J. 182; *Wampler v. Wolfinger*, 13 Md. 337. [Cited and annotated in 21 L. R. A. 53, on purchaser at judicial sale as bona fide purchaser.]

#### § 277. Possession.

##### Cross-Reference.

Change of possession as affecting validity as to creditors, see "Fraudulent Conveyances," § 140.

#### § 278.— In general.

(a) A purchaser of real estate, sold by a sheriff under an execution, acquires the title which the defendant in execution had at the time the judgment against him was rendered; and the latter cannot, by an agreement made after the rendition of the judgment, to hold the land as tenant of a third party, defeat the purchaser's right to a writ of habere facias possessionem.—*Miller v. Wilson*, 32 Md. 297.

(b) The purchaser of lands sold under a fi. fa. applied to the County Court for a writ of habere facias possessionem, under act 1825, c. 103, against one in possession under a title subsequent to the rendition of the judgment on which the fi. fa. issued. It appeared that the judgment debtor had only an equitable interest in the land levied on, holding a bond of conveyance from the owner of the fee, which bond he had assigned to the tenant in possession before the fi. fa. issued. *Held*, that he was entitled to the writ.—*McMechen v. Marman*, 8 G. & J. 57. (See *Deakins v. Rex*, 60 Md. 593; Code, art. 75, § 93; art. 83, §§ 1, 2.) [Cited and annotated in 38 L. R. A. 249, on priority of judgment over conveyance made after beginning of term.]

#### § 279.— During period for redemption.

#### § 280.— Remedies for recovery.

##### Cross-References.

Accrual of right of action, see "Limitation of Actions," § 44.

Against party to mortgage, see "Mortgages," § 214.

Jurisdiction of justices' courts as affected by questions of title, see "Justices of the Peace," § 36.

Purchasers of homestead, see "Homestead," § 128.

Replevin by purchaser of tenant's interest in crop, see "Landlord and Tenant," § 332.

(a) A writ of possession will not be refused the purchaser of land sold under execution because an ejectment suit involving title to the land is pending in a federal court.—*Deakins v. Rex*, 60 Md. 593.

(b) A writ of possession may issue, although the title of the execution debtor is an equitable one only, if he is entitled to the possession.—*Deakins v. Rex*, 60 Md. 593.

(c) Where a writ of hab. fac. pos. strictly pursues the return of the sheriff's levy and sale under a writ of fi. fa., and the return to the writ of possession certifies the delivery of the land described in that process, it cannot be objected that the latter writ commands the delivery of more land than was sold.—*Penn v. Isherwood*, 5 Gill 206.

(d) A judge of the Court of Appeals, who is satisfied by the affidavit of a party entitled to a writ of possession that the sheriff of the county could not with safety be trusted to execute such writ, may order the clerk to issue the writ to an elisor named and appointed by such judge.—*Penn v. Isherwood*, 5 Gill 206.

(e) In an action of ejectment against the defendant in a judgment, whose land had been levied upon and sold to pay his debt by the purchaser thereof, he is not compelled to show title out of the state. The production of the judgment against the defendant, the fi. fa., and proof of the sale of the land to the plaintiff are all that is required.—*Miles v. Knott*, 12 G. & J. 442.

(f) In an ejectment by a purchaser under a sheriff's sale, against the debtor, who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment and the fi. fa., and to prove the sale of the land, which may be done either by a deed from the sheriff or a return of the fi. fa.—*Fenwick v. Floyd*, 1 H. & G. 172.

(g) A party who has, at a sale on fi. fa., fairly purchased an equitable interest in land, is entitled to the aid of a court of equity to give him the legal title.—*Hopkins v. Stump*, 2 H. & J. 301.

### § 281. Rents and profits.

#### Cross-References.

See ante, § 278; "Landlord and Tenant," § 139.

(a) A purchaser of land at a sale under execution is entitled to the rent which accrues or becomes payable after the day of sale, provided the possession is not surrendered to him.—*Dailey v. Grimes*, 27 Md. 440.

(b) Where, pending a tenancy, the premises are sold, and the tenant, on notice from the purchaser, agrees to give up possession, and an agent of the latter puts cattle on the premises to pasture and receives possession from the tenant, but permits the latter to keep his stock on the farm during the winter, on condition that he will remove them in the spring, it will be presumed that the tenant has surrendered the premises, and the purchaser cannot distrain for any rent for the term so surrendered.—*Dailey v. Grimes*, 27 Md. 440.

(c) Where land was rented with the understanding that, instead of rent, the tenant should make improvements on the premises, and furnish produce sufficient to pay the taxes, the improvements to be made from year to year during the tenancy, and these had been made to the satisfaction of the landlord, together with payments for the taxes, prior to the day of the sale of the premises under execution, the purchaser has no claim for rent for any period prior to the day of sale.—*Dailey v. Grimes*, 27 Md. 440.

§§ 282-289. (See Analysis.)

### § 290. Purchasers from execution purchasers.

#### Cross-References.

Authority to convey after sale has been set aside, see ante, § 257.

Liability as to application of proceeds, see post, § 329.

Rights on reversal of judgment, see ante, § 276.

Purchasers from judgment debtor, see "Vendor and Purchaser," § 229.

### (C) REDEMPTION.

#### Cross-References.

Equity of redemption as property subject to execution, see ante, § 40.

Possession of purchaser during period for redemption, see ante, § 279.

Authority of agent for creditors purchasing property to agree to reconvey land, see "Principal and Agent," § 103.

Effect of charge of statutory rate of interest on redemption, see "Interest," § 30.

Laws relating to redemption as impairing constitutional rights, see "Constitutional Law," §§ 98, 183.

### § 291. Right to redeem in general.

(a) Where C. was entitled to an equitable interest in land which was sold to R. under execution in satisfaction of a judgment

against C., R. had, in equity, a right to appropriate the lands to the payment of his debt, and a sale of them would have been decreed for that purpose; and hence equity will not decree a conveyance from R. to C., although C.'s equitable title was not liable to sale under execution.—*Rowland v. Crawford*, 7 H. & J. 52.

§§ 292-302. (See Analysis.)

(D) CONVEYANCE TO PURCHASER.

*Cross-References.*

Admissibility of deed in trespass to try title, see "Trespass to Try Title," § 40. As evidence of ownership in prosecution for larceny, see "Larceny," § 60. Mandamus to compel making of deed, see "Mandamus," § 73.

§ 303. Necessity and nature in general.

(a) A deed from the sheriff to the purchaser at a sale under execution is not necessary to pass the legal estate, but the same becomes vested in the vendee by operation of law.—*Boring v. Lemmon*, 5 H. & J. 223; *Stump v. Henry*, 6 Md. 201, 61 Am. Dec. 300.

§ 304. Statutory provisions.

§ 305. Authority to make.

*Cross-Reference.*

Order of probate court to deliver decedent's property to state treasury as vesting title in state, see "Escheat," § 6.

§ 306. Right to conveyance.

*Cross-References.*

Issuance of certificate as prerequisite to right to deed, see ante, § 241. Joinder of sheriff and person claiming adversely to plaintiff in action to obtain deed, see "Parties," § 25.

§ 307. Time for making.

§ 308. Restraining making or delivery.

§§ 309-312. Form and contents.

(a) In an action of ejectment by a party claiming under a sheriff's sale, the following description in the schedule of the property sold was held to be sufficient: "To one of land called and known by the name of Indian Creek, with addition, containing two hundred and seventeen acres, more or less."—*Marshall v. Greenfield*, 8 G. & J. 349, 29 Am. Dec. 559. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

§§ 313-317. (See Analysis.)

§ 318. Construction and operation.

§ 319.— In general.

§ 320.— Conclusiveness of recitals.

*Cross-Reference.*

See post, § 344.

(a) The bill of sale of a sheriff for chattels levied on and sold by him is improper testimony in itself, however it may be considered when accompanied by proof of the sheriff's authority to sell the property.—*Sanderson v. Marks*, 1 H. & G. 252.

§ 321.— Relation back.

*Cross-Reference.*

See ante, §§ 266, 306.

(E) PROCEEDS.

*Cross-References.*

Failure to bring proceeds into court as ground for setting aside sale, see ante, § 247.

Priorities, see ante, §§ 112, 113.

Proceeds as bound by subsequent bona fide execution coming to sheriff's hands, see ante, § 55.

Reception of proceeds as creating estoppel to attack sale, see ante, § 245.

As assets of decedent's estate, see "Executors and Administrators," § 40.

Proceeds of sale of homestead as exempt, see "Homestead," § 78.

§ 322. Disposition in general.

(a) Where land is sold on execution, the surplus of the proceeds remaining after satisfying the execution is to be disposed of as real estate, and it is not to be considered as converted into personalty.—*Jones v. Jones*, 1 Bland 443, 18 Am. Dec. 327. [Cited and annotated in 61 L. R. A. 385, on effect of death after judgment on remedy by execution.]

§§ 323-326. (See Analysis.)

§ 327. Rights to surplus.

*Cross-References.*

Limitation of actions for recovery of surplus, see "Limitation of Actions," § 48. Rights of action vesting in assignee in insolvency, see "Insolvency," § 55.

(a) On an execution sale under a senior judgment, holders of junior judgments may resort in the same forum to any surplus after satisfaction of the execution.—*Leonard v. Groome*, 47 Md. 499. [Cited and annotated in 36 L. R. A. (N. S.) 433, 435, on necessity of making junior encumbrancer party to foreclosure.]



### § 328. Proceedings for distribution.

#### Cross-Reference.

Consolidation of motions, see "Motions," § 36.

### § 329. Liabilities of purchaser as to application of proceeds.

## VIII. RETURN.

#### Cross-References.

Execution against the person, see post, § 444.

Necessity of return of execution against property to authorize execution against the person, see post, § 426.

As evidence of value in action for conversion, see "Trover and Conversion," § 40.

As prerequisite to creditors' suit, see "Creditors' Suit," § 16.

As prerequisite to suit to avoid fraudulent conveyance, see "Fraudulent Conveyances," § 241.

In justices' courts, see "Justices of the Peace," § 135.

Liability of sheriff or constable for failure to make return, see "Sheriffs and Constables," § 123; for making false return, see "Sheriffs and Constables," § 124.

Necessity of return to prevent dormancy of judgment, see "Judgment," § 853.

Practice in federal courts, see "Courts," § 355.

### §§ 330-333. (See Analysis.)

### § 334. Form and requisites.

#### Cross-References.

Effect of variance between return and deed, see ante, § 311.

Sufficiency of return of execution levied on property fraudulently conveyed by debtor, see "Fraudulent Conveyances," § 230.

### § 335.—In general.

(a) A sheriff's return on an execution which certifies, in general terms, that he "levied," is sufficient, without stating the acts done in making the levy; the necessary proceedings will be implied.—*Byer v. Etnyre*, 2 Gill 150, 41 Am. Dec. 410.

(b) A sheriff returned a fi. fa.: "Laid per schedule, and property sold to B. for \$750. Resold to H. for \$725, and sale not complied with, and, of course, on hand." Held, that the return was well made.—*Scott v. Bruce*, 2 H. & G. 262.

### § 336.—Description of property.

#### Cross-References.

Effect of insufficient description on sale, see ante, § 275.

In deed, see ante, § 312.

In entry of levy, see ante, § 140.

(a) When a sheriff has levied upon part of a tract of land, and the return does not show what part was levied on, the defect is not cured by a mere recital in the deed afterwards executed by the sheriff that he had levied on the whole tract.—*Langley v. Jones*, 33 Md. 171. [Cited and annotated in 21 L. R. A. 40, on purchaser at judicial sale as bona fide purchaser.]

(b) A writ of fi. fa. on a judgment by a justice of the peace of condemnation in attachment described the property condemned, following the attachment and judgment, as "one law office and the lot of ground on which it stands." The return stated that they were levied on "one lot and buildings thereon," and that the same were sold. Another fi. fa. was issued on a judgment regularly rendered on a warrant in debt. The schedule stated the property levied on to be "one office and lot and stable," and the return set forth that the officer sold "the lot and buildings mentioned in the schedule." Held, that such levies and sales were void for uncertainty.—*Dorsey's Lessee v. Dorsey*, 28 Md. 388.

(c) A sheriff's return to an execution upon land should describe the premises sold with precision; but it is enough if the description be such as that the property can be clearly identified.—*Duvall v. Waters*, 1 Bland 569, 18 Am. Dec. 350; *Berry v. Griffith*, 2 H. & G. 337, 18 Am. Dec. 309. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

(d) Where it was shown that property patented as "Western Route" was sometimes called "West Route," a description thereof by such name in a sheriff's return of execution levy was sufficient.—*Huddleson v. Reynolds's Lessee*, 8 Gill 332, 50 Am. Dec. 702.

(e) A return to a fieri facias by the sheriff, that he had levied upon a part of a tract of land, is void for uncertainty.—*Waters v. Duvall*, 6 G. & J. 76.

(f) A return by the sheriff to a writ of fi. fa. that he had levied upon "part of a tract of land called 'B.,' supposed to contain," etc., was defective. Where, however, the return to the venditioni exponas was correct, it was held to give certainty to the fieri facias.—*Clarke v. Belmear*, 1 G. & J. 443.

(g) Where land sold under execution is described in the inventory and appraisement as "part of a tract of land called 'C. and B.,' containing 500 acres more or less, valued at \$6,000," and in the sheriff's return as "all that part of a tract of land called 'C. and B.' which was devised to E. by his father and appraised at \$6,000," the objection that the sale was irregular and void because of discrepancy between the description in the inventory and appraisement and that in the return was not well taken, since the identity of the land in the two descriptions was apparent.—*Berry v. Griffith*, 2 H. & G. 337, 18 Am. Dec. 309. [Cited and annotated, see supra.]

(h) A sheriff's return on a writ of fieri facias, describing the land levied on as "a tract of land called 'Borough Hall,'" sufficiently describes the land for purposes of location; the tract being popularly known by that name.—*Thomas v. Turvey*, 1 H. & G. 435.

(i) A sheriff's return to a fieri facias, showing a levy on a certain number of acres of a tract of land, which fails to designate the part of the tract from which the quantity designated is to be taken, so that it can be located, is fatally defective.—*Fenwick v. Floyd*, 1 H. & G. 172; *Thomas v. Turvey*, Id. 435.

### § 337. Record.

### § 338. Amendment.

#### Cross-References.

See ante, § 247.

Conclusiveness of amended return, see post, § 344.

Return of extent, see post, § 346.

Right to amend in garnishment proceedings based thereon, see "Garnishment," § 8.

(a) Where property has been sold on a judgment of a justice court, and the sale ratified by the Superior Court of Baltimore City, and return made to it by the justice court, as required by Code 1860, art. 83, § 9, the Superior Court may allow the return to be amended so as to show that defendant was summoned in the justice court.—*Mottu v. Fahey*, 78 Md. 389, 28 Atl. 387. (See Code 1911, art. 52, §§ 40-42, 56.)

(b) The provision under Code 1860, art. 83, § 9, that the constable shall make return

to the justice, who shall forthwith deliver all of said return to the Superior Court of Baltimore City, applies only to the original filing of the return, and does not prevent the constable from refiling the papers under an order for an amendment thereof.—*Mottu v. Fahey*, 78 Md. 389, 28 Atl. 387. (See Code 1911, art. 52, §§ 40-42, 56.)

(c) An amendment to the return of a deputy sheriff to a fi. fa., moved for after his death, by the purchaser, to correct its alleged date of levy and its statement that the interest of one of the defendants only had been levied on, is properly refused where neither the sheriff nor any other disinterested person is reliably cognizant of the facts.—*Jarboe v. Hall*, 37 Md. 345. [Cited and annotated in 21 L. R. A. 45, on purchaser at judicial sale as bona fide purchaser.]

(d) It is a sheriff's right and duty to correct his return to a fieri facias to make it conform to the facts, and thereby give it legal effect.—*Berry v. Griffith*, 2 H. & G. 337, 18 Am. Dec. 309. [Cited and annotated, see supra, § 336.]

### § 339. Defects, objections, and waiver.

#### Cross-Reference.

Ground for setting aside sale, see ante, § 247.

### § 340. Quashing or setting aside.

#### Cross-Reference.

See ante, § 247.

### § 341. Construction.

(a) In the absence of proof to the contrary, any entry or indorsement upon a fieri facias, when returned, relating to the payment or satisfaction of the claim, is presumed to be true, and to be there with the knowledge and approbation of the officer.—*Parker v. Sedwick*, 5 Md. 281.

(b) There is no discrepancy between a sheriff's return and the inventory and appraisement affecting the validity of his sale under execution, where the latter describes the land as a "tract called 'C.,' the property of B.," and the former describes it as a "tract called 'C.,' belonging to B., which was devised to him by his father."—*Berry v. Griffith*, 2 H. & G. 337, 18 Am. Dec. 309. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

### §§ 342-344. Operation and effect.

(a) In an action on the sheriff's bond for an alleged escape of a party arrested on a ca. sa., which the officer had returned as properly served, the plaintiff may show that such return was untrue in fact, and that the sheriff did not have the body of the defendant in court at the return day of the writ, ready to be delivered upon the demand of the plaintiff.—*State v. Lawson*, 2 Gill 62.

(b) Declarations of a deputy sheriff, at the time he made a sale of land under a fi. fa., are inadmissible, in an action of ejectment for the land, to contradict the return of the sheriff, and thus show that a tract returned as sold by one name was in fact sold by another name.—*Miles v. Knott*, 12 G. & J. 442.

### § 345. Effect of return or defects therein on title of purchaser.

(a) The purchaser at a judicial sale is entitled to the benefit of all the legal proceedings in the case; and, if they furnish a description from which the property can be identified, it is sufficient, though the schedule, return, and advertisement have slight errors therein.—*Busey v. Tuck*, 47 Md. 171.

(b) A sale may be quashed for error in the return of the deputy sheriff as to the date of levy, and the interest seized; the deputy being dead, and the sheriff not being sufficiently cognizant of the facts to furnish reliable data for an amendment of the return.—*Jarboe v. Hall*, 37 Md. 345. [Cited and annotated in 21 L. R. A. 45, on purchaser at judicial sale as bona fide purchaser.]

(c) The omission by a sheriff to mention in his return to a fi. fa. the price at which the property was sold, or to state affirmatively that he gave legal notice of the sale, does not impair the title of the purchaser.—*Milner v. Wilson*, 32 Md. 297.

(d) Where land is sold under fieri facias, and the judgment debtor acknowledges the perfect validity of the purchaser's title, equity will not interpose in his behalf in an action to set aside the sale for want of a proper return in the action in which judgment was rendered.—*Nelson v. Turner*, 2 Md. Ch. 73.

(e) Though a tract of land was patented as "Western Route," yet, where it was shown that such tract was sometimes called "West Route," a description thereof by such name, in a sheriff's return of execution, levy, and conveyance under execution sale, was sufficient to pass the title.—*Huddleson v. Reynolds's Lessee*, 8 Gill 332, 50 Am. Dec. 702.

(f) Where a sheriff makes a sale of land under a fi. fa., and does not make his return to the term at which the process is returnable, but after the actual sittings of the court are over, at a day in vacation, the defendant may move to set aside the sale at the next term thereafter, notwithstanding the record states the return to have been made at the term to which the fi. fa. was returnable.—*Moreland v. Bowling*, 3 Gill 500.

(g) Where a sheriff, in his return on a fi. fa., stated that he seized part of a certain tract of land, without describing the part seized, a sale of the whole tract on a subsequent venditioni exponas was void for uncertainty.—*Waters v. Duvall*, 11 G. & J. 37, 33 Am. Dec. 693. [Cited and annotated in 21 L. R. A. 42, on purchaser at judicial sale as bona fide purchaser.]

(h) The fact that a return of a fi. fa. did not set out the name of the purchaser, nor contain a description of the land sold, does not invalidate the purchaser's title, since it is not the return which gives title to the purchaser, but the sale as evidenced by his deed.—*Barney v. Patterson*, 6 H. & J. 182.

(i) Where a sheriff's return on a fieri facias, and his conveyance of the land sold under it, are apparently regular, the title cannot be divested out of the purchaser, except by proof of fraud or collusion between him and the sheriff.—*Bull v. Sheredine*, 1 H. & J. 410.

### § 346. Return of extent.

### § 347. Failure to make.

## IX. PAYMENT, SATISFACTION, AND DISCHARGE.

### Cross-References.

Execution against the person, see post, §§ 450, 451.

Authority of attorney to receive money or security in satisfaction of execution, see "Attorney and Client," § 100.

In justices' courts, see "Justices of the Peace," § 135.

Recovery of payments, see "Payment," § 82.

Release procured by threats, see "Threats," § 10.

### § 348. Payment.

#### Cross-Reference.

Tender by surety on debtor's recognition, see "Tender," §§ 9, 18.

(a) Judgments were obtained against A. and his surety, B., and executions issued upon both. The one against A. was laid on his lands, and the one against B. was returned satisfied. A venditioni exponas was issued for the sale of the lands taken under the execution against A., and was indorsed for the use of B., and the lands were sold. *Held*, that the payment by the surety did not affect the responsibility of the principal, and, being made subsequent to the levying of the execution against the principal, was to be considered as operating as an assignment of the judgment, and that the execution might be carried on for the use of the surety.—*Sotheren v. Reed*, 4 H. & J. 307. [Cited and annotated in 68 L. R. A. 569, 573, on extinction of judgments against principals by sureties' payment.]

(b) The return to a writ of venditioni exponas was "countermanded by the plaintiff," and there was an indorsement on the writ by way of assignment from the plaintiff to a third person. *Held*, that the same amounted in express terms to an acknowledgement of satisfaction by the plaintiff from the defendant through such third person, and a new writ of venditioni exponas, afterwards issued for the use of such third person, and the return thereto should be quashed.—*Williamson v. Perkins*, 1 H. & J. 449.

§§ 349-357. (See Analysis.)

## X. SUPPLEMENTARY PROCEEDINGS.

#### Cross-References.

Appealability of order made in justice's court, see "Justices of the Peace," § 147. Applicability of limitations as to actions on judgments, see "Judgment," § 910. Creditors' suit to reach property not subject to execution, see "Creditors' Suit." Effect of debtor's discharge in bankruptcy, see "Bankruptcy," § 433.

For collection of taxes, see "Taxation," § 600.

In condemnation proceedings, see "Eminent Domain," § 249.

Intervention of personal representative, see "Executors and Administrators," § 439.

On judgment against administrator, see "Executors and Administrators," § 454.

Participation in, as waiver of right to open default, see "Judgment," § 147.

Property exempt from execution, see "Execution," § 111; "Homestead," § 186.

Remedy by supplementary proceedings as bar to creditors' suit, see "Creditors' Suit," § 6.

Right to jury trial, see "Jury," § 16.

Right of receiver to accounting by purchaser of property under mortgage recorded in wrong county, see "Chattel Mortgages," § 197.

Statement of opinion as to nonresidence in affidavit of debtor, see "Affidavits," § 17.

To enforce judgment for alimony, see "Divorce," § 264.

#### Annotation.

Exemption of officer's salary from execution.—54 L. R. A. 566, note.

§§ 358-412. (See Analysis.)

### § 413. Lien or other rights acquired by proceedings.

#### Annotation.

Lien acquired by service of notice in supplementary proceedings.—3 L. R. A. (N. S.) 123, note.

### § 414. Liens and claims of third persons.

(a) Act 1868, c. 471, § 211, provides that "suits against a foreign corporation exercising franchises in this state may be brought by a resident of the state for any cause of action, and by a plaintiff not a resident of this state, when the cause of action has arisen or the subject of the action shall be situated in this state." M., residing in Baltimore, sued out an attachment in a court of Maryland against B., of Chicago, and garnished an insurance company incorporated in Great Britain, and doing business both in Baltimore and Chicago, in order to reach funds due B. for a loss by fire of B.'s store in Chicago. E., a citizen of Chicago, intervened by petition claiming the fund by assignment from B. *Held*, that the plaintiff in attachment as against the garnishee, was subrogated to the rights of the debtor, and could recover only by the same right, and to the same extent, as the debtor might recover if he were

suing the garnishee.—*Myer v. Liverpool, London & Globe Ins. Co.*, 40 Md. 595. (See Code, art. 23, §§ 92, 412.) [Cited and annotated in 70 L. R. A. 536, on nonresident's right to sue foreign corporation.]

(b) Where a plaintiff assigned a claim, and the defendant afterwards sued out an attachment, and laid the same thereon, it was held that he obtained no lien thereby to defeat the assignee.—*Baldwin v. Wright*, 3 Gill 241.

#### § 415. Costs.

#### §§ 416-419. Disobedience to order or subpoena as contempt.

##### Cross-References.

Habeas corpus to review proceedings to punish for contempt, see "Habeas Corpus," § 30.

Motions to take affidavits, see "Motions," § 42.

Proceedings for punishment in general, see "Contempt," §§ 30-69.

#### § 420. Defects and irregularities in proceedings, and waiver thereof.

### XI. EXECUTION AGAINST THE PERSON.

##### Cross-References.

Against executors, see "Executors and Administrators," § 429.

Against married women, see "Husband and Wife," § 241.

Correction of judgment by adding direction that *capias ad satisfaciendum* issue, see "Judgment," § 307.

Effect of arrest on liabilities of receiptors of attached property, see "Attachment," § 189.

Effect of bankruptcy, see "Bankruptcy," §§ 392, 393.

Evidence in action for false imprisonment, see "False Imprisonment," § 31.

In bastardy proceedings, see "Bastards," § 83.

In equity, see "Equity," § 439.

In justices' courts, see "Justices of the Peace," § 135.

Jailer's liabilities, see "Prisons," §§ 10, 16, 18.

To enforce collection of costs, see "Costs," § 279.

To enforce payment of alimony or other allowances, see "Divorce," § 268.

To enforce payment of fine, see "Fines," § 9.

#### § 421. Nature and purpose of remedy.

#### § 422. Constitutional and statutory provisions.

##### Annotation.

Constitutionality of imprisonment on execution.—34 L. R. A. 634, note.

#### § 423. Actions in which execution is authorized.

#### § 424. Previous arrest in same action.

#### § 425. Judgments on which execution is authorized.

##### Cross-Reference.

Authority of court to strike out of judgment provision for execution against the person, see "Judgment," § 298.

#### § 426. Previous issue and return of execution against property.

(a) Where goods taken under a *fi. fa.* have been sold for a part of the amount taken on the judgment, a *ca. sa.* cannot be legally issued for the residue, until the sheriff has made a final return of the *fi. fa.*, showing what has been done with the property. This return should be in the term time; and, if made to the clerk's office in the recess, it is void.—*Turner v. Walker*, 3 G. & J. 377, 22 Am. Dec. 329.

#### §§ 427-436. (See Analysis.)

#### § 437. Renewal and reissue.

(a) The return of *cepi* to a *ca. sa.*, plaintiff not proceeding to enforce the writ by having defendant committed, defaulting the sheriff, or having it entered not called, does not preclude him from taking out a new *ca. sa.*—*West v. Hyland*, 3 H. & J. 200.

(b) Where the original execution has been lost, and no return made on it, the defendant may be committed to prison on a duplicate execution taken out by the plaintiff's attorney.—*Fulton v. Wood*, 3 H. & McH. 99.

#### §§ 438-442. (See Analysis.)

#### § 443. Quashing or vacating.

(a) Execution might be quashed because more than a year had elapsed from the date of the decree before the application for the *capias ad satisfaciendum*.—*Stump v. Hopkins*, 3 Bland 327, note.

(b) Where a judgment is recovered against a defendant, and he attaches the debt in his own hands, this is ground for a motion to quash a *ca. sa.* issued against him on the judgment; but he is bound to show that the attachment was regularly levied.—*Baldwin v. Wright*, 3 Gill 241.

(c) A writ of *capias ad satisfaciendum* may not be avoided by *audita querela*, because of the death after its teste, but before

its issue, of the one in whose name it was issued.—*Docura v. Henry*, 4 H. & McH. 480. [Cited and annotated in 61 L. R. A. 377, on effect of death after judgment on remedy by execution.]

(d) A motion to quash an execution against the person cannot be heard in the absence of the defendant.—*Guthers v. Langton*, 3 H. & McH. 185.

#### § 444. Return.

(a) The return of "Cepi," upon a writ of ca. sa., is a sufficient return, and signifies that the sheriff has taken the body of the defendant, and has him ready to be produced, etc., and is prima facie evidence of those facts.—*State v. Lawson*, 2 Gill 62.

(b) Since no return on an execution against the person is necessary to justify a commitment, a commitment may be had on a copy or duplicate of a mislaid execution.—*Fulton v. Wood*, 3 H. & McH. 99.

(c) A sheriff's return on an execution against the person, reciting that he had the dead body of the prisoner, is sufficient, without reciting where he died, since his recitation of the death is only necessary to excuse himself from producing the body and purge himself of contempt of the process, and whether or not he died in custody is a conclusion of law to be drawn from the facts.—*Christie v. Goldsborough*, 1 H. & McH. 540.

§§ 445-449. (See Analysis.)

#### § 450. Discharge on surrender of or disclosure as to property.

##### Cross-Reference.

Effect of principal's discharge in bankruptcy on surety's liabilities, see "Bankruptcy," § 431.

(a) It is no objection to the action of a judge in appointing a trustee in insolvency and taking a bond and discharging the defendant during a recess of the court as authorized by act 1805, c. 110, §§ 2, 3, that such acts were done prior to the filing of the petition in insolvency.—*Bowie v. Jones*, 1 Gill 208.

#### § 451. Discharge of poor debtors.

##### Cross-References.

Father of bastard child, see "Bastards," § 83.

Relief of poor debtor committed on attachment for contempt in not paying costs, see "Costs," § 281.

(a) It is not necessary that it should appear negatively in the proceedings under act 1774, c. 28 (providing that, if any person committed for the want of special bail for the space of 20 days shall petition any three justices of the peace of the county for his discharge, the justices shall appoint a time for their meeting, and certify in writing to the sheriff, who shall produce the prisoner, and, if it shall appear that the whole debts of the prisoner do not amount to £200, then such prisoner may deliver to the sheriff a schedule of his whole estate, and at his request the justices shall administer to him the oath prescribed by the act), that the debts of the insolvent at the time of his application do not exceed £200 sterling. It is sufficient if it appears affirmatively that they were under that sum.—*Winingder v. Diffenderffer*, 5 H. & J. 181.

(b) Where it appeared by proceedings under act 1774, c. 28 (providing that, if any person committed for the want of special bail for the space of 20 days shall petition any three justices of the peace of the county for his discharge, the justices shall appoint a time for their meeting, and certify in writing to the sheriff, who shall produce the prisoner, and, if it shall appear that the whole debts of the prisoner do not amount to £200, then such prisoner may deliver to the sheriff a schedule of his whole estate, and at his request the justices shall administer to him the oath prescribed by the act), that the insolvent, at the time of applying for the benefit of the act, had been in confinement for 20 days and upward, and that afterwards, on the day of meeting, the sheriff certified to the justices that the insolvent had been in prison 52 days, the legal inference is that he had not been confined for a longer period, though no negative words were used showing such was not the case.—*Winingder v. Diffenderffer*, 5 H. & J. 181.

(c) The certificate of the justices of the peace of their proceedings under act 1774, c. 28 (providing that, if any person committed for the want of special bail for the space of 20 days shall petition any three justices of the peace of the county for his discharge, the justices shall appoint a time for their meeting, and certify in writing to the sheriff,

who shall produce the prisoner, and, if it shall appear that whole debts of the prisoner do not amount to £200, then such prisoner may deliver to the sheriff a schedule of his whole estate, and at his request the justices shall administer to him the oath prescribed by the act), is of itself evidence of the facts it contains; and the party claiming under such proceedings is not compelled to prove such facts by evidence aliunde the certificate.—*Winingder v. Diffenderfer*, 5 H. & J. 181.

### § 452. Rearrest.

### § 453. Liabilities on bonds, undertakings, or recognizances.

#### Cross-References.

Conclusiveness of return, see ante, § 344.  
As affected by tender, see "Tender," §§ 9, 18.  
Bastardy bond, see "Bastards," § 83.  
Parol or extrinsic evidence, see "Evidence," § 386.  
Surety's liability as affected by debtor's discharge in bankruptcy, see "Bankruptcy," § 431.

(a) On the production of a release of the principal debtor under the insolvent laws of another state by the special bail, the court should enter an exoneration of the bail.—*Richmond v. De Young*, 3 G. & J. 64. [Cited and annotated in 14 L. R. A. (N. S.) 512, on discharge of principal in bankruptcy releasing surety on bond in action at law.]

## XII. WRONGFUL EXECUTION.

#### Cross-References.

As conversion, see "Trove and Conversion," § 5.  
As slander of title, see "Libel and Slander," §§ 130, 135.  
Estoppel by failure to make claim, see "Estoppel," § 94.  
Liability of officer, see "Sheriffs and Constables," § 113.  
Malicious execution, see "Malicious Prosecution."  
Mortgagor's right of action for conversion against execution creditors of mortgagor, see "Chattel Mortgages," § 170.

§§ 454-461. (See Analysis.)

### § 462. Persons liable.

(a) Where the execution plaintiff directs the sheriff to seize property of another person than that of defendant in execution, he becomes thereby a joint trespasser with the sheriff.—*Corner v. Mackintosh*, 48 Md. 374.

(b) Where an officer levies execution on property which does not belong to defendant under the judgment, but plaintiff in the judgment nowise participates in or sanctions such improper levy, plaintiff cannot be held, in an action for damages brought by the real owner of the property.—*Snively v. Fahnestock*, 18 Md. 391. [Cited and annotated in 53 L. R. A. 626, on extent of trespasser's liability for consequential injuries.]

### §§ 463-474. Actions.

#### Cross-References.

Application of general statute of limitations, see "Limitation of Actions," §§ 2, 33, 43.

Jurisdiction dependent on amount or value in controversy, see "Courts," §§ 120, 121.

Right of action by husband or wife or both for unauthorized levy on wife's separate property, see "Husband and Wife," § 210.

#### Damages.

See "Chattel Mortgages," § 173.

In action against officers, see "Sheriffs and Constables," § 139.

Wrongful levy on intoxicating liquors illegally kept for sale, see "Intoxicating Liquors," § 325.

(a) Act 1870, c. 84, is simply to allow one not a party to a suit, whose property has been seized in execution on a judgment rendered by a justice of the peace, on the assumption that it belonged to the debtor, to recover the property back in specie before it is sold; and by exercising the privilege conferred by the act such a one is not deprived of his common-law remedy for the unlawful seizure and detention.—*Clark v. Dressel*, 56 Md. 147. (See Code, art. 52, § 73.)

## EXECUTIVE DEPARTMENT.\*

#### Cross-References.

See "Attorney General"; "Constitutional Law," §§ 76-80; "Customs Duties"; "Internal Revenue"; "Post Office," §§ 3-5; "States," § 45; "United States," §§ 30-33.

Applications for patents for inventions and proceedings thereon, see "Patents," §§ 97-114.

Applications for patents for mining lands and proceedings thereon, see "Mines and Minerals," §§ 40, 41.

Applications for patents for public lands and proceedings thereon, see "Public Lands," §§ 94-109.

Interstate Commerce Commission, see "Commerce," §§ 83-98.

Municipal departments, see "Municipal Corporations," §§ 175-213.

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

**EXECUTIVE POWER.\****Cross-References.*

See "Constitutional Law," §§ 58, 62, 76-80; "Counties," §§ 38-102; "District of Columbia," §§ 6, 7; "Extradition"; "Municipal Corporations," §§ 123-220; "Pardons"; "States," §§ 41-84; "Territories," §§ 23, 23; "Towns," §§ 15-34; "United States," §§ 26-52.

Appointment of officers in general, see "Officers," §§ 6, 58.  
Approval or veto of bills, see "Statutes," §§ 25-35.  
Approval or veto of constitutional amendments, see "Constitutional Law," § 7.  
Approval or veto of ordinances, see "Municipal Corporations," § 107.  
Of city council, see "Municipal Corporations," § 60.  
Removal and suspension of officers in general, see "Officers," §§ 7, 71, 72.

**EXECUTORS AND ADMINISTRATORS.\****Scope-Note.*

[INCLUDES general administration of decedents' estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors or administrators in respect to the collection, management, and disposition of their testators' or intestates' estates; and legal proceedings relating thereto.

[EXCLUDES probate, establishment, interpretation, and effect of wills (see "Wills"); testamentary powers and trusts (see "Powers"; "Trusts"); rights upon distribution of intestates' estates (see "Descent and Distribution"); administration of community property (see "Husband and Wife"); settlement of partnership affairs by surviving partners or by statutory partnership administrators (see "Partnership"); and particular rights and liabilities of devisees and legatees (see "Wills"), and of heirs and next of kin (see "Descent and Distribution").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Administration in General.**

- § 1. Nature of the trust.
- § 2. What law governs.
- § 3. Necessity of administration.
- § 4. Fact of death.
- § 5. Fact of intestacy.
- § 6. Intermeddling in administration.
- § 7. Withdrawing estate from administration.

**II. Appointment, Qualification, and Tenure.**

- § 8. Jurisdiction of courts.
- § 9. — In general.
- § 10. — Domicile of decedent.
- § 11. — Existence of assets.
- § 12. — Situs of assets.
- § 13. — Particular courts.
- § 14. Appointment of executor.
- § 15. Competency of person named as executor.
- § 16. Acceptance or renunciation by executor.
- § 17. Right to appointment as administrator.
- § 18. Qualifications of administrator.
- § 19. Renunciation of right to administer.
- § 20. Proceedings for appointment.

\*Annotation: Words and Phrases. same title.



**II. Appointment, Qualification, and Tenure—Continued.**

- § 21. Administrator with will annexed.
- § 22. Temporary or special appointment.
- § 23. Second or additional appointment.
- § 24. Public administrators.
- § 25. Acceptance and oath of office.
- § 26. Bond.
- § 27. Issuance of letters.
- § 28. Evidence of appointment or authority.
- § 29. Operation and effect of appointment.
- § 30. Failure to qualify or act.
- § 31. Termination of authority in general.
- § 32. Revocation of letters.
- § 33. Resignation and discharge.
- § 34. Disqualification.
- § 35. Removal.
- § 36. Death.
- § 37. Administrators de bonis non.

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- § 40. Proceeds of sale of real property.
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- § 44. Interests in partnerships.
- § 45. Trust estates and other equitable estates and interests.
- § 46. Interests under insurance policies.
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- § 51. — Right of action for death of decedent.
- § 52. — Evidence of indebtedness.
- § 53. Exempt property.
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- § 58. — Property accruing after death.
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- § 60. Foreign assets.
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- § 65. — Proceedings to compel.
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**III. Assets, Appraisal, and Inventory—Continued.**

- § 68. — Requisites and sufficiency of inventory.
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- § 75. Representation of creditors.
- § 76. Jurisdiction of courts.
- § 77. Powers before issue of letters or qualification.
- § 78. Powers pending contest of will.
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- § 133. Mortgaged and incumbered property.
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**IV. Collection and Management of Estate—Continued.****(C) PERSONAL PROPERTY—Continued.**

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- § 210. Agreements by decedent to make will.
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- § 212. Taxes.
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Representatives of deceased trustees, see "Trusts," § 244.

Representatives of deceased trustees in bankruptcy, see "Bankruptcy," § 276.

Right of action by legatee as affected by want of administration, see "Wills," § 748.

Right of administrator of grantor in trust deed to purchase at sale of property under power, see "Mortgages," § 362.

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Right of executors of deceased stockholder to inspect corporate books, see "Corporations," § 181.

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Right of executor to proceed for appointment of new trustee under trust deed, see "Mortgages," § 342.

Right of executor to purchase at sale under execution in his favor, see "Execution," § 228.

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Right of widow to release cause of action for death of decedent, see "Death," § 25.

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Rights in respect to body of decedent, see "Dead Bodies," § 1.

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Right to damages arising from public improvement, see "Municipal Corporations," § 398.

Right to jury trial in administration proceedings, see "Jury," §§ 17, 19.

Sale of decedent's land for nonpayment of taxes, see "Taxation," § 632.

Service of notice of public improvements, see "Municipal Corporations," § 294.

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Situs of property of decedent's estate as affecting liability for taxes, see "Taxation," § 99.

Tax deed to executor, see "Taxation," § 747.

Tender to personal representative, acceptance of, see "Tender," § 27.

Testamentary gifts over to executors, see "Wills," § 556.

Testamentary trustees, see "Trusts"; "Wills," § 681.

Testimony as to transactions with persons subsequently deceased, see "Witnesses," §§ 125-183.

Trust arising from individual interest of personal representative in affairs of estate, see "Trusts," § 102.

Trust resulting from transactions with executor or administrator, see "Trusts," § 84.

Validity of assignment to executor of living person, see "Assignments," § 62.

Validity of will executed for purpose of appointment of executor alone, see "Wills," § 76.

## I. ADMINISTRATION IN GENERAL.

### *Cross-References.*

Necessity of appointment of administrator of deceased heir on application for sale of real estate of ancestor's estate, see post, § 335.

Necessity of representation of estate in action on administrative bond, see post, § 537.

### § 1. Nature of the trust.

### § 2. What law governs.

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

### § 3. Necessity of administration.

#### Cross-References.

Administrator of estate of deceased executor, see post, § 128.

Ground for appointment of administrator d. b. n., see post, § 37.

Right of action by legatee, see "Wills," § 748.

#### Annotation.

Necessity of administration in devolution of decedent's personalty.—15 L. R. A. 491, note.

(a) Under Code 1904, art. 93, § 320, providing no legacy shall lapse or fail by the legatee's death in testator's lifetime, but every such legacy shall have the same effect and operation in law to transfer the right, estate, and interest in property mentioned in such devise as if such legatee had survived testator, it is unnecessary to appoint an administrator, of a deceased legatee; but the legacy goes immediately to persons entitled to take under such legatee.—*Vogel v. Turnt*, 110 Md. 192, 72 Atl. 661. (See Code 1911, art. 93, § 326.)

(b) Administration should not be granted on estate of wife who dies leaving no issue and owing no debts; act 1892, c. 571, providing, if intestate be a married woman, her personal property shall devolve on her husband absolutely, and it shall not be necessary to administer on her estate to pass title to him unless she owe debts, but title shall not pass to him when administration is not necessary, except by order of the court on his application.—*Wilkinson v. Robertson*, 85 Md. 447, 37 Atl. 208. (See Code, art. 93, § 31, note.)

(c) A leaseholder conveyed his interest by a deed on its face in fee to the mother of plaintiff's intestates and their sister, who, on the title becoming vested in them, repudiated the title before it had ripened into a title by adverse possession, and procured from their mother's grantor a conveyance of the land as a leasehold. *Held*, that the latter conveyance was inoperative, and plaintiff's intestates could only claim under the original conveyance, which conveyed such title only as the grantor had, and that, administration not having been taken out on the mother's estate, an administration sale of intestates' interest in the land was pre-

mate.—*Barnitz v. Reddington*, 80 Md. 622, 24 Atl. 409.

(d) Under Code 1888, art. 93, § 32, providing that the personal property of a married woman who dies intestate, leaving no child or descendant, shall devolve upon her husband absolutely, and that administration upon her estate shall not be necessary to pass title to him, unless she is liable in law for debts owing by her, debtors of her estate are fully protected in making payment to the husband without there being any administration on the wife's estate.—*In re Lee's Estate*, 76 Md. 108, 24 Atl. 422. (See Code 1911, art. 93, § 31, note.)

(e) A. sold certain chattels to B., which C. purchased from B., giving his note therefor, which was afterwards paid, and intrusted them to A. to use and replenish, as occasion arose, for C.'s benefit, with privilege of re-possession at any time. *Held*, on the death of A. and retention of the chattels by his widow, C. could bring replevin, even before the appointment of an administrator.—*Biemuller v. Schneider*, 62 Md. 547.

(f) The rule that the title to the personal estate of a decedent can be transmitted only through instrumentality of the letters of administration does not apply where the title or right of possession to the goods was not in the decedent.—*Biemuller v. Schneider*, 62 Md. 547.

(g) Distributees cannot recover their distributive shares without an administration on the estate of the intestate.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate; in 15 L. R. A. 491, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 45, on assets passing to administrator de bonis non.] *Rockwell v. Young*, 60 Md. 563. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

(h) Where a testator in Ireland appointed executors there, and declared that a certain person should be trustee of his property in America, such trustee cannot act without taking out letters testamentary.—*Hunter v. Bryson*, 5 G. & J. 483, 25 Am. Dec. 313.

#### § 4. Fact of death.

##### Cross-References.

Collateral attack on administrator's sale, see post, § 383.

Evidence of death, see "Death," §§ 1-6.

Limitation of actions by supposed deceased for recovery of property, see "Limitation of Actions," § 20.

(a) Under the general authority conferred on the Orphans' Courts to grant administration on and to settle the estates of deceased persons, such courts cannot determine conclusively against a living person that he is dead.—*Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475.

(b) All proceedings as to property of a person not within the state depend on the fact of death, and are void if he be in fact alive, whether administration was granted on misapprehension of such fact or on the presumption of death from absence.—*Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475.

(c) Act 1908, p. 260, c. 125 (amending Code 1904, art. 93, § 234), authorizing administration on the estates of absentees absent and unheard of for more than seven years, does not require that the full period shall have elapsed after passage of the act; it being sufficient that the period of absence which combined with other circumstances creates a legal presumption of death ran wholly or only in part after the enactment of the statute.—*Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475. (See Code 1911, art. 93, § 235.)

#### § 5. Fact of intestacy.

(a) Under Code 1904, art. 93, § 14, providing that, when any person shall die intestate, letters of administration may be forthwith granted by the Orphans' Court, and § 16, providing that it shall be incumbent on the person applying for administration to prove intestacy to the satisfaction of the court, unless the same be notorious, the Orphans' Court has no authority to appoint an administrator without proof of intestacy.—*Stouffer v. Stouffer*, 110 Md. 368, 72 Atl. 843. (See Code 1911, art. 93, §§ 14, 16.)

#### § 6. Intermeddling in administration.

##### Cross-Reference.

Executors de son tort, see post, §§ 538-544.

#### § 7. Withdrawing estate from administration.

##### Cross-References.

Release from duty to account, see post, § 466.

Error in judgment as to independent character of will as affecting probate, see "Wills," § 417.

## II. APPOINTMENT, QUALIFICATION, AND TENURE.

##### Cross-References.

Administration by executor de son tort, see post, § 543.

Ancillary appointment, see post, § 518.

Duty to account notwithstanding invalidity of appointment, see post, § 461.

Foreign appointment, see post, § 517.

Powers before issue of letters or qualification, see post, § 77.

Appointment as evidence of death, see "Death," § 4.

Competency as witnesses of persons interested in estate in proceedings for appointment or removal as to transactions with person since deceased, see "Witnesses," § 132.

Consideration for agreement as to appointment, see "Contracts," § 54.

Consul as administrator of estate of deceased alien, see "Ambassadors and Consuls," § 5; "Treaties," § 8.

Contracts relating to right to administer as inducing breach of trust, see "Contracts," § 113.

Petition for letters as estoppel, see "Estoppel," § 4.

Power to make treaty affecting right to administer on estates of citizens of foreign countries, see "Treaties," § 2.

Refusal to appoint executor named in will as denial of privilege or immunity, see "Constitutional Law," § 207.

Right to jury trial, see "Jury," §§ 17, 19, 25.

Sale of right to administer on estate as contravening public policy, see "Contracts," § 108.

Statutory partnership administrators, see "Partnership," § 252.

Surviving partner as executor or administrator of deceased, see "Partnership," § 251.

Uniformity of operation of statute authorizing trust companies to act as administrator, see "Statutes," § 73.

#### § 8. Jurisdiction of courts.

##### Cross-References.

See "Wills," §§ 247-261.

To appoint administrator de bonis non, see post, § 37.

Administrator for estate of Indian, see "Indians," § 28.

Appellate jurisdiction, see "Courts," § 236.

Appointment of guardian ad litem for infants, see "Infants," § 78.

Concurrent and conflicting jurisdiction, see "Courts," §§ 472, 475.



Effect of pendency of appeal from judgment on question as to existence of will, see "Wills," § 368.

Waiver of objections to jurisdiction, see "Courts," § 37.

### § 9.—In general.

### § 10.—Domicile of decedent.

#### Cross-References.

Matters concluded by appointment, see post, § 29.

What constitutes domicile in general, see "Domicile."

#### Annotation.

Jurisdiction of estate of inmate of federal home or institution.—39 L. R. A. (N. S.) 586, note.

(a) The probate court of the county in which deceased resided at the time of his death has exclusive jurisdiction to grant administration.—*Raborg's Adm'r v. Hammond's Adm'r*, 2 H. & G. 42. [Cited and annotated in 21 L. R. A. 149, on validity of acts under letters probate afterwards revoked or held invalid; in 25 L. R. A. (N. S.) 1158, 1160, on time to which contingency of death of legatee or devisee without child or issue, upon which gift conditioned is referable; in 36 L. R. A. (N. S.) 987, on character and kinds of judgments and orders not collaterally assailable for fraud not affecting jurisdiction.]

### § 11.—Existence of assets.

#### Cross-Reference.

Ancillary appointment, see post, § 518.

#### Annotation.

Appointment of administrator for sole purpose of bringing action under federal employers' liability act.—47 L. R. A. (N. S.) 78, note.

What assets will give jurisdiction to appoint administrator.—24 L. R. A. 684, note.

### § 12.—Situs of assets.

### § 13.—Particular courts.

### § 14.—Appointment of executor.

#### Cross-References.

Necessity for appointment in will, see "Wills," § 83.

Validity of will executed for purpose of appointment alone, see "Wills," § 76.

(a) The person named as executor cannot be disregarded by the court, unless he is for some reason disqualified to act, and its authority is limited to qualifying him and issuing letters.—*Decker v. Fahrenholtz*, 107 Md. 515, 68 Atl. 1048, 72 Atl. 339. [Cited

and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(b) A testator may appoint different executors in different countries in which his effects may lie, or different executors as to different parts of his estate in the same country.—*Hunter v. Bryson*, 5 G. & J. 483, 25 Am. Dec. 313.

### § 15.—Competency of person named as executor.

#### Cross-References.

Disqualification after appointment, see post, § 34.

Provision that nonresident shall not be appointed as deprivation of liberty or property without due process of law, see "Constitutional Law," § 274.

#### Annotation.

Nonresidents as executors.—1 L. R. A. (N. S.) 341, note.

Foreign corporation as trustee, administrator, etc.—24 L. R. A. 291, note.

(a) One convicted of making an overcharge for prosecuting a pension claim, in violation of act Cong. June 27, 1890, c. 634, § 4, 26 Stat. 183 [U. S. Comp. St. 1901, p. 3231], and subject to imprisonment in the discretion of the court, has not been convicted of a "crime rendering him infamous according to law," within Code, art. 93, § 51, making one convicted of a "crime rendering him infamous according to law" disqualified from acting as executor, though it be assumed that in the contemplation of the federal jurisdiction the offense be deemed an infamous one.—*Garitee v. Bond*, 102 Md. 379, 62 Atl. 631, 111 Am. St. Rep. 385. (See Code 1911, art. 93, § 52; U. S. Comp. St. 1913, § 8938.)

### § 16.—Acceptance or renunciation by executor.

(a) If proof of acceptance of an executorship is necessary, it will be supplied by acts showing an intention to accept, such as proving the will, or by any acts which would make one liable as executor de son tort.—*Decker v. Fahrenholtz*, 107 Md. 515, 68 Atl. 1048, 72 Atl. 339. [Cited and annotated, see supra, § 14.]

(b) An agreement whereby one joint executor renounces his right to letters testamentary in favor of his coexecutor, in consideration of being paid one-half of the com-

missions, is supported by a valid consideration.—*Ohlendorf v. Kanne*, 66 Md. 495, 8 Atl. 351.

(c) The probate of a will by the executor named as trustee, and his taking out letters testamentary, are sufficient evidence of an acceptance of the trust.—*Hanson v. Worthington*, 12 Md. 418. [Cited and annotated in 21 L. R. A. 153, on validity of acts under letters probate afterwards revoked or held invalid.]

### § 17. Right to appointment as administrator.

#### Cross-References.

Administrator de bonis non, see post, § 37.  
Administrator with will annexed, see post, § 21.

Ancillary appointment, see post, § 518.  
Public administrator, see post, § 24.

#### Annotation.

Right of committee of lunatic or guardian of an infant to appointment as administrator or executor.—L. R. A. 1915C, 581, note.

Payment or tender of debt due from estate as affecting creditor's right to letters of administration.—45 L. R. A. (N. S.) 237.

Right of one first entitled to administration to nominate a third person, to exclusion of those next entitled thereto.—22 L. R. A. (N. S.) 1161, note.

Nonresidents as administrators.—1 L. R. A. (N. S.) 346, note.

(a) Where several persons forming a distinct class are equally entitled to be selected as administrator, the selection is committed to the discretion of the Orphans' Court.—*Lewis v. Logan*, 120 Md. 329, 87 Atl. 750.

(b) Act 1908, p. 260, c. 125, provides for administration of estates of persons presumed dead, and Code 1904, art. 93, § 134, declares that, if there are no creditors or relatives, the estate shall be paid the school commissioners of the county for use of the public schools. By Balto. City Code 1906, Charter, § 99, the school board is made a department of the mayor and city council. Held, that where an absentee formerly residing in Baltimore left the city, and was absent till presumed to be dead, and left no creditors or relatives claiming administration, letters were properly granted the agent or attorney of the mayor and city council for benefit of the schools.—*Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475.

(See Code 1911, art. 93, §§ 135, 235; Balto. City Rev. Charter, § 99.)

(c) Under act 1908, p. 260, c. 125, providing for administration of estates of persons presumed dead by seven years' absence unheard from, declaring circumstances under which and persons to whom letters shall be granted, resort must be had to Code 1904, art. 93, § 31, in case no relative or creditor was applying for administration to determine the person entitled, providing that, under such circumstances, administration may be granted at the court's discretion.—*Savings Bank of Baltimore, v. Weeks*, 110 Md. 78, 72 Atl. 475. (See Code 1911, art. 93, §§ 31, 235.)

(d) Under Code 1904, art. 93, § 21, providing that, if there be neither husband, widow, child, grandchild, nor father, brothers and sisters shall be preferred as administrators, and § 23 providing that males shall be preferred to females in equal degrees of kin, where defendant left neither widow, child, grandchild, nor father, but left a brother and sisters surviving, the brother should be appointed administrator of his estate, if he is capable and qualified to discharge the trust.—*Stouffer v. Stouffer*, 110 Md. 368, 72 Atl. 843. (See Code 1911, art. 93, §§ 21, 23.)

(e) An application for appointment of an administrator should not be refused, where the applicant is of the proper relationship to decedent, and is not shown to be incapable within Code 1904, art. 93, § 31, which provides that, if there shall be neither husband, wife, child, grandchild, father, mother, brother, nor sister, or if these be incapable, administration may be granted at the discretion of the court.—*Stouffer v. Stouffer*, 110 Md. 368, 72 Atl. 843. (See Code 1911, art. 93, § 31.)

(f) Under Code 1904, art. 93, §§ 18, 19, the widow of one dying intestate leaving a widow, minor children, mother and sisters, is first entitled to the administration of his estate.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. (See Code 1911, art. 93, §§ 18, 19.) [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.]

(g) While under Code 1904, art. 93, § 15, administration may be granted to two or

more with the consent of the persons first entitled, the right to administer cannot be delegated.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. (See Code 1911, art. 93, § 15.) [Cited and annotated, see supra.]

(h) Under Code 1904, art. 93, §§ 21, 31, 32, prescribing persons entitled to administer the estate of an intestate, the mother of an intestate leaving a widow, minor children, mother and sisters, is entitled to administer on the widow and sisters renouncing their rights.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. (See Code 1911, art. 93, §§ 21, 31, note.) [Cited and annotated, see supra.]

(i) Under Code 1904, art. 93, §§ 20, 21, 27, the right to administer the estate of an intestate leaving a widow, minor children, a widowed sister, and a married sister devolved on the married sister, where the widow and the widowed sister renounced the right to administer.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. (See Code 1911, art. 93, §§ 20, 21, 27.) [Cited and annotated, see supra.]

(j) Code 1888, art. 93, § 30, provides that, "if there be no relatives, administration shall be granted to the largest creditor applying for the same." Held, that the fact that the trustee of a company of which decedent had been a shareholder was authorized to collect an assessment against such company, and had obtained judgments against decedent's estate, does not entitle the trustee to be appointed administrator, as a creditor of decedent.—*Glenn v. Reid*, 74 Md. 238, 24 Atl. 155. (See Code 1911, art. 93, § 30.)

(k) The broad discretionary power vested in the Orphans' Court in selecting persons to whom letters of administration shall be granted, conferred by Code 1860, art. 93, §§ 30, 31, 33, is not intended to be withdrawn by the proviso of act 1874, c. 483, § 104, relating to foreign executors, "that administration shall not be granted to any one in this state except the next of kin, residuary legatee, or a creditor."—*Dalrymple v. Gamble*, 66 Md. 298, 7 Atl. 683, 8 Atl. 468. (See Code 1911, art. 93, §§ 30, 31, 33.) [Cited and annotated in 48 L. R. A. (N. S.) 861, on right of domiciliary executors and administrators, or their nominees, to ancillary letters; in 49 L. R. A. (N. S.) 896, on

revocation of letters of administration upon discovery of will.]

(l) Letters of administration should be granted to the person entitled to them at the time of the application, without regard to whether he was entitled to them at the time of the intestate's death.—*Griffith v. Coleman*, 61 Md. 250.

(m) H. died intestate, leaving personal property, but no relatives. L., a niece by marriage, paid the funeral expenses, thereby becoming the sole creditor of the estate. Held, that L. was entitled to letters of administration.—*Lentz v. Pilert*, 60 Md. 296, 45 Am. Rep. 732. [Cited and annotated in 33 L. R. A. 664, on liability of decedent's estate for funeral expenses.]

(n) Upon the death of a decedent, the husband or wife is first entitled to administration.—*Hubbard v. Barcus*, 38 Md. 175; *Willis v. Jones*, 42 Md. 422.

(o) The mere fact that a wife was indebted at the time of her death does not give her creditors the right to administer.—*Willis v. Jones*, 42 Md. 422.

(p) The legal right to administer on the estate of a deceased person cannot be delegated.—*Georgetown College v. Browne*, 34 Md. 450.

(q) Under Code 1860, art. 93, § 22, providing that the "next of kin" shall be preferred in granting letters of administration, certain other relatives being dead, a female first cousin of an intestate on his father's side is entitled to appointment as against a male first cousin on the mother's side, since she is the "next of kin"; the term being used in its legal sense of "kindred," and importing heirs at law or relation by consanguinity.—*Kearney v. Turner*, 28 Md. 408. (See Code 1911, art. 93, § 22.)

(r) Under Code 1860, art. 93, § 23, a grandson of an intestate, though indebted to the estate, is entitled to letters of administration, in preference to a granddaughter; and the Orphans' Court has no power to deprive him of the right.—*Cook v. Carr*, 19 Md. 1. (See Code 1911, art. 93, § 23.)

(s) One entitled to the administration cannot delegate his right to another, to the exclusion of the party next entitled under the

statute.—*Stocksdale v. Conaway*, 14 Md. 99, 74 Am. Dec. 515. [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.]

(t) Where an intestate died leaving a brother and three sisters, and the oldest sister, who was entitled to a prior right to letters of administration, was absent from the state, the husband of one of the other sisters was not entitled to precede the eldest sister, and claim administration, without the consent of or notice to the others.—*Owings v. Bates*, 9 Gill 463.

(u) Where an intestate died leaving a brother and three sisters, and the eldest sister, who was older than the brother, and unmarried, had a prior right to administration on the estate, she could be deprived thereof only on proof of her indefinite absence from the state.—*Owings v. Bates*, 9 Gill 463.

(v) Act 1798, c. 101, subc. 5, § 19, declaring that in the grant of letters of administration a feme sole shall be preferred to a married woman, applies to a case where an intestate left two daughters, one of whom was married and the other was not.—*Smith v. Young*, 5 Gill 197. (See Code, art. 93, § 27.) [Cited and annotated in 1 L. R. A. (N. S.) 346, on nonresident's right to act as executor or administrator.]

(w) It is no objection to the grant of letters of administration to the daughter of an intestate that she is a nun in a convent in the District of Columbia.—*Smith v. Young*, 5 Gill 197. [Cited and annotated, see supra.]

(x) In 1835 application was made, by an officer of the Charitable Marine Society of Baltimore, for letters of administration on the estate of a seaman who died abroad. This was resisted by A., who had funds of the deceased, and claimed to retain a portion of them for services rendered. The deceased had no kindred. Held, that A., on proving himself to be a creditor, would be entitled to administration, and that, in the absence of such proof, the Orphans' Court could grant letters in their discretion.—*Hoffman v. Gold*, 8 G. & J. 79.

(y) Administration will be granted to natural children who are residuary legatees

in preference to the widow.—*Govane v. Govane*, 1 H. & McH. 346. (See Code, art. 93, § 18.)

### § 18. Qualification of administrator.

#### Cross-Reference.

Disqualification after appointment, see post, § 34.

#### Annotation.

Requisite moral qualifications of executors.—16 L. R. A. 538, note.

(a) The fact that a person is indebted to the estate of a decedent is a circumstance to be considered by the Orphans' Court in appointing him as administrator, but such indebtedness does not disqualify him, nor render his appointment void.—*Kailer v. Kailer*, 92 Md. 147, 48 Atl. 712.

(b) A corporation may act as executor or administrator where such power is expressly given by its charter under a special act of the Legislature.—*Reed v. Baltimore Tr. & Guar. Co.*, 72 Md. 531, 20 Atl. 194.

(c) A corporation, incorporated under the general incorporation laws, is powerless to act as an executor or administrator.—*Reed v. Baltimore Tr. & Guar. Co.*, 72 Md. 531, 20 Atl. 194.

(d) Administration may be granted to one residing beyond the limits of the state.—*Ehlen v. Ehlen*, 64 Md. 360, 1 Atl. 880. [Cited and annotated in 1 L. R. A. (N. S.) 346, 348, on nonresident's right to act as executor or administrator.]

(e) A corporation cannot become an executor or administrator.—*Georgetown College v. Browne*, 34 Md. 450. (See *Reed v. Baltimore Tr. & Guar. Co.*, 72 Md. 531, 20 Atl. 194.)

(f) A widow who is entitled to administer upon her husband's estate is not disqualified by her inability to read and write.—*Nusz v. Grove*, 27 Md. 391.

(g) The fact of a separation by mutual consent between husband and wife, extending from a few months after marriage to the husband's death, does not disqualify her from acting as administratrix of his estate.—*Nusz v. Grove*, 27 Md. 391.

(h) Under the laws of Maryland a married woman may act as administratrix or executrix.—*Binnerman v. Weaver*, 8 Md. 517.

## § 19. Renunciation of right to administer.

### Cross-Reference.

Administration with will annexed, see post, § 21.

(a) A renunciation by the widow of an intestate of her right to administer his estate is final and irrevocable, unless the renunciation was made under a mistake of fact.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.]

(b) A petition for leave to withdraw a renunciation of plaintiff's right to administer his father's estate is properly dismissed when it contains no allegation that such renunciation was filed under a mistake, or that there is any other sufficient reason.—*Lutz v. Mahan*, 80 Md. 233, 30 Atl. 645.

(c) Defendant qualified as administrator in February, 1886. In March, 1887, the person entitled to administer filed her petition asking his removal. *Held*, that the petition was filed too late.—*McColgan v. Kenny*, 68 Md. 258, 11 Atl. 819.

(d) A letter by C., a creditor of a decedent, addressed to the Orphans' Court, stating he would ask the appointment of D. as administrator of the estate, *held* to amount to a declaration by the writer of his willingness to decline the administration, and to be final and irrevocable.—*Carpenter v. Jones*, 44 Md. 625. [Cited and annotated in 28 L. R. A. (N. S.) 796, on relief from mistake of law as to effect of instrument.]

(e) After a creditor addressed a letter to the Orphans' Court stating that he would ask the appointment of a certain person as administrator of the estate of his deceased debtor, the Orphans' Court had full power, under Code 1860, art. 93, § 38, to grant administration as if the creditor were not entitled thereto, as such declaration was equivalent to an irrevocable renunciation of the right to administer.—*Carpenter v. Jones*, 44 Md. 625. (See Code 1911, art. 93, § 37.) [Cited and annotated, see supra.]

(f) On a petition for a revocation of letters testamentary it appeared that the letters were granted October 17, 1854, and that this fact came to the knowledge of the petitioner

December 25 following, but that the petition was not filed until June 4, 1855. *Held*, that the petition was filed too late.—*Edwards v. Bruce*, 8 Md. 387.

(g) A widow, who has relinquished her rights to her husband's estate in virtue of her marriage by an antenuptial agreement, has no right to the administration of his estate.—*Maurer v. Naill*, 5 Md. 324.

(h) Where parties in contemplation of marriage agreed that all the property of the intended wife to which she was then entitled or might thereafter become entitled should be conveyed to a trustee for the use of the wife, her heirs and assigns, and to be under her exclusive control, with power to sell, such contract was not a temporary surrender only of the marital rights, but an entire abandonment of them; and, on the death of the wife, the husband was not entitled to administration of her estate.—*Ward v. Thompson*, 6 G. & J. 349.

## § 20. Proceedings for appointment.

### Cross-References.

See "Prohibition," § 3.

Administrator de bonis non, see post, § 37.  
Administrator with will annexed, see post, § 21.

Allowance of expenses of proceedings, see post, § 111.

Ancillary appointment, see post, § 518.

Power of executor or administrator pending appeal, see post, § 79.

Public administrators, see post, § 24.

Sufficiency of record of appointment to sustain sale of real estate, see post, § 384.

Temporary or special appointment, see post, § 22.

Administrator of estate of absentee, see "Absentees," § 6.

Appealability of discretionary orders, see "Appeal and Error," § 87.

Appeal by agent of widow, see "Appeal and Error," § 322.

Petition for letters as estoppel, see "Estoppel," § 4.

Review of decision as dependent on finality, see "Appeal and Error," §§ 69, 77.

Right to jury trial, see "Jury," §§ 19, 25.

(a) Under act 1908, c. 125, p. 260, amending Code 1904, art. 93, § 234, providing for administration on estates of persons presumed dead from absence, a written petition for administration is not required.—*Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475. (See Code 1911, art. 93, § 235.)

(b) Under act 1908, c. 125, p. 260, amending Code 1904, art. 93, § 234, providing for

administration of estates of persons presumed dead, a petition by the agent of school commissioners, alleging absence and supposed death, that diligent but unavailing efforts have been made to locate the heirs and next of kin, that the estate consisted of money on deposit in a bank, which under the law belonged to the commissioners, and praying for letters, was not objectionable for failure to allege that there were no creditors or relatives of the supposed deceased absentee.—*Savings Bank of Baltimore v. Weeks*, 110 Md. 78, 72 Atl. 475. (See Code, art. 93, § 235.)

(c) Where, in a proceeding involving the right to administer the estate of an intestate leaving a widow, minor children, mother, a widowed sister, and a married sister, it was alleged that the widow's renunciation of her right to administer was made under a mistake of fact, and that the married sister praying for the revocation of letters of administration granted to strangers of the intestate had renounced or waived her right to administer, the court should, on submitting issues to a jury, submit the issues whether the widow renounced her right under a mistake of fact, and whether the married sister renounced or waived her right.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.]

(d) Code 1888, art. 93, § 22, declares that if there be neither widow, nor child, nor grandchild, nor father, nor brother, nor sister, nor mother, the next of kin shall be preferred in granting letters of administration; and § 33 declares that it shall not be necessary to summon collateral relations more remote than brothers or sisters of the intestate in order to exclude them from administration, and that such persons shall not be considered as entitled to letters unless they apply for the same. Deceased died intestate, leaving as his only relatives a sister and a niece, the plaintiff. The sister renounced her right to administer, and letters were issued to defendant, a stranger. Held, that the fact that no notice was given plaintiff of the sister's renunciation or of defendant's application did not invalidate defendant's letters.—*Williams v. Addison*, 93

Md. 41, 48 Atl. 458. (See Code 1911, art. 93, § 22.)

(e) The Orphans' Court has no power to try the question of the alleged unsoundness of mind of a person entitled to administration. The question is to be decided by a writ de lunatico inquirendo.—*Kearney v. Turner*, 28 Md. 408.

(f) Questions of title to personal property should not be tried by the Orphans' Courts in a summary proceeding upon an application for letters.—*Grimes v. Talbert*, 14 Md. 169.

(g) Resistance to the application for letters, on the ground that there is no personal property, cannot avail, unless it be clearly and explicitly shown beyond all doubt that there is none.—*Grimes v. Talbert*, 14 Md. 169.

(h) To authorize the grant of letters of administration under the testamentary law of Maryland, the dying intestate and the leaving of personal estate must both be proved—the former to the satisfaction of the court, but of the latter prima facie evidence is sufficient.—*Grimes v. Talbert*, 14 Md. 169.

(i) The lapse of 28 years from the death to the application for letters, and the presumption of title thereby created in favor of the parties in possession, can have no application to the question of the grant of letters, where there is prima facie proof that the property belonged to the intestate.—*Grimes v. Talbert*, 14 Md. 169.

## § 21. Administrator with will annexed.

### Cross-References.

Appointment of administrator de bonis non with will annexed, see post, § 37.

Concurrent and conflicting jurisdiction, see "Courts," § 475.

(a) Code 1904, art. 93, § 30, which provides that, if there be no relatives, administration shall be granted to the largest creditor applying therefor, relates only to cases of intestacy, and not to a case where the executor named in the will declines to serve.—*McCaughy v. Byrne*, 115 Md. 85, 80 Atl. 653. (See Code 1911, art. 93, § 30.)

(b) Under Code 1904, art. 93, § 33, which declares that in granting administration with the will annexed the residuary legatee

or legatees shall be preferred, and directs the Orphans' Court to proceed in the manner directed by law with respect to executors within the state before administration with the will annexed shall be granted to any other person, the phrase "in the manner directed by law" relates to the provisions of §§ 32 and 33, relative to notice; and, where the executor named in the will declined to act, the residuary legatee was the person next entitled, and a person who, in addition to a bequest of the residue of the estate after the death of another, was given a remainder in a specific part of the estate, is a "residuary legatee," and hence on petitions by such legatee and by a creditor the court could not grant administration to the creditor.—*McCaughy v. Byrne*, 115 Md. 85, 80 Atl. 653. (See Code 1911, art. 93, §§ 32, 33.)

(c) Where the Orphans' Court, on allegations that one of two residuary legatees, appointed administratrix with the will annexed, is non compos mentis, resorts to the method prescribed by Code 1904, art. 93, § 55, of issuing a writ de lunatico inquirendo to try that issue, and it is determined that she is incompetent to act, then the other, under the express provisions of Code 1904, art. 93, § 33, is entitled to the appointment, or, without such a determination, the other may be selected as one of the two residuary legatees to whom administration may be granted.—*McCaughy v. Byrne*, 115 Md. 85, 80 Atl. 653. (See Code 1911, art. 93, §§ 33, 56.)

(d) Under Code 1904, art. 93, § 33, which declares that, if administration with the will annexed is to be granted, a residuary legatee shall be preferred, where there is only one individual answering to the description of the person entitled, he must be appointed, but the Orphans' Court has discretion to make selection, where there is more than one person equally entitled.—*McCaughy v. Byrne*, 115 Md. 85, 80 Atl. 653. (See Code 1911, art. 93, § 33.)

(e) A widow, by renouncing right to administer when it is supposed her husband died intestate, is not, on discovery of will, and renunciation of right by executor, deprived of her right to administration cum

testamento annexo, and to notice of grant of letters, as provided in Code 1888, art. 93, §§ 31, 33, 34.—*Brodie v. Mitchell*, 85 Md. 516, 37 Atl. 169. (See Code 1911, art. 93, §§ 31, 32, 33.)

(f) Under Code 1888, art. 93, § 44, providing that if a sole executor was present at the probate of the will, and failed to qualify, or was not present, but was in the state, and failed to appear after being summoned, letters may be granted as in case of intestacy, the Orphans' Court has no jurisdiction to appoint an administrator with the will annexed in the absence of a showing that the executor was present at the probate, and failed to qualify, or, if not present, was summoned and failed to attend, or was out of the state, or had become disqualified.—*Wheeler v. Stifter*, 82 Md. 648, 33 Atl. 434. (See Code 1911, art. 93, § 44.)

(g) In reversing an order of the Orphans' Court for error in not granting letters of administration cum testamento annexo to some one, and dismissing the petition without granting such letters as are sought, the Court of Appeals will not decide to whom such letters should have been granted, as such question is not properly before it for determination.—*Neal v. Charlton*, 52 Md. 495. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(h) Where a will which has been admitted to probate has been declared void by the Court of Appeals, administration with the will annexed is also void.—*Smith v. Stockbridge*, 39 Md. 640. [Cited and annotated in 21 L. R. A. 153, on validity of acts under letters probate afterwards revoked or held invalid.]

(i) A corporation named as executor in a decedent's will, though disqualified to act because it is a corporation, could not designate a person to administer on the estate cum testamento annexo, since the right of administration could not be delegated.—*Georgetown College v. Browne*, 34 Md. 450. (See *Reed v. Baltimore Tr. & Guar. Co.*, 72 Md. 531, 20 Atl. 194.)

## § 22. Temporary or special appointment.

### Cross-References.

Collateral attack on appointment, see post, § 29.

Special appointment to sell and convey property, see post, § 352.

Termination of authority, see post, § 31.

(a) Under Code, art. 93, § 235, defining the powers of the Orphans' Court, *held*, that such court on caveat to a will had the power to appoint a special administrator to defend it, and to protect the contingent interests of the testator's descendants, born and unborn. —*Friedenwald v. Burke*, 122 Md. 156, 89 Atl. 424. (For second appeal, see *Same v. Same*, 123 Md. 511, 91 Atl. 461.)

(b) Under Code, art. 93, § 68, providing for the appointment of an administrator pendente lite where a will is contested, if the person who would be entitled to administer by law in case of intestacy renounce the right, the right passes to the next of kin and the court may in its discretion appoint such next of kin in preference to the executor and the largest legatee named in the will. —*Lewis v. Logan*, 120 Md. 329, 87 Atl. 750.

(c) Where two wills offered for probate were both contested, and administrators pendente lite appointed before the trial of the first contest, the court was not required, on the termination thereof, to appoint as administrator pendente lite the executor named under the other will, to enable him to use the assets of the estate to defend the caveat thereto; as such contest was not litigation "for the recovery or security of any part of the estate," the cost of which may be allowed to an administrator, under Code 1888, art. 93, § 5.—*Harrison v. Clark*, 95 Md. 308, 52 Atl. 514. (See Code 1911, art. 93, § 5.) [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(d) Under Code 1888, art. 93, § 68, providing that letters of administration pendente lite in a contest over a will may be granted to the person named as executor, or to the person to whom the most of the real estate is devised, or to the person who would have been entitled to letters if the deceased had died intestate, where two wills not pass-

ing real estate named different executors, and the probate of each was contested, it was proper to appoint as administrators pendente lite the executor named in the last will and the husband of decedent's legatee, whose appointment was requested by the persons entitled to administration if there had been an intestacy.—*Harrison v. Clark*, 95 Md. 308, 52 Atl. 514. (See Code 1911, art. 93, § 68.) [Cited and annotated, see supra.]

(e) A will executed by testator in 1882 was, after his death in 1885, offered for probate, and, on contest of its validity, a daughter of testator appointed administratrix pendente lite, who had, with other devisees, petitioned for admission of the will to probate, and for the appointment of the executors therein named. Under Code 1860, art. 93, § 68, which provides for the appointment, pending the contest of a will, of either the person named in the will, or to whom the largest portion of personal estate has been bequeathed, or who would be entitled to letters testamentary in case of intestacy, *held*, that administratrix was one of the classes of persons entitled to letters, and had not, by signing and filing the petition consenting to the probate of the will, renounced her right. —*McIntire v. Worthington*, 68 Md. 203, 12 Atl. 251; *Same v. Wilson*, 68 Md. xiv, 12 Atl. 253, memorandum case. (See Code 1911, art. 93, § 68.) [Cited and annotated in 18 L. R. A. (N. S.) 100, on power of one lacking testamentary capacity to revoke will.]

(f) The Orphans' Court has power to appoint an administrator pendente lite only where the validity of the will is contested.—*Munnikhuyse v. Magraw*, 57 Md. 172. (See Code, art. 93, § 68.)

(g) Under Code 1860, art. 93, § 68, authorizing the Orphans' Court, when the will is contested, to appoint an administrator pendente lite, the court has power only where the will has not been admitted to probate, or where letters testamentary have not been granted, or, if granted, have been revoked.—*Munnikhuyse v. Magraw*, 35 Md. 280. (See Code 1911, art. 93, § 68.)

(h) A widow took out letters of administration on the estate of her husband, March 15, 1853. On the 27th a petition was filed by one, named as executor in a document pur-



porting to be the will of deceased, praying for revocation of the widow's letters, and grant of letters testamentary to himself. An issue was made for a jury at the Circuit Court, to test the validity of the will. Before the issue was decided, and before the prayer was acted on, he filed another petition for the revocation of the widow's letters, and grant of letters pendente lite to himself. *Held*, that the party having known, when he filed his first petition, that the widow's letters had been granted, and his prayer not having yet been acted on finally, the second petition, on the ground that it came too late, must be dismissed.—*Edelen v. Edelen*, 10 Md. 52.

(i) A caveat was filed to a will, and upon application of the party who was admitted to be the executor named in the will, being the largest legatee of the personalty, he was appointed by the Orphans' Court administrator pendente lite. *Held*, that the Orphans' Court had full power to make this appointment, and, the eligibility of the party being admitted, that the exercise of its discretion by the court must determine the matter.—*Cain v. Warford*, 3 Md. 454.

(j) Where, pending a caveat to a will appointing an executor, the Orphans' Court granted letters of administration pendente lite, and the caveat was overruled and the will established, and the contestants appeal, the appeal suspends all other proceedings, and the court cannot grant letters of administration in chief.—*Offutt v. Gott*, 12 G. & J. 385.

### § 23. Second or additional appointment.

(a) Pending an appeal from an order of the Orphans' Court revoking letters of administration and appointing another administrator, the court, on application of the next of kin, and before the appeal bond was executed, appointed an associate administrator. *Held*, that the appointment of an associate administrator, being but a modification of the decree appealed from, must stand or fall with it.—*Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571.

### § 24. Public administrators.

#### Cross-References.

Appointment as executor, see ante, § 14.  
Compensation, see post, §§ 488, 496.

Effect of invalid appointment, see post, § 29.

Effect of resignation, see post, § 33.

Form of actions against, see post, § 421.

Right to appeal from order appointing administrator, see ante, § 20.

Right to contest appointment of administrator, see ante, § 20.

Supervision by probate court, see post, § 76.

Termination of authority, see post, § 31.

Vouchers on accounting, see post, § 503.

As ex officio public guardian, see "Guardian and Ward," § 10; "Insane Persons," § 30.

Award of costs and damages for frivolous appeal, see "Costs," § 260.

Embezzlement, see "Embezzlement," §§ 11, 48.

Right to oppose probate of will, see "Wills," § 220.

#### Annotation.

Jurisdiction and power of consuls to administer on estates.—45 L. R. A. 496; 37 L. R. A. (N. S.) 549, notes.

(a) A coroner has no right, by virtue of his office, to ask to be appointed as administrator of a person found dead within his jurisdiction.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827.

### § 25. Acceptance and oath of office.

### § 26. Bond.

#### Cross-References.

Ancillary appointment, see post, § 518.

Condition precedent to action by foreign representative, see post, § 524.

Expense of procuring, see post, § 109.

Liabilities on bonds, see post, §§ 527-537.

Special bond for sale of property under order of court, see post, § 351.

Best and secondary evidence, see "Evidence," § 158.

Conditional signature by surety, see "Principal and Surety," §§ 23, 27.

Contract of administrator with surety on his bond as within statute of frauds, see "Frauds, Statute of," § 44.

Fraud affecting validity of bond, see "Principal and Surety," §§ 39, 41, 42.

Stamp tax, see "Internal Revenue," § 19.

(a) The signing, sealing and delivery of an administration bond are prima facie evidence of its acceptance and approval.—*Wilson v. Ireland*, 4 Md. 444.

(b) Administrators pendente lite generally give bonds, and the legal validity of such bonds is beyond doubt.—*In re Colvin*, 3 Md. Ch. 278.

(c) The Orphans' Courts are the exclusive judges of the sufficiency of the penalty of the bonds required of executors and administrators, and the Court of Chancery cannot

review their determinations in this respect.—*Alexander v. Stewart*, 8 G. & J. 226. [Cited and annotated in 15 L. R. A. 492, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

### § 27. Issuance of letters.

(a) Letters of administration cannot be granted while an appeal is pending from an order granting them.—*State v. Williams*, 9 Gill 172.

### § 28. Evidence of appointment or authority.

#### Cross-References.

See post, § 221; "Wills," § 748.

Evidence in actions by or against executor or administrator in general, see post, § 450.

Best and secondary evidence, see "Evidence," § 158.

Presumption as to posting notice of appointment pursuant to order of court, see "Evidence," § 82.

Will as evidence, see "Wills," § 433.

(a) The probate of a will wherein were named as executors the persons who acted as such, the filing and approval of their bond, and the exhibition and passage by the court of their accounts as executors, showing, among other matters, the specific allowance of a fee paid by them to the register for issuing the letters testamentary, are sufficient proof that such letters were granted to them as executors.—*Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560.

(b) A deed from an administratrix, describing her as such, to the defendant, in a proceeding in equity to enforce her lien on the property for the purchase money, is sufficient evidence of the capacity in which she sues.—*Bratt v. Bratt*, 21 Md. 578.

(c) Letters of administration cannot be presumed where there is no pretense that the proper record has been lost or mutilated.—*Smith v. Wilson*, 17 Md. 460, 79 Am. Dec. 665. [Cited and annotated in 15 L. R. A. 496, on necessity for administration in devolution of decedent's personalty.]

(d) In a suit by an administrator ad colligendum, plaintiff's right to sue is established after proof that he was appointed administrator ad colligendum and gave bond

before suit was brought.—*Wilson v. Ireland*, 4 Md. 444.

(e) The original letters of administration, and the bond duly filed and recorded in the office of the register of wills, are sufficient evidence of the right of an administrator to sue in behalf of the estate.—*Wilson v. Ireland*, 4 Md. 444.

(f) Letters of administration de bonis non with the will annexed are inoperative unless authenticated by the official seal of the Orphans' Court by which they were granted, and hence, unless so authenticated, are not admissible in an action by the administrator to prove his authority to sue.—*Tuck v. Boone*, 8 Gill 187.

### § 29. Operation and effect of appointment.

#### Cross-References.

Administrator de bonis non, see post, § 37.

Ancillary appointment, see post, § 518.

As to executor de son tort, see post, § 544.

Invalidity of appointment as defense to action on bond, see post, § 537.

On foreign appointment, see post, § 517.

As evidence of death in general, see "Death," § 4.

#### Annotation.

Effect of appointment of debtor as executor or administrator to discharge debt, or charge personal representative and his sureties.—26 L. R. A. (N. S.) 411, note.

(a) A judgment or order of the Orphans' Court of Baltimore City, granting letters as to an estate, cannot be impeached collaterally in the Orphans' Court of Baltimore County on the ground that the decedent was a resident of the county and not the city.—*Donohue v. Daniel*, 58 Md. 595.

(b) The propriety of the action of the Orphans' Court in granting letters of administration to the wife of the testator cannot be collaterally inquired into upon appeal to test the validity of the will.—*Edelen v. Edelen*, 6 Md. 288.

(c) Valid grant of letters of administration by the tribunal having exclusive jurisdiction is prima facie evidence of the death of the alleged intestate, and of the right of representing him.—*Peterkin v. Inloes*, 4 Md. 175.

(d) In a suit by an administrator ad colligendum, a court of law cannot inquire into the legality of the acts of the Orphans'

Court in granting the letters to the administrator, no matter how the question is raised.—*Wilson v. Ireland*, 4 Md. 444.

(e) Where letters of administration have been granted, a court of law in which a suit may be instituted by the administrator cannot go into an inquiry whether administration is rightfully granted or not.—*Raborg v. Hammond*, 2 H. & G. 42. [Cited and annotated in 21 L. R. A. 149, on validity of acts under letters probate afterwards revoked or held invalid.]

(f) Letters of administration are legally efficient until they are revoked; and in an action by the administrator, evidence which tends to impeach and nullify them cannot be admitted.—*Fishwick v. Sewell*, 4 H. & J. 393.

### § 30. Failure to qualify or act.

### § 31. Termination of authority in general.

#### Cross-References.

By death, see post, § 36.

Effect as to jurisdiction over pending action, see post, § 435.

Execution of deed, see post, § 394.

Power of sale, see post, § 138.

Power to require accounting, see post, § 461.

(a) Under Code 1888, art. 93, § 68, providing for letters of administration pendente lite where a will is contested, and § 69, providing that the grant of letters testamentary or of administration shall revoke a previous grant of letters pendente lite, where two wills were offered for probate, and both contested, letters of administration pendente lite issued before the trial of the contest over the last will were not revoked by the mere termination of that contest, but the administrators were entitled to serve, unless removed for a cause, until the issuance of letters testamentary or of administration at the conclusion of the controversy over the other will.—*Harrison v. Clark*, 95 Md. 308, 52 Atl. 514. (See Code 1911, art. 93, §§ 68, 69.) [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(b) Under the law of Indiana, the time limited for the administration of an estate by an executor in that state had elapsed before money was paid him by a debtor in this state; but he had not passed an account, and

was still acting in his capacity of executor, and not of trustee, which he also was under the will. Held, that the doctrine of mutation of title by operation of law did not apply, and that the money was paid to him as executor, and not as trustee.—*Citizens' Nat. Bank v. Sharp*, 53 Md. 521.

(c) Testator named three persons as executors, and bequeathed to them all his property in trust to pay his wife a specified annuity. He then directed the continuance of his business under some arrangement between his surviving partner and his executors, and that, when his capital should be realized from the business, it should be invested to pay the annuity and increase the estate. On his wife's death the property was given to a trustee for the benefit of his three children. Testator's partner and executors failed to agree on a continuation of the business, and it was closed, and the capital paid to the executors. Held, in an action on the executors' bond to recover for a devastavit, that the executors' duties, as such, were performed when they had paid testator's debts and collected the assets, and that thereafter they should be considered as holding as trustees under the will.—*State v. Cheston*, 51 Md. 352. [Cited and annotated in 16 L. R. A. (N. S.) 209, on transfer of funds or securities from one estate to another by common trustee.]

(d) Where a sole executor is at the same time guardian, the authority of the executor to dispose of the estate of his testator does not terminate in every case on the expiration of the period limited for the final accounting.—*Lark v. Linstead*, 2 Md. Ch. 162.

(e) Letters of administration pendente lite are revoked by an order granting letters of administration.—*State v. Williams*, 9 Gill 172.

(f) Where counter security was ordered, and not given, an order directing that intestate's goods be delivered to the surety de-vests and extinguishes the right of the administrator derived from the administration.—*Scott v. Burch*, 6 H. & J. 67.

### § 32. Revocation of letters.

#### Cross-References.

Effect on pending actions, see post, § 440.

Removal on ground arising subsequent to appointment, see post, § 35.  
Concurrent and conflicting jurisdiction, see "Courts," § 475.

*Annotation.*

Validity of acts done by an executor or administrator under letters testamentary or of administration afterwards revoked or held invalid.—21 L. R. A. 147; 43 L. R. A. (N. S.) 634, notes.

(a) Where petitions for revocation of letters testamentary and the appointment of caveator as administrator pendente lite did not pray that the probate be revoked, an order granting such petition could not be sustained on the theory that the probate decree was invalid for want of proper notice.—*Grill v. O'Dell*, 111 Md. 64, 73 Atl. 876.

(b) Letters testamentary after probate will not be revoked on a caveat filed pending the controversy, except for legal and sufficient cause satisfactorily shown.—*Grill v. O'Dell*, 111 Md. 64, 73 Atl. 876.

(c) Code 1904, art. 93, § 67, providing that on contest of a will letters of administration pending the contest may be granted to certain persons, was applicable only where a caveat was filed before the will was admitted to probate and letters granted, and did not authorize the revocation of letters granted after probate on the subsequent filing of the caveat and the appointment of the caveator as administrator pendente lite on her mere assertion that she did not believe she could have justice done her.—*Grill v. O'Dell*, 111 Md. 64, 73 Atl. 876. (See Code 1911, art. 93, § 68.)

(d) Where on an application for revocation of letters of administration defendants pleaded that petitioner had renounced or waived her right to administration, and that the letters granted to defendants were awarded with the petitioner's knowledge and approval, defendants were entitled to litigate such issue with petitioner, and on proof thereof the petition was properly denied.—*Slay v. Beck*, 108 Md. 72, 69 Atl. 513. (For former appeal, see *Same v. Same*, 107 Md. 357, 68 Atl. 573.)

(e) Where, in a proceeding by a sister of an intestate leaving a widow, minor children, mother, and sisters, to revoke letters of administration granted to strangers to the intestate, the issues were whether the widow

had renounced her right to administer under a mistake of fact and whether the sister had renounced or waived her right to administer, the burden of proof rested on the administrators to show the legality of their appointment.—*Slay v. Beck*, 107 Md. 357, 68 Atl. 573. [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.] (For subsequent appeal, see *Slay v. Beck*, 108 Md. 72, 69 Atl. 513.)

(f) Where a brother of intestate, who is entitled to letters of administration, petitions the court to continue a stranger who has previously been appointed, and joins the latter in resisting the application of a third person for such appointment, the brother cannot afterwards have the administrator removed on the ground that the latter was not entitled to administration, by showing that the attorney of the former imposed on him in procuring such action, the administrator not being shown to have participated in such fraud.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827.

(g) Code 1888, art. 93, § 31, provides that if there be neither husband, wife, child, grandchild, father, brother, sister, or mother, or if they are incapable or disclaim or refuse to appear on notice, or if other relations or creditors neglect to apply, administration may be granted, at the discretion of the court. Section 33 provides that it shall not be necessary to give notice to a person entitled to administer, if he is out of the state, nor shall it be necessary to summon others more remote than brothers or sisters. The nearest relative of intestate was a brother living outside the state. *Held*, that the appointment of a stranger as administrator before the filing of application by the brother would not be revoked, as having been improvidently granted, on the application of the latter, in the absence of fraud in the original appointment.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827. (See Code 1911, art. 93, §§ 31, 32.)

(h) It was error to remove an administrator appointed within three days after the death of an intestate, on the ground that the administration was improvidently granted, since the 20-day limitation does not ap-

ply when the intestacy of deceased is notorious or satisfactorily proven, which will be presumed from the making of the appointment.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827. (See Code, art. 93, §§ 14, 16.)

(i) Where letters of administration were granted a stranger, his right to commissions constituted a sufficient interest to support an appeal from an order revoking his letters.—*Williams v. Addison*, 93 Md. 41, 48 Atl. 458.

(j) Code 1888, art. 93, §§ 14, 16, provide that whenever any person shall die intestate, leaving personalty, letters of administration may forthwith be granted on proof by the person applying that the deceased died intestate, and that no administration shall be granted until 20 days after the death of a supposed intestate. Deceased died on September 8th, leaving as his only relatives a sister and plaintiff, his niece. Deceased was admitted to have died intestate, and on September 11th his sister renounced her right to administer, and on the 18th letters were granted to a stranger, without notice to plaintiff. *Held*, that it was error to revoke the letters, as improvidently issued because 20 days had not expired after the death of deceased, since the 20-day limitation applies only in cases of "supposed" intestacy.—*Williams v. Addison*, 93 Md. 41, 48 Atl. 458. (See Code 1911, art. 93, §§ 14, 16.)

(k) Under Code 1888, art. 93, § 230, giving the Orphans' Court full power to secure the rights of orphans and legatees, and administer justice in all matters relative to the affairs of deceased persons, the court may revoke the appointment of an executor who has neglected his duties.—*Carey v. Reed*, 82 Md. 383, 33 Atl. 633. (See Code 1911, art. 93, § 235.)

(l) Letters of administration granted to the second son of decedent upon the representation that he is the only son, will be revoked for fraud, notwithstanding the eldest son may since have filed a renunciation of his right to the appointment.—*Lutz v. Mahan*, 80 Md. 233, 30 Atl. 645.

(m) Where letters of administration are granted to intestate's sister, and a person alleging herself to be his widow petitions the Orphans' Court to revoke this sister's letters of administration, upon denial by the

sister that the petitioner is intestate's widow, a prayer by the widow that the issue "whether the petitioner, I. R., is the widow of W. R., deceased," should have been granted.—*Richardson v. Smith*, 80 Md. 89, 30 Atl. 568; *Same v. Same*, 80 Md. 94, 30 Atl. 570.

(n) If a nonresident preferred by law neglects to apply for letters of administration until after a resident of the state next entitled has been duly appointed, it is then too late to ask the revocation of such letters on the ground that the nonresident had a preferred claim to administer.—*Ehlen v. Ehlen*, 64 Md. 360, 1 Atl. 880. [Cited and annotated in 1 L. R. A. (N. S.) 346, 348, on nonresident's right to act as executor or administrator.]

(o) The fact that the administrator is also trustee of the fund from which the subject-matter of the administration is derived is no reason for revoking his letters.—*Ehlen v. Ehlen*, 64 Md. 360, 1 Atl. 880. [Cited and annotated, see *supra*.]

(p) An appeal lies from an order of the Orphans' Court revoking the letters of a joint administrator, upon the application of his coadministrator. The broad terms in which the right of appeal is given to any party aggrieved by an order of the Orphans' Court gives the right in this case, although the revocation is in the discretion of the court.—*Forney v. Shriner*, 60 Md. 419.

(q) If an administrator fails to pass his accounts in conformity with the provisions of the Code, the Orphans' Court may revoke his letters upon the application of any one interested.—*Biddison v. Mosely*, 57 Md. 89. (See Code 1911, art. 93, §§ 1-3.)

(r) Pending an appeal by an administrator from an order of an Orphans' Court revoking his letters, the appellant remains the administrator, and cannot be disturbed in his office; and any proceeding which displaces him pending his appeal, and takes the funds of the estate from his hands, is unwarranted.—*Biddison v. Story*, 57 Md. 96.

(s) In November, 1879, letters de bonis non were granted to A. on the estate of B., 50 years after letters of administration were first granted. An inventory was in

the same month returned by A., and in the following month C. petitioned the Orphans' Court, alleging that she was a granddaughter of B., and entitled to letters, and prayed that those granted to A. be revoked. A. alleged in answer that C. and all other heirs and personal representatives had waived their rights of administration and directed him to administer, and that he had nearly completed the settlement of the estate. There was no written renunciation. *Held*, that C. was not entitled to have the letters to A. revoked.—*Pollard v. Mohler*, 55 Md. 284.

(t) Where an administratrix fails to render an account of her administration, as required by Code 1860, art. 93, §§ 1-3, the court may revoke her letters of administration.—*Jones v. Jones*, 41 Md. 354. (See Code 1911, art. 93, §§ 1-3.)

(u) An application to revoke letters of administration de bonis non, made within 68 days after the grant of such letters, is in proper time.—*Stocksdale v. Conaway*, 14 Md. 99, 74 Am. Dec. 515. [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.]

(v) An application to the Orphans' Court to revoke letters testamentary can only be made within the same time after the applicant has notice that they have been granted as that within which an original application for letters is to be made.—*Edwards v. Bruce*, 8 Md. 387; *Clagett v. Hawkins*, 11 Md. 381. (See Code, art. 93, § 3.) [Cited and annotated in 57 L. R. A. 254, on effect of delay in probating wills.]

(w) The revocation of an order admitting papers to probate as a will necessarily revokes the letters testamentary previously granted thereon.—*Clagett v. Hawkins*, 11 Md. 381. [Cited and annotated, see *supra*.]

(x) Where, at an interview between all the distributees of an estate, it was agreed that the eldest sister, who was entitled to administration, should administer the estate, and the husband of one of the other sisters was present at the time and disclaimed all right or intention of applying for administration, but, on the eldest sister leaving the state temporarily, with the express and under-

stood intention of returning within a month to apply for administration, the husband of the younger sister applied for and obtained letters during her absence, such letters were prematurely and improvidently granted, and would be revoked.—*Owings v. Bates*, 9 Gill 463.

(y) An appeal from a decree of a probate court revoking letters of administration suspends the operation of the decree.—*State v. Williams*, 9 Gill 172.

(z) An appeal will not lie from an order of the Orphans' Court in Maryland refusing to revoke letters testamentary.—*Hebb v. Hebb*, 5 Gill 506. (See Code, art. 5, §§ 60, et seq.)

(aa) The Orphans' Court has authority, on application for that purpose, to revoke letters of administration improvidently issued. Such power is inherent, and a part and of the essence of the power delegated to it of granting administration.—*Raborg's Adm'x v. Hammond's Adm'r*, 2 H. & G. 42. [Cited and annotated in 21 L. R. A. 149, on validity of acts under letters probate afterwards revoked or held invalid.]

### § 33. Resignation and discharge.

#### Cross-References.

Ancillary administrator, see post, § 518.  
Discharge as defense to action, see post, § 433.

Effect as to jurisdiction of proceedings for accounting, see post, § 469.

Effect of discharge on liability of sureties on administration bond, see post, § 530.

Effect of resignation pending action, see post, § 440.

Pleading discharge, see post, § 443.

Effect on competency to testify as to transactions with decedent, see "Witnesses," § 140.

#### Annotation.

Power to permit executor who has qualified to resign.—13 L. R. A. (N. S.) 438, note.

### § 34. Disqualification.

#### Cross-References.

Allowance of claims, see post, § 234.

Qualifications for appointment, see ante, §§ 15, 18.

### § 35. Removal.

#### Cross-References.

As defense to action against administrator, see post, § 433.

Conclusiveness of settlement made on removal, see post, § 513.

Effect as to pending proceedings for accounting, see post, § 471.

Effect on pending action, see post, § 440. Intermeddling in estate after removal, see ante, § 6.

Jurisdiction of application to sell real estate, see post, § 333.

Jurisdiction of proceedings for accounting, see post, § 469.

Revocation of letters for grounds relating to appointment, see ante, § 32.

Ground for dissolving injunction, see "Injunction," § 163.

Review of orders as dependent on finality, see "Appeal and Error," § 69.

Right to jury trial, see "Jury," § 17.

#### Annotation.

Effect of removal or resignation of personal representative on liability of estate to attorney employed by him.—25 L. R. A. (N. S.) 74, note.

(a) The Orphans' Court has power in proceedings for the removal of an executor to allow a counsel fee to the executor's counsel, payable out of the estate.—*Bates v. Revell*, 116 Md. 691, 82 Atl. 986.

(b) Omissions in an executor's inventory held insufficient to require his removal.—*Bates v. Revell*, 116 Md. 691, 82 Atl. 986.

(c) Evidence in an action for the removal of an administrator for his alleged collusion with certain claimants to absorb the whole personal estate of the decedent and to defraud the petitioners of their interests therein, his abuse of trust, his concealment of chattels and money, and his failure to defend suits against the estate held insufficient to sustain the charges made.—*Dunigan v. Cummins*, 115 Md. 289, 80 Atl. 922.

(d) A stranger was appointed administrator of an estate of which the brother of deceased was sole heir, and the brother, who was represented by counsel, urged an immediate settlement of the estate. A private settlement was made, the brother personally taking part therein, and the administrator truthfully disclosed and accounted for all the personal property, though he retained a certain amount as compensation for himself and his attorney, with the knowledge and consent of the brother and the attorney of the latter. The administrator was not shown to have had any connection with an alleged fraud on the brother by the brother's attorneys. Held, not to show sufficient misconduct to authorize the removal of the administrator.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827.

(e) Where the sole distributee of an estate induces the administrator to make a distribution before the time for filing claims has expired, which he is under no obligation to do, and whereby he assumes a risk, and the distributee agrees that the administrator may retain a certain compensation for services of himself and his attorney, the distributee cannot afterwards insist on the removal of the administrator on the ground of fraud in retaining such agreed compensation.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827.

(f) Code 1888, art. 93, § 230, giving the Orphans' Court jurisdiction to superintend the distribution of estates of intestates, secure the rights of legatees, and to administer justice in all matters affecting the affairs of deceased persons, does not authorize the court to remove an administrator for retaining a certain compensation with the consent of the sole distributee, and without fraud on the part of the administrator, though no application for such allowance was made to the court.—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827. (See Code 1911, art. 93, § 235.)

(g) Where an order of the Orphans' Court directing the executor of an estate to sell certain real estate is void, the court cannot remove the executor for refusal to comply therewith.—*Snook v. Zentmyer*, 90 Md. 705, 45 Atl. 1006.

(h) An executor returned under oath an inventory, and two months thereafter returned a second inventory, which he claimed to be a correction of the first, and in which he charged himself with less than one-half of the first inventory. More than one-half of this second inventory was at the time pledged for his individual debt. Shortly thereafter he was placed under an order to give new security by a certain day, which he failed to do. Held, that the court was justified in removing him.—*Carey v. Reed*, 82 Md. 383, 33 Atl. 633.

(i) The sale of property of an estate by the executor, without an order of court therefor, is ordinarily sufficient ground for removing him.—*Levering v. Levering*, 64 Md. 399, 2 Atl. 1.

(j) Evidence that an executrix had refused

to defend suits brought against her as executrix, although notified by the parties interested in the estate that the claims were unjust, and that she had colluded with the persons bringing such suits, was sufficient to justify her removal.—*Cox v. Chalk*, 57 Md. 569.

(k) Where one of two joint executors is unwilling, or fails, to discharge his duty, his coexecutor, or any one else in interest, may apply to the Orphans' Court to discharge him from his office.—*Hesson v. Hesson*, 14 Md. 8.

### § 36. Death.

#### Cross-References.

Effect on pending action, see post, § 440.  
Personal representative of deceased executor or administrator, see post, § 128.

### § 37. Administrators de bonis non.

#### Cross-References.

Administration of assets coming to hands of administrator de bonis non, see post, § 120.

Appointment by will, see ante, § 14.  
Compensation, see post, § 499.

(a) Account of executrix who was also sole legatee for life held equivalent to a distribution of the assets to her for life, and hence, she thereafter not holding as executrix, there were no unadministered assets which would support administration de bonis non.—*Sydnor v. Graves*, 119 Md. 321, 86 Atl. 341.

(b) By the statutes no preference in the appointment of an administrator d. b. n. is given by reason of seniority, and selection from among those in the proper degree of relationship is within the discretion of the Orphans' Court.—*Bowie v. Bowie*, 73 Md. 232, 20 Atl. 916.

(c) Testator devised an estate to his widow for life, with remainder to such of his children and grandchildren as she should by will appoint, and, in default of such appointment, the estate to pass as if testator had died intestate. Held, that after the widow, as executrix of testator's will, has passed her accounts in the Orphans' Court, and that court has allowed her the residue of the estate, subject to the terms of the will, her administration of the estate is at an end, and she holds the residue, not as executrix, but as tenant for life and as trustee for the remainder-men; and on her death the Orphans' Court has no power to appoint an administrator d. b. n. c. t. a. of testator's personal estate retained by the widow as life tenant under the will, but her executor or administrator will be compelled to account therefor in a court of equity.—*Myers v. Safe Deposit & Trust Co.*, 73 Md. 413, 21 Atl. 58; *Safe Deposit & Trust Co. v. Myers*, Id. [Cited and annotated in 64 L. R. A. 905, on execution by will of power of appointment.]

(d) Code 1888, art. 93, §§ 30, 31, provide that if there are no relatives, administration shall be granted to the largest creditor of decedent; and, if the relatives or creditors decline to act or neglect to apply, administration shall be granted at the discretion of the court. Section 33 provides for notice to relatives within the state. Section 243 provides that, where letters of administration are revoked, it shall be the duty of the court to appoint a new administrator. Held, that, as the law does not provide for notice to creditors, it is the duty of the largest creditor to assert and claim his right of administration before the court is required to notice it; and, as the law fixes no time within which he must make his application, the court may, in its discretion, where the circumstances require it, appoint a new administrator immediately on the revocation of the letters of a former, though, as a general rule, it should wait a reasonable time for relatives and creditors to assert their claims.—*McGuire v. Rogers*, 71 Md. 587, 18 Atl. 888. (See Code 1911, art. 93, §§ 30-32, 248.)

(e) Where letters of administration are revoked, the failure of brothers and sisters of decedent, who are made parties to the proceeding, to ask that the letters be issued to them, if issued at all, is equivalent to a declination of the letters, and there being no widow or residuary legatee, and no creditor or more remote collateral applying, the court can exercise the discretion in the selection of a person for the office vested in it, in such case, by Code 1860, art. 93, §§ 30, 31, 33.—*Dalrymple v. Gamble*, 66 Md. 298, 7 Atl. 683, 8 Atl. 468. (See Code 1911, art. 93, §§ 30-32.) [Cited and annotated in 48 L. R. A. (N. S.) 861, on right of domi-

tee for the remainder-men; and on her death the Orphans' Court has no power to appoint an administrator d. b. n. c. t. a. of testator's personal estate retained by the widow as life tenant under the will, but her executor or administrator will be compelled to account therefor in a court of equity.—*Myers v. Safe Deposit & Trust Co.*, 73 Md. 413, 21 Atl. 58; *Safe Deposit & Trust Co. v. Myers*, Id. [Cited and annotated in 64 L. R. A. 905, on execution by will of power of appointment.]



ciliary executors and administrators, or their nominees, to ancillary letters; in 49 L. R. A. (N. S.) 896, on revocation of letters of administration upon discovery of will.]

(f) Letters of administration de bonis non with the will annexed were granted to one having no claim to the administration or interest in the estate, and upon a mere ex parte application, without notice to those entitled to administer. *Held*, an irregularity, for which the court granting such letters might revoke them.—*Wilcoxon v. Reese*, 63 Md. 542. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(g) Under act 1865, c. 162, providing that where the executor named in the will "shall refuse or decline to act, or shall die without executing the power vested in him," the Orphans' Court might appoint an administrator de bonis non, *held*, that, on the death of the executor in the lifetime of the testator, the court could not appoint an administrator de bonis non to make sale of property devised to be sold on the death of the life tenant, but that equity alone had jurisdiction.—*Wilcoxon v. Reese*, 63 Md. 542. (See Code, art. 93, §§ 70, et seq.) [Cited and annotated, see supra.]

(h) An executor having died without distributing a parcel of leasehold property inventoried by him, administration de bonis non is properly granted 24 years after his death; and the allegation of the testator's widow that she purchased of the executor the property in question, and paid him for it, affords no ground for refusing the letters.—*Neal v. Charlton*, 52 Md. 495. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(i) Where an executor brought suit to foreclose a mortgage due to his testatrix, and a decree was passed for a sale of the mortgaged property, and the executor was appointed trustee, and died before the sale was effected, and another was appointed trustee in his place, and sold the property, letters de bonis non should be taken out upon the estate of the mortgagee, so that the trustee could turn over the funds to a duly-appointed administrator.—*Kirby v. State*, 51 Md. 383. [Cited and annotated in 40 L. R. A. (N. S.)

1137, on decree directing transfer by executor, administrator, or guardian to himself in another fiduciary capacity, as affecting liability of sureties.]

(j) Code 1860, art. 93, § 22, provides that "the next of kin" shall be preferred in granting letters of administration; certain other relatives being dead. Section 70 declares that letters de bonis non may be granted at the discretion of the court, giving preference to the person entitled, if he shall actually apply for the same. *Held*, that a female first cousin of an intestate on his father's side being the "person entitled" under § 22, the court has no discretion to refuse letters de bonis non to her, if she actually applies.—*Kearney v. Turner*, 28 Md. 408. (See Code 1911, art. 93, §§ 22, 70.)

(k) The fact that an applicant for letters de bonis non is indebted to the estate of decedent affords no ground on which the court is authorized to deprive her of administration.—*Kearney v. Turner*, 28 Md. 408.

(l) An administrator de bonis non may properly be appointed, even where the original administrator has reduced all the assets of the estate to money.—*Donaldson v. Rabor*, 26 Md. 312.

(m) Under Code 1860, art. 93, § 70, providing that, if an executor or administrator dies before the administration is completed, letters of administration may be granted at the discretion of the court, "giving preference, however, to the person entitled, if he shall actually apply for the same," the court has no jurisdiction to appoint a third person administrator de bonis non without notice or opportunity to those entitled to administration to make the application.—*Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571. (See Code 1911, art. 93, § 70.)

(n) In granting letters of administration de bonis non, the Orphans' Court has not a discretion to select any competent person, without first summoning those who would be entitled on an original application for administration.—*Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571.

(o) Where one entitled to administration has renounced, and recommended another, who has been appointed administrator de bonis non, and it afterwards appears to the

satisfaction of the court that such renunciation was executed by mistake, the court should cancel the appointment and restore the first party to the right of administration; and hence the appointment of a third person in violation of the rights of the party so restored is erroneous.—*Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571.

(p) Letters of administration de bonis non must be granted in every case where, upon the death of the administrator, there are unadministered assets; and prima facie proof of such assets is all that is required.—*Scott v. Fox*, 14 Md. 388. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(q) A renunciation, by a party entitled, of the right to letters of administration de bonis non, filed in the Orphans' Court, cannot subsequently be retracted.—*Stocksdale v. Conaway*, 14 Md. 99, 74 Am. Dec. 515. [Cited and annotated in 22 L. R. A. (N. S.) 1161, on right of one first entitled to administration to nominate third person.]

(r) The Orphans' Court has exclusive cognizance of the appointment of administrators de bonis non; and where an executor has not completed the administration, not having paid all the legacies or delivered over the property in his hands to the persons entitled thereto, such an appointment may be rightfully made.—*Alexander v. Stewart*, 8 G. & J. 226. [Cited and annotated in 15 L. R. A. 492, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(s) Where property of a testator remains specifically after the death of the executor, it is held to be unadministered property, and the taking out of letters of administration is not only demanded by the statute, but is indispensably necessary to carry out the purposes of the testator, and to give title, through the medium of an administration, to the persons entitled to distribution, even though the testator's debts be paid; and if the administrator of the executor should transfer the property of the testator remaining specifically in his hands directly to the distributees, their possession might be divested by the subsequent grant of letters to

an administrator de bonis non.—*Alexander v. Stewart*, 8 G. & J. 226. [Cited and annotated, see supra.]

### III. ASSETS, APPRAISAL, AND INVENTORY.

#### Cross-References.

Assets ground of jurisdiction of administration of estate, see ante, §§ 11, 12.

Conclusiveness of settlement as to assets unadministered or not accounted for, see post, § 513.

Grounds for appointment of administrator de bonis non, see ante, § 37.

Property available for payment of debts, see post, §§ 271-274.

Property covered by bond of executor or administrator, see post, § 528.

Property to be included in accounting, see post, § 465.

Right to commissions on property not assets of estate, see post, § 495.

Award in condemnation proceedings, see "Eminent Domain," § 156.

Indian lands, see "Indians," § 10.

Ownership of corporate stock and right to vote same, see "Corporations," §§ 197, 198.

Pension warrant, see "Pensions," § 10.

Recovery of payments made by decedent, see "Payment," § 82.

Rights of public administrator in respect to money found on body of decedent, see "Finding Lost Goods," § 10.

Rights under homestead entry, see "Public Lands," §§ 35, 140.

What constitutes gift by decedent, see "Gifts," § 4.

#### § 38. Property constituting assets in general.

#### § 39. Real property and estates and interests therein.

(a) From the time of making a contract for the sale of land, and until payment, the vendor has a mere lien on the land for the purchase money. The interest of the vendor in such contract is not real estate, but only personal estate; and, in case of the vendor's death, the unpaid purchase money is treated only as personal estate, and goes, not to his heirs, but to his personal representatives.—*Hall v. Jones*, 21 Md. 439. [Cited and annotated in 57 L. R. A. 649, on nature of interest in land contract as real or personal; in 37 L. R. A. (N. S.) 1205, on right of one advancing purchase price to subrogation to vendor's lien.]

(b) A mortgage, before foreclosure, is considered in equity as a chattel interest, going to the executor; and, though the technical fee may descend to the heir of the mort-

gatee, it is in trust for the executor.—*Chase v. Lockerman*, 11 G. & J. 185, 35 Am. Dec. 277. [Cited and annotated in 31 L. R. A. (N. S.) 351, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

#### § 40. Proceeds of sale of real property.

##### Annotation.

Is surplus realized on foreclosure sale of real estate after mortgagor's death to be deemed real or personal property.—19 L. R. A. (N. S.) 723, note.

(a) B. executed an agreement to sell a tract of land to C. and P. for \$29,000 in cash and \$25,000 in five years, interest payable semi-annually, and to convey to any person purchasing from C. and P. a part of the land, of the value of \$5,000, upon receipt of that sum, and to consummate the sale as soon as the papers could be prepared, and he further agreed that his wife should release her dower. The \$29,000 was paid to B. A month after the execution of the agreement, B. and his wife executed a lease of the land to C. and P. at a yearly rental of \$1,500, payable semi-annually; the lease containing a covenant on the part of B. to convey to C. and P. the reversion at any time within five years upon the payment by them of \$25,000. Shortly after the execution of the lease B. went to Europe, and continued to reside there for several years after the expiration of the time within which C. and P. had the right to purchase the reversion. It was in proof, however, that B. was willing to accept the payment of \$25,000 both during and after the expiration of the term, and to convey the same to C. and P. in fee, but the latter insisted that the wife of B. should join in the conveyance; but this, owing to the relations then existing between him and his wife, B. refused to procure. P. assigned his interest in the land to C., his co-purchaser and co-lessee, who subsequently died, leaving a last will. The credit payment of \$25,000 with interest, by consent of all the parties in interest, was paid by the executors of C. to the executor of B. On a bill filed by the executor of B. to have determined the respective rights of the parties in interest, *held*, that the lease should be considered as a mere security for the payment of the \$25,000, part of the purchase money, and this sum, together with the interest thereon paid by the executors of C.

to the executor of B., must be considered as personal estate, to be distributed as such.—*Johns Hopkins University v. Williams*, 52 Md. 229.

#### § 41. Rents and profits.

##### Cross-Reference.

Collection by executor or administrator in general, see post, § 131.

(a) A will created an estate for life in the residue, with remainder over. Shortly before death the testator formed a partnership, to be carried on for three years, even if he should die sooner. *Held*, that the profits went to the life tenant as income, and did not belong to the corpus of testator's estate.—*Heighe v. Littig*, 63 Md. 301, 52 Am. Rep. 510.

(b) A will contained a bequest in the following words: "I give and bequeath to O. \$8,000 in state of Missouri bonds." The testator owned, at the time of the execution of the will, and also at the time of his death, eight, and only eight, state of Missouri bonds of the value of \$1,000 each. *Held*, that the executor was entitled to the coupons falling due within the year after the testator's death.—*Dryden v. Owings*, 49 Md. 356. [Cited and annotated in 11 L. R. A. (N. S.) 53, 66, 68, 69, 72, 75, on bequest of stocks, bonds, or notes as general or specific.]

(c) A testator devised a portion of his real estate, which was then under lease, to his executor, with directions to sell the same and apply the proceeds to the payment of certain legacies. *Held*, that the rents accruing on this property, after the death of the testator, should go to the executor, to be applied, if necessary, in payment of the legacies.—*Getzandaffer v. Caylor*, 38 Md. 280. [Cited and annotated in 40 L. R. A. 329, on right to rents on lease of intestate's property.]

(d) A testator gave by his will the services of a negro girl to his wife until the wife's death or until the negress should attain the age of 35 years, when she was to be free. If the wife died before that period, then the son of the testator was to take the slave himself, having her services valued and accounting for them as the father's executor. The wife died six years before the time when the slave would have attained the age of 35, having sold the entire term of service of said

negress. *Held*, that the period of service after the death of the wife belonged to the estate of the husband, and must be accounted for by the administrator of the wife.—*Smith v. Smith*, 6 Md. 496.

(e) A testator devised all the rest of his estate to be sold, and the money arising therefrom to be invested, and to be held for the use of his child. The rest of his estate, of whatsoever kind, after deducting his wife's dower and thirds, he gave to his child. By a codicil he declared that, with respect to the estate which by his will was given to his child, it was his desire that, in the event of his dying in infancy, the estate provided for be given to A. and B. The child died several years after the father, in infancy. *Held*, that the profits of the investment of the property devised to the child, accruing between the death of the testator and the death of the child, did not pass to A. and B., but went to the personal representatives of the child.—*Worthington v. McPherson*, 5 Gill 51.

(f) A bequest "of the use of a female slave until the youngest of the testator's grandchildren arrived at age" was *held* to vest in the legatee a property in the issue born during the existence of such estate.—*Sutton v. Crain*, 10 G. & J. 458.

(g) A. devised his real estate to his nephew, and directed his executors to sell such parts as they might think proper and necessary for the payment of debts and legacies. *Held*, that under this will the executors had only a naked power to sell, and until the exercise of that power the estate passed in fee simple to the devisee, who only was authorized to receive the rents and profits, and that an order of the Court of Chancery appointing one of the executors a trustee to sell the real estate to pay debts and legacies, founded upon an allegation of the insufficiency of the personal assets without any reference to rents and profits, did not affect the devisee's right thereto, nor the accountability of the executor so appointed for such rents and profits if received by him.—*Guyer v. Maynard*, 6 G. & J. 420.

(h) All the increase and income resulting from personal property specifically bequeathed from and after the testator's death, where the assets are abundantly sufficient to

pay debts and legacies, inures to the benefit of the specific legatee, and forms no part of the general residue.—*Evans v. Iglehart*, 6 G. & J. 171. [*Cited and annotated* in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

(i) There is no distinction between the rights of a legatee for life to the increase and profits of a specific legacy from the testator's death, and the rights of a similar legatee of a general residue to like interests from the same period.—*Evans v. Iglehart*, 6 G. & J. 171. [*Cited and annotated*, see *supra*.]

## § 42. Crops and products of land.

(a) Clover and hay growing on land belonging to a decedent do not vest in his personal representatives as personal property.—*Evans v. Iglehart*, 6 G. & J. 171. [*Cited and annotated*, see *supra*, § 41.]

(b) Crops planted or sown by a decedent, and gathered during the summer and autumn next succeeding his death, are part of the personal estate, if properly emblements, and pass to the personal representative of the deceased.—*Evans v. Iglehart*, 6 G. & J. 171. [*Cited and annotated*, see *supra*, § 41.]

(c) Crops sown or planted by one in his lifetime, and which are gathered during the summer and autumn next after his decease, constitute part of his personality.—*Evans v. Iglehart*, 6 G. & J. 171. [*Cited and annotated*, see *supra*, § 41.]

## § 43. Personal property in general.

(a) The title to personal property of a deceased is vested in the administrator, and he is the only person who can assert title to it on behalf of the estate for the benefit of creditors.—*Fowler v. Brady*, 110 Md. 204, 73 Atl. 15.

(b) The subscription list and good will of a publishing and printing office are not assets in the hands of the administrator. They are of inappreciable value, and of too uncertain and contingent a nature to be the subject of appraisal and estimation.—*Seighman v. Marshall*, 17 Md. 550.

(c) An executor, who is also a creditor, is not entitled to hold a manumitted slave of

his testator, debtor, as a slave, or treat him as assets. He must resort to his legal remedy to vacate the deed of manumission.—*Allein v. Sharp*, 7 G. & J. 96.

#### § 44. Interests in partnerships.

##### Cross-Reference.

Statutory partnership administration, see "Partnership," § 252.

(a) In a suit by the administratrix of a deceased partner against the surviving partners, in which plaintiff claimed that the firm had been carried on under the old name at great profit, and prayed that her intestate's share of such profits might be paid over to her, where it appeared that the firm property consisted both of realty and personalty, the court may apply such assets in the order in which, as between the parties, they are liable.—*Goodburn v. Stevens*, 1 Md. Ch. 420. [Cited and annotated in 28 L. R. A. 89, on partners' rights inter se in firm realty.]

#### § 45. Trust estates and other equitable estates and interests.

##### Cross-References.

Estates held by decedent as executor or administrator, see post, § 128.

Executor or administrator as representative of deceased trustee, see "Trusts," § 244.

#### § 46. Interests under insurance policies.

##### Cross-References.

Right to proceeds of life or accident insurance policy payable to insured, his representatives or estate, see "Insurance," § 583.

Right to proceeds of mutual benefit insurance of decedent, see "Insurance," §§ 795, 796.

##### Annotation.

Widow's right to proceeds of insurance on deceased husband's life payable to himself or his executors or administrators.—35 L. R. A. (N. S.) 964, note.

#### § 47. Legacies and distributive shares.

(a) The share of an heir or distributee in an estate does not vest in his heirs upon his decease, and can be recovered only by his personal representatives.—*Hanson v. Hanson*, 4 Gill 69. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

(b) Intestate had several brothers, and a sister, who died before him, leaving children and grandchildren, and one brother who survived him, but who died before the distribu-

tion of the intestate's estate. *Held*, in the distribution of the personal estate, that the share of the brother who survived intestate was payable to the executor or administrator of such brother.—*Duvall v. Harwood's Adm'rs*, 1 H. & G. 474.

#### § 48. Debts and rights of action.

##### Cross-References.

Assignment and transfer by executor or administrator, see post, § 171.

Recovery of payments made by decedent, see "Payment," § 82.

#### § 49.— In general.

(a) In an action by three undivided owners of a mine for carrying away coal therefrom, plaintiffs (including the executor of one who died after the commencement of the action) may recover the full value of the property injured, even if it absorbs the fee simple. Decedent's devisee takes only what remains after the testator's death, and the devisee can institute no action for the consequences of the trespass committed in the testator's lifetime. There can be but one satisfaction for the injuries done him.—*Barton Coal Co. v. Cox*, 39 Md. 1, 17 Am. Rep. 525.

(b) Action of trespass quare clausum fregit will lie by an executor for a trespass on real estate committed in the life of the testator.—*Kennerly v. Wilson*, 1 Md. 102.

(c) An action on the case will not lie by an executor for overflowing lands of the testator in his lifetime.—*McLaughlin v. Dorsey*, 1 H. & McH. 224. (Compare *Kennerly v. Wilson*, 1 Md. 102; Code, art. 93, § 104.)

#### § 50.— Debts due from executor or administrator.

##### Cross-References.

Collection of indebtedness of executor or administrator to estate, see post, § 88.

Effect of inclusion in inventory, see post, § 72.

Failure to file inventory, see post, § 73.

Liability on administration bond, see post, § 528.

Scope of inquiry on accounting, see post, § 507.

##### Annotation.

Debt as asset on appointment of debtor as executor or administrator.—26 L. R. A. (N. S.) 413, note.

(a) Under Code 1888, art. 93, § 224, providing that "the bare naming an executor in a will shall not operate to extinguish any

just claim which the deceased had against him," it was error for the Orphans' Court, in an order allowing executors to restate an account, to provide that they should not retain any of the distribution to which one of the executors might be entitled on account of any alleged indebtedness from him to the estate, where such executor was indebted to the estate as a surviving partner of the deceased.—*Hoffman v. Armstrong*, 90 Md. 123, 44 Atl. 1012. (See Code 1911, art. 93, § 228.) [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

#### § 51.— Right of action for death of decedent.

##### Cross-Reference.

Persons entitled to sue in general, see "Death," § 31.

##### Annotation.

Administration based on right of action for negligent killing of a person as an asset.—1 L. R. A. (N. S.) 885, note.

#### § 52.— Evidence of indebtedness.

##### Cross-References.

Evidence in actions by or against executor or administrator in general, see post, § 450.

Evidence of payment in general, see "Payment," §§ 65, 66, 73, 74, 76.

(a) Where there was evidence that deceased was a sick man for a number of years before his death, that plaintiff nursed him, and that deceased said he would pay for such services, the case should be submitted to the jury.—*Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324. [Cited and annotated in 11 L. R. A. (N. S.) 888, on implied agreement to pay for services of relative or member of household.]

#### § 53. Exempt property.

##### Cross-Reference.

Homestead entry on public lands, see "Public Lands," § 140.

#### § 54. Ownership of property at time of death.

##### Cross-Reference.

Scope of inquiry on accounting, see post, § 507.

#### § 55.— In general.

##### Annotation.

When personal representative not entitled to possession of personal assets of estate.—3 L. R. A. (N. S.) 704, note.

(a) The fact that a bank account, on the death of an administrator, stood on the books of the bank in the name of his intestate, was prima facie evidence that it belonged to the latter's estate.—*Getty v. Long*, 82 Md. 643, 33 Atl. 639. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

#### § 56.— Property disposed of by decedent.

##### Cross-Reference.

What constitutes gift, see "Gifts," § 4.

(a) The owner of a brewery transferred it to a corporation formed by him, the stockholders consisting of himself and his wife and children; they having given no consideration whatever for the few shares issued to them. Subsequently property of the brewing corporation was conveyed by it to a real estate company formed by the brewer, and in which his children held five shares of stock each, merely to qualify them as corporators. Held, that such property would be regarded in equity, in determining the assets of his estate, as the individual property of the brewer.—*Bauernschmidt v. Bauernschmidt*, 101 Md. 148, 60 Atl. 437.

#### § 57.— Property fraudulently conveyed.

##### Cross-References.

Actions by creditors to set aside, see post, § 423.

Conditions precedent to action, see post, § 431.

Effect of insolvency of estate, see post, § 413.

Enforcement of judgment against property fraudulently conveyed, see post, § 454.

Powers of special administrator, see post, § 122.

Right to possession, see post, § 130.

Sale under order of court, see post, § 329.

Execution as remedy for attacking fraudulent conveyance, see "Fraudulent Conveyances," § 230.

Transfers and transactions invalid in general, see "Fraudulent Conveyances," § 172.

(a) A personal representative of decedent cannot impeach a transfer made by him, though it is fraudulent as to creditors.—*Dorsey v. Smithson*, 6 H. & J. 61 [Cited and annotated in 50 L. R. A. (N. S.) 322, on right of personal representative to avoid conveyance by decedent in fraud of creditors.] *Kinnemon v. Miller*, 2 Md. Ch. 407. [Cited and annotated in 50 L. R. A. (N. S.) 322, on

right of personal representative to avoid conveyance by decedent in fraud of creditors.]

(b) A bill of sale of personal property, executed and acknowledged, but not recorded, is void as to creditors, if made to their injury, but is binding on the donor, her executors, etc., and all persons claiming under her or them, both at common law and under act 1729, c. 8, § 6. The executor of the donor has no right to the goods, and is estopped to allege that the deed is a fraud upon the creditors. The property is not assets in his hands, and he is not accountable for it as executor.—*Dorsey v. Smithson*, 6 H. & J. 61. (See Code, art. 21, § 43; Stat. 13 Eliz. c. 5, Alex. Brit. Stat. [Coe's ed.] 499.) [Cited and annotated, see supra.]

#### § 58.— Property accruing after death.

##### Cross-Reference.

Property acquired by executor or administrator, see post, §§ 152, 172.

#### § 59.— Evidence of ownership.

##### Cross-References.

Evidence in actions by or against executor or administrator in general, see post, § 450.

Evidence on accounting, see post, § 506.

(a) In an action by an heir to recover of a former executor certain bonds alleged to be wrongfully withheld by defendant from the estate, evidence examined, and held insufficient to show that decedent was the sole owner of such bonds.—*Gerting v. Wells*, 103 Md. 624, 64 Atl. 298, 433.

#### § 60. Foreign assets.

##### Cross-References.

Duty to collect, see post, § 86.

Right of action by foreign administrator, see post, § 524.

#### § 61. Legal and equitable assets.

#### § 62. Appraisal and inventory.

##### Cross-References.

Appraisal of allowance to surviving wife, husband, or children, see post, § 193.

Appraisal of property to be sold under order of court, see post, § 353.

Claims barred by limitations as charge against uninventoried assets, see post, § 437.

Determination as to sufficiency of personalty to pay debts, see post, § 341.

Evidence on accounting, see post, § 506.

Validity of sale of uninventoried property, see post, § 367.

Admissibility in trespass to try title, see "Trespass to Try Title," § 40.

Fee for filing appraisal as tax subject to requirement of uniformity, see "Taxation," § 40.

Inventory for purpose of computing succession tax, see "Taxation," § 893.

#### § 63.— Necessity and purpose.

##### Cross-Reference.

Condition precedent to collection of claims due estate, see post, § 86.

#### § 64.— Time for making.

#### § 65.— Proceedings to compel.

(a) If property not included in an administrator's inventory belongs to the estate, it is his duty to make return of it as required by Code 1904, art. 93, § 215, and upon his failure to do so after notice a creditor of the estate may file a petition against him in the Orphans' Court, under § 259, to require him to do so.—*Fowler v. Brady*, 110 Md. 204, 73 Atl. 15. (See Code 1911, art. 93, §§ 216, 260.)

#### § 66.— Property to be included.

##### Cross-Reference.

See post, § 129.

(a) Where plaintiff in an action assigns the debt sued on as collateral security for a contingent liability, the judgment, on his death, ought to be returned among the separate debts due his estate, with a statement of the manner in which the same had been assigned.—*McAleer v. Young*, 40 Md. 439.

#### § 67.— Making appraisal.

(a) It having been the practice from time immemorial for two persons to appraise the estate of a decedent, act 1908, c. 118, § 2, providing that the register of wills of Baltimore shall appoint four "general" appraisers to appraise all estates under administration in that city, will be construed not as intending that all four appraisers shall serve in the appraisal, but that from the four general appraisers so appointed two shall be designated by such register of wills to serve in each case.—*Barron v. Smith*, 108 Md. 317, 70 Atl. 225. (See Code, art. 93, § 207, note; Balto. City Rev. Charter, § 354A.)

#### § 68.— Requisites and sufficiency of inventory.

#### § 69.— Defects and objections.

#### § 70.— Amendment and correction.

(a) If the Orphans' Court, acting within its jurisdiction, on petition of one claiming to be

the owner of personal property, has ordered such property to be stricken from the inventory, the court cannot order the same issue to be sent to a jury for trial on petition of a creditor of the estate.—*Fowler v. Brady*, 110 Md. 204, 73 Atl. 15.

(b) A devisee of lands under a will applied to the Orphans' Court to have the rental proportion of certain crops growing upon said lands at the death of the testator stricken from the inventory of the personal estate, in which it had been included and returned. *Held*, that the Orphans' Court had no jurisdiction over the subject-matter; but, if the possessory rights of the devisee were involved by the appraisal, he must assert them before appropriate tribunals in the same manner as if the injury had been perpetrated by a private individual.—*Spencer v. Ragan*, 9 Gill 480.

#### § 71.—Additional or supplemental inventory.

#### § 72.—Operation and effect.

##### Cross-References.

Charges and credits on accounting, see ante, §§ 63-70.

Effect as to jurisdiction of court, see post, § 76.

(a) The mere fact that a rental proportion of certain crops growing on lands owned by a devisee had been returned by the executor as a part of the personal property of said testator's estate does not show such an invasion of the devisee's rights as would entitle him to seek redress in any judicial tribunal.—*Spencer v. Ragan*, 9 Gill 480.

(b) An executor who has returned a slave in his inventory as part of the estate of his testator is not thereby estopped from showing, in resistance of the slave's alleged right to freedom under the testator's will, that the slave was the property of another and did not belong to the estate.—*Harriett v. Ridgely*, 9 G. & J. 174.

(c) A copy of a paper purporting to be an additional inventory to that filed by the administrator of an estate, certified under the hand and seal of the register of wills to be a true copy taken from the original additional inventory lodged in the office of the register, is not competent evidence to charge the administrator with the amount of goods

and chattels therein inventoried.—*Emory's Adm'r v. Thompson's Ex'x*, 2 H. & J. 244.

(d) An original paper, purporting to be an additional inventory, proved to be in the handwriting of a person who acted as clerk for the administrator, and indorsed "Additional Inventory" in the administrator's handwriting, found among the papers in the office of the register of wills, wrapped in the original inventory of decedent's estate, is competent evidence to charge the administrator with the property specified therein as part of the assets of the decedent's estate.—*Emory's Adm'r v. Thompson's Ex'x*, 2 H. & J. 244.

#### § 73.—Failure to make.

##### Cross-References.

Deprivation of compensation, see post, § 500.

Ground for removal, see ante, § 35.

Constitutionality of statute imposing penalty for failure to inventory, creating vested right, see "Constitutional Law," § 104.

Constitutionality of statute imposing penalty for failure to file inventory, impairing contract, see "Constitutional Law," § 121.

Constitutionality of statute imposing penalty for failure to file inventory, retroactive law, see "Constitutional Law," § 191.

Limitations on liability for failure, see "Limitation of Actions," § 59.

(a) Not returning an inventory on the estate of his intestate is not sufficient to charge the administrator with a debt of the intestate.—*Leeke v. Beanes*, 2 H. & J. 373.

### IV. COLLECTION AND MANAGEMENT OF ESTATE.

##### Cross-References.

Actions by or against executors or administrators, see post, §§ 420-457.

Administration of insolvent estates, see post, §§ 408-419.

Foreign and ancillary administration, see post, § 519.

Functions and acts covered by bond of executor or administrator, see post, § 529.

Liabilities for conduct and defense of actions, see post, § 457.

Liabilities of executor de son tort to rightful executor or administrator, see post, § 540.

Liabilities on sale of property under order of court, see post, §§ 391, 392.

Removal of executor or administrator for mismanagement, see ante, § 35.

What law governs, see ante, § 2.



Appellate jurisdiction of appeals in proceedings for collection of assets, see "Courts," § 219.

Authority of agent of administrator as to disbursements, see "Principal and Agent," § 106.

Authority to make tender, see "Tender," § 6.

Charitable devises and bequests, see "Charities," § 48.

Duty to probate will, see "Wills," § 211.

Extent and execution of testamentary powers, see "Powers," §§ 16-44.

Liabilities of executor or administrator constituting debts created in fiduciary capacity affected by discharge in bankruptcy, see "Bankruptcy," § 426.

Payment of fiduciary funds for conveyance to executor or administrator as creating resulting trust, see "Trusts," § 84.

Ratification of collection agent's acts, see "Principal and Agent," §§ 165, 169.

Restraining misappropriation, see "Injunction," § 18.

Subject and title of acts relating to management of estate, see "Statutes," § 115.

#### (A) IN GENERAL.

### § 74. Representation of decedent.

#### Cross-Reference.

Authority to make tender, see "Tender," § 6.

### § 75. Representation of creditors.

#### Cross-Reference.

Fraudulent conveyances, see ante, § 57.

(a) Where administration on an estate was granted to the sisters of deceased in the absence of plaintiff, who had a prior right thereto, and such administrators, during the existence of their administration and before their letters were revoked, at the instance of plaintiff, sold slaves belonging to the estate, which was possessed of sufficient other property to pay all the debts of the estate, such sales were valid; and plaintiff, after appointment as administratrix, could not maintain replevin for the slaves.—*Phippard v. Forbes*, 4 H. & McH. 481.

### § 76. Jurisdiction of courts.

#### Cross-References.

Actions, see post, § 435.

Directing performance of decedent's contracts, see post, § 135.

Discovery of assets, see post, § 85.

In respect to inventory and appraisal, see ante, §§ 63-73.

Setting aside sale by executor, see post, § 149.

Appellate jurisdiction dependent on whether case involves constitutional questions, see "Courts," § 213.

Determination of validity of assignment by legatee, see "Wills," § 743.

Effect of appeal from order as to probate of will, see "Wills," § 368.

Exclusive jurisdiction of courts of equity, see "Courts," § 472.

Interference by state court with property of estate to which jurisdiction of federal court has attached, or vice versa, see "Courts," § 505.

(ā) Where a bill by heirs against the administrators alleges that defendants have assets of the estate which are not administered, and the answer admits the allegation, complainants are entitled to administration of the estate under the direction of the court of equity.—*Koontz v. Koontz*, 79 Md. 357, 32 Atl. 1054.

(b) The Orphans' Court has no jurisdiction of an action by an administrator to obtain possession of property belonging to the estate, where the title thereto is in issue, and the defendant alleges that the property did not belong to, and is not part of, the estate of the decedent.—*Gibson v. Cook*, 62 Md. 256.

(c) Act 1846, c. 279, authorizing deeds to be made by the administrators of persons selling realty and dying before receiving the purchase money, and requiring the administrator to satisfy the Orphans' Court that the purchaser has paid the full amount of the purchase money, confers no jurisdiction on such courts to determine controversies in regard to sales of realty by intestates.—*Grant Coal Co. v. Clary*, 59 Md. 441. (See Code, art. 93, § 81; *Id.* [vol. 3], art. 93, § 81.)

(d) An administrator pendente lite is responsible to the Orphans' Court for the execution of his trust, and proceedings to prevent waste must be brought against him in that court and not in a court of equity.—*Lee v. Price*, 12 Md. 253.

(e) Before the proof of a will in the prerogative court, a caveat was entered against its probate, and a citation issued to the executrix to prove the same. She did not appear, and administration was granted to others. This administration was afterwards revoked, and letters testamentary issued to the executrix. *Held*, that a disposition of slaves belonging to the estate by the administrators by virtue of their administration was valid, it being admitted that testator left estate enough besides to pay all

his debts.—*Phippard v. Forbes*, 4 H. & McH. 481.

### § 77. Powers before issue of letters or qualifications.

#### Cross-References.

Expenses incurred before appointment as claim against estate, see post, § 218.

Jurisdiction of proceedings to compel accounting, see post, § 469.

Release of cause of action for death, see "Death," § 25.

(a) The title and rights of executors are created by the will, and not by the probate which is merely evidence thereof, and in this respect the probate relates back to the death of the testator.—*Decker v. Fahrenholtz*, 107 Md. 515, 68 Atl. 1048, 72 Atl. 339. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(b) Where one receives money due an intestate, an administrator afterwards appointed may affirm his act, and sue as for money had and received to his use, since his title relates back to the time of the intestate's death.—*Dempsey v. McNabb*, 73 Md. 433, 31 Atl. 378.

(c) A copy of the will of A., in Virginia, was exhibited and proved in Maryland, and letters testamentary were granted to one of the executors therein named; the other having renounced. Before the letters were granted, a suit had been brought in the name of the executor to whom the letters were afterwards granted, who declared and made profert before such letters were granted. *Held*, that the action could not be sustained.—*Ratrie v. Wheeler*, 6 H. & J. 94.

### § 78. Powers pending contest of will.

(a) The Orphans' Court has no authority to direct a creditor, pendente lite, to pay a sum of money to the persons named as executors in a paper purporting to be a will, to be appropriated to pay counsel employed to resist a caveat before said paper was admitted to probate.—*Townshend v. Brooke*, 9 Gill 90. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

### § 79. Powers pending appeal from appointment.

### § 80. Delegation of powers.

### § 81. Execution of provisions of will in general.

#### Cross-Reference.

See "Powers," §§ 16-44.

(a) On caveat after probate and issuance of letters testamentary, it is the executor's duty to defend the will.—*Grill v. O'Dell*, 111 Md. 64, 73 Atl. 876.

(b) A testator in Ireland appointed executors there, and declared that a certain person should be trustee of his property in America, with power and direction to collect and remit the same to his executors in Ireland. *Held*, that such person should be considered, not as trustee, but as limited executor, and bound to execute the trust in the mode prescribed by the will under which the authority is derived.—*Hunter v. Bryson*, 5 G. & J. 483.

### § 82. Instructions of court.

#### Cross-References.

Costs, see post, § 456.

Right to jury trial, see "Jury," § 19.

### § 83. Discovery and collection of assets.

#### Cross-References.

See ante, § 81.

By administrator de bonis non, see post, § 120.

Insolvent estate, see post, § 413.

Property constituting assets, see ante, §§ 38-73.

### § 84.— Authority and duty in general.

(a) Before the proof of a will in the prerogative court, a caveat was entered against its probate, and a citation issued to the executrix to prove the same. She did not appear, and administration was granted to others. This administration was afterwards revoked, and letters testamentary issued to the executrix. *Held*, that a disposition of slaves belonging to the estate by the administrators by virtue of their administration was valid, it being admitted that testator left estate enough besides to pay all his debts.—*Phippard v. Forbes*, 4 H. & McH. 481.

### § 85.— Proceedings for discovery of assets.

#### Cross-References.

By creditors, see post, § 423.

Examination on accounting, see post, § 505.

(a) Appeal from an order of the Orphans' Court allowing an administrator, in a proceeding to compel him to include his individual indebtedness in his list of debts due the estate, to amend his answer to allege that said indebtedness did not accrue within three years prior to death of intestate, and that the claim is barred by the statute, is premature; it not following that under the amended answer the court would reverse its previous action in refusing to grant an issue on the point of limitations.—*Long v. Long*, 118 Md. 198, 84 Atl. 375.

(b) A petition filed in the Orphans' Court against an administrator prayed that defendant be required to include certain claims in his list of debts as administrator and be ordered to file an answer, and that issues arising out of the petition and answer be framed and sent to the Circuit Court for trial. An answer was filed on February 24th denying the indebtedness, and nothing further was done until September 27th, when petitioner filed another petition referring to the former petition and answer, and proposing an issue of whether the administrator was indebted to the estate, and, if so, how much, and prayed that the issues be sent to the Circuit Court. On September 30th the administrator asked that the petition first filed be dismissed because under the pleadings, there was no issue, and that they showed nonindebtedness. On October 4th a replication was filed, and thereafter a motion that it be not received was granted, and the original petition was dismissed. Code 1904, art. 93, § 227, provides that, on the administrator's failure to return any claim against him, any interested person may allege the same by petition to the Orphans' Court, and the court may direct an issue to be tried in the Circuit Court, whose certificate of the verdict shall be admitted to establish or destroy the claim. *Held*, that, while the administrator was required to answer, and, technically, a replication should be filed to put in issue the answer, strict compliance with the rules of equity pleading was not necessary in the Orphans' Court, and the second petition was sufficient to form an issue without a formal replication, though petitioner should have been permitted to file the one offered.—*Long*

*v. Long*, 115 Md. 130, 80 Atl. 699, 848. (See Code 1911, art. 93, § 228.)

(c) In proceedings against an administrator to compel him to include certain claims in his list of debts as administrator, the facts alleged in the answer must be taken as true if the case is submitted on the petition and answer.—*Long v. Long*, 115 Md. 130, 80 Atl. 699, 848.

(d) Where a bill was filed against an executrix under Code 1888, art. 93, § 239, providing that the Orphans' Court shall have jurisdiction to grant relief on an appeal by one interested in an estate alleging that the executor or administrator has concealed or failed to return assets in his inventory, the fact that she set up title in herself individually as to part of the assets in question did not deprive the Orphans' Court of jurisdiction.—*Linthicum v. Polk*, 93 Md. 84, 48 Atl. 842. (See Code 1911, art. 93, § 244.) [Cited and annotated in 26 L. R. A. (N. S.) 416, on effect on debt of appointment of debtor as executor or administrator.]

(e) The fact that the answer to such a bill averred that the moneys in question came into the hands of the executrix during the lifetime of the deceased did not deprive the Orphans' Court of jurisdiction under Code 1888, art. 93, § 239, since such allegation did not excuse the executrix from accounting for such moneys.—*Linthicum v. Polk*, 93 Md. 84, 48 Atl. 842. (See Code 1911, art. 93, § 244.) [Cited and annotated, see *supra*.]

(f) Whether proceedings in the Orphans' Court are summary, under Code 1860, art. 5, § 40, or plenary, under art. 93, §§ 249, 250, is determined by the rule that whenever a petition or bill is filed, whether or not the parties are cited to appear, if in point of fact they do appear and answer, the proceedings are plenary.—*Cannon v. Crook*, 32 Md. 482. (See Code 1911, art. 5, § 61; art. 93, §§ 254, 255.)

## § 86.—Collection and protection of assets in general.

### Cross-References.

Parties to actions by executor or administrator, see post, § 438.

Personal or representative capacity, see post, § 427.

Acceptance of tender, see "Tender," § 27.

**Annotation.**

Payment to administrator as discharge of debt when will is subsequently discovered and probated.—17 L. R. A. (N. S.) 878, note.

What assets pass to the administrator de bonis non.—40 L. R. A. 33, note.

(a) An order of the Orphans' Court was not necessary to enable the executors of the assignee of a mortgage containing a power of sale to sell the land, as it was no part of his estate, and the proceeding was merely one to collect a debt.—*Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868.

(b) Under Code 1860, art. 64, § 20, which provides that, on the death of a mortgagee of lands, his interest and estate in the mortgaged premises, together with the debt secured by the mortgage, shall devolve on and vest in his executor or administrator, where power is given in a mortgage to the mortgagee, his heirs or assigns, to sell the mortgaged premises on default in the payment of the mortgage debt or the interest thereon, it is competent for the administrator of the mortgagee to execute the power.—*Harnickell v. Orndorff*, 35 Md. 341. (See Code 1911, art. 66, § 21.)

(c) A claim against defendant for money belonging to decedent, deposited by decedent in a bank, payable either to himself or to defendant, and obtained from the bank by defendant after decedent's demise, is not within Code 1860, art. 93, § 238, authorizing the Orphans' Court, in cases of "concealment" of the property of a deceased person, to direct its delivery to decedent's personal representative in a summary manner.—*Taylor v. Bruscup*, 27 Md. 219. (See Code 1911, art. 93, § 243.)

(d) It is competent for an executor, in the absence of fraud, to agree that an order by which certain claims of his testatrix had been allowed against another decedent's estate be rescinded, so that the statute of limitations could be interposed to the claim.—*Young v. Mackall*, 4 Md. 362.

(e) A testator in Ireland appointed executors there, and declared that a certain person should be trustee of his property in America, with power and direction to collect and remit the same to his executors in Ireland. *Held*, that such person should be considered, not as trustee, but as limited execu-

tor, and bound to execute the trust in the mode prescribed by the will under which the authority is derived.—*Hunter v. Bryson*, 5 G. & J. 483.

**§ 87.—Compromise or release of claims.****Cross-References.**

See ante, § 86.

Compromise with purchaser at administration sale, see post, § 368.

Powers of special administrator, see post, § 122.

Sale of note as compounding of indebtedness due estate, see post, § 367.

**Annotation.**

Compromise or release by personal representatives of claims due estate.—14 L. R. A. 414, note.

(a) The trust confided to an executor is defined by his letters testamentary, which is the commission under which he acts; and the mode in which the trust is to be performed is prescribed by statute.—*Gibbons v. Riley*, 7 Gill 82.

(b) Courts of equity require executors and administrators, whom they consider as trustees for creditors, legatees, and next of kin of the deceased, to preserve his property distinct from their own, that it may be known and readily traced. If they do so the courts will protect and assist them to the extent of their power.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate; in 15 L. R. A. 491, on necessity for administration in devolution of decedent's personality; in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

**§ 88.—Debts due from executor or administrator.****Cross-References.**

Debts due from executor or administrator as assets, see ante, § 50.

Discovery, see ante, § 85.

Evidence on accounting, see post, § 506.

Liability on administration bond, see post, § 528.

Recovery by administrator de bonis non, see post, § 120.

Sale as desperate claim, see post, § 329.

(a) Where the administrator of an estate comes into the possession of unpaid notes formerly given by him to his decedent, possession on his part of such notes does not raise the presumption of payment.—*Love v. Dilley*, 64 Md. 238, 610, 1 Atl. 59, 4 Atl. 290,

6 Atl. 168. (See *Dilley v. Love*, 61 Md. 603; *Wingert v. Gordon*, 66 Md. 106, 6 Atl. 581.)

### § 89.— Failure to collect.

#### Cross-References.

Coexecutors and coadministrators, see post, § 125.

Deprivation of compensation, see post, § 500.

Evidence on accounting, see post, § 506.

(a) Where executors who are in possession of the books and papers of their testator, and who are or should be fully acquainted with the condition of the estate, and the solvency or insolvency of the debtors thereof, report that certain debts are doubtful or desperate, the Orphans' Court has no power, in the absence of evidence sufficient to show that such debts are collectible, to pass an order charging the executors therewith.—*Wrightson v. Tydings*, 94 Md. 358, 51 Atl. 44.

(b) Where the failure of executors to collect an amount due their testator from a distributee was due to their negligence, they should be charged with the amount.—*Hoffman v. Armstrong*, 90 Md. 123, 44 Atl. 1012. [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

### § 90. Custody and management of estate.

#### § 91.— In general.

(a) Testator named his wife, N., and C. as executors, and bequeathed them all his property, in trust to pay his wife an annuity. He then directed his executors to continue his business, in which most of his personal property was invested, under some arrangement to be made with his partner, paying the annuity from the proceeds and investing the excess. After his wife's death, the property was to be divided into three parts, each of which was given to N. in trust for his three children respectively. Testator's business was not continued, no arrangement being possible between the surviving partner and the executors. Held, that the duties of the executors, as such, did not include the making of investments, but were confined to collection of the assets, payment of debts, and payment of the balance to themselves as trustees.—*State v. Cheston*, 51 Md. 352. [Cited and annotated in 16 L. R. A. (N. S.)

209, on transfer of funds or securities from one estate to another by common trustee.]

(b) Where the administrator of an executor takes out, jointly with another, letters of administration de bonis non on the estate of the testator, he does not exclusively represent both estates, and consequently there can be no transfer by operation of law of the property in his hands as administrator to him as administrator de bonis non.—*Thomas v. Wood*, 1 Md. Ch. 296.

(c) Where it appears from the inventory of an executor that he is in possession of negroes belonging to his testatrix, he is chargeable with the hire or the value of their services, in the absence of proof of an adequate excuse for not having received such hire or value.—*Wilson v. Barnett*, 9 G. & J. 158.

(d) Where it appears, by the inventory returned by an executor or administrator, that he is in possession of negro property belonging to the deceased, he is properly chargeable with their hire, or the value of their services, unless he shows an adequate excuse for not having received such hire or value.—*Wilson v. Barnett*, 9 G. & J. 158.

(e) Where, notwithstanding an order directing the sale of sufficient personal property to pay an intestate's debts, the administrator retained certain personal estate, including slaves, paying debts to the amount of their appraised value, he was accountable for the increase of the slaves and for the use, labor, and hire of those retained or hired out by him, and for the value of the slave which ran away, unless he used reasonable efforts to regain possession.—*Hall v. Griffith*, 2 H. & J. 483.

### § 92.— Performance of decedent's obligations.

#### Cross-References.

Contracts relating to personal property, see post, § 156.

Contracts relating to real property, see post, § 135.

### § 93.— Continuance of decedent's business.

#### Cross-References.

Compensation, see post, §§ 494, 495.

Evidence, see post, § 450.

Form of action, personal or representative capacity, see post, § 430.

Fraud, see post, § 119.

Individual interest of administrator, see post, § 115.

Mortgage of real estate, see post, § 151.

Questions for jury, see post, § 451.

**Annotation.**

Power of personal representative, testamentary trustee, or guardian to carry on business on behalf of estate.—40 L. R. A. (N. S.) 205, note.

Individual liability of personal representatives or testamentary trustee for carrying on business on behalf of estate.—40 L. R. A. (N. S.) 211, note.

(a) Where a testator directs his executors to carry on his business for a definite time after his death for the benefit of his estate, the executors will not be charged for any loss resulting in the course of an honest administration of the trust.—*Bennett v. Rhodes*, 58 Md. 78. [Cited and annotated in 40 L. R. A. (N. S.) 211, 213, on personal representative, testamentary trustee, or guardian carrying on business.]

**§ 94. Partnership.**

**Cross-Reference.**

Jurisdiction, see ante, § 76.

**Annotation.**

Rights of executor or administrator as to partnership real estate.—27 L. R. A. 340; 28 L. R. A. 99, 107, 136, notes.

When partnership in land continues after death of partner.—28 L. R. A. 106, note.

Respective powers of surviving partner and personal representative of deceased partner.—28 L. R. A. 136, note.

**§ 95. Contracts.**

**Cross-References.**

By coexecutors, see post, § 125.

Effect of removal of executor, see ante, § 35.

Mortgage or pledge of personalty, see post, § 169.

On sale under order of court, see post, § 364.

Repairs and improvements on real estate, see post, § 132.

Respecting incumbrances on real estate, see post, § 133.

Suing in personal or representative capacity, see post, § 427.

Application of statute of frauds to promises by executor or administrator, see "Frauds, Statute of," §§ 7-12.

Inducing fraud or breach of trust, see "Contracts," § 113.

**§ 96.— In general.**

**Annotation.**

Personal liability on contract to which words indicating representative capacity are added to signature.—42 L. R. A. (N. S.) 56, note.

(a) While an executor, acting in the faithful discharge of his duties, will receive the favor and protection of a court of equity, yet if he enters into a covenant, either for his own benefit or that of him with whom he contracts, by which he binds himself personally for the payment of a debt or legacy which, with the assets then in his hands, and in due course of administration, he was not then in a condition to pay, he must take the consequences of his own gratuitous act.—*Steuart v. Carr*, 6 Gill 430.

**§ 97.— Services.**

**Cross-References.**

Allowance of expenditures, see post, § 109.

As claim against estate, see post, § 216.

Individual interest of executor, see post, § 115.

Question for jury, see post, § 451.

Special administrator, see post, § 122.

Continuation of contract of employment made by decedent, see "Master and Servant," § 26.

(a) It is not necessary for administrators to procure an order of the Orphans' Court authorizing the employment of counsel.—*Ward v. Koenig*, 106 Md. 433, 67 Atl. 236.

(b) Where an administrator employed an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney, it was held that the compensation of such agent was not a charge upon the estate.—*Gwynn v. Dorsey*, 4 G. & J. 453.

**§ 98.— Borrowing money.**

**Cross-References.**

Claims against estate, see post, § 217.

Individual interest of executor, see post, § 115.

Mortgage of land under order of court, see post, § 321.

Power to mortgage real estate, see post, § 151.

Questions for jury, see post, § 451.

To make repairs on real estate, see post, § 132.

Loan from estate to executor by sole legatees as consideration for transfer of his individual property attacked by his creditors as fraudulent, see "Fraudulent Conveyances," § 87.

**§ 99.— Bills and notes.**

**Cross-References.**

Indorsement and transfer by executor or administrator, see post, § 170.

In respect to realty, see post, § 129.

Alteration by administrator of note payable to himself, see "Alteration of Instruments," § 11.

§ 100.—**Guaranty or suretyship.**

§ 101. **Investments.**

*Cross-References.*

Commissions, see post, § 495.

Evidence on accounting, see post, § 506.

Joint liability of coexecutors, see post, §§ 125, 126.

Liability for interest on funds not invested, see post, § 104.

Special administrators, see post, § 122.

§ 102.—**In general.**

(a) A will directed the executors to sell testator's property, and divide the residue among his sons and daughters, leaving to the executors' discretion, subject to certain provisions, as to the time and mode of closing testator's business and realizing his estate, the investing and re-investing of the moneys of the children, and directed that, when the estate should be finally settled, the children's shares should be invested in fee simple ground rents or stock in their respective names, and be managed by their guardians until their majority, the sons' shares to be given to them absolutely at their majority. *Held*, that the power given the executors to invest and reinvest refers to the period while they were settling the estate, and was not intended to apply to the children's shares after the shares were ascertained and invested as directed.—*Murphy v. Coale*, 107 Md. 198, 68 Atl. 615. [Cited and annotated in 42 L. R. A. (N. S.) 440, on divestiture of estates of persons not in being.]

(b) While executors under a power to sell real estate and invest the proceeds in safe and productive stocks or funds, have no authority to invest the proceeds in a leasehold, and would be liable for any loss arising therefrom, still, it having been bought with the funds of the estate, it would belong thereto, and could be disposed of by the executors in the same manner as any of the other personal estate.—*Seldner v. McCreery*, 75 Md. 287, 23 Atl. 641. [Cited and annotated in 38 L. R. A. (N. S.) 16, on what is a marketable title.]

(c) Act 1831, c. 315, and Code 1860, art. 93, § 237, were intended to add a further safeguard to the proper administration of personal estates, and to hold executors, administrators, and guardians to such account-

ability in case of investment or deposit that no exercise of private judgment, though made in good faith, would relieve their official responsibility.—*Bacon v. Howard*, 20 Md. 191. (See Code 1911, art. 93, § 242.) [Cited and annotated in 44 L. R. A. (N. S.) 944, on personal liability of trustee for losses; in 45 L. R. A. (N. S.) 8, on trustee's liability for loss of bank deposit.]

(d) Where money, or personal property whose use is its conversion into money, is either specifically given to one for life by a will, or is included in the bequest of a general residue, an investment thereof must be made by the executor in some safe and productive fund, so as to secure the dividends to the legatee for life, and the principal, after his death, to the legatee in remainder.—*Wootten v. Burch*, 2 Md. Ch. 190. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use.]

(e) A. devised all his real estate to his wife, and then as follows: "After her death I will the tract of land called H. together with all the personal property which may belong thereto at her death, to B. and her heirs forever. Item, I give to my wife for life, all my personal property not hereinbefore disposed of, together with all the money of which I may die possessed. After her death I give the one half part of all my said personal property to the children of C. and D. to be equally divided among them immediately, or in a convenient time after the death of my said wife. The other half shall go to and be vested in whomsoever my said wife shall by her will direct." The widow appointed B. to take under the power so given to her after her death, and a bill was filed by certain of the residuary legatees in remainder of A. against the personal representatives of A. and his wife, and B. and others of the residuary legatees for an account and distribution of A.'s personal estate among the parties entitled, and, upon the construction of the will, it was held that the limitation over to B. of all the personal property, etc., was conclusive evidence that testator did not intend that the residue should be sold and invested.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for

life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

(f) Where a surplus or residue bequeathed for life, with remainder over, consists of money or property, whose use is its conversion into money, and which could not, for that reason, be intended to be specifically enjoyed or consumed in the use—e. g. merchandise, a crop of tobacco, etc.,—an investment thereof must be made by the executor in some safe and productive fund, most properly under the direction of the orphans' court or court of equity, so as to secure the dividends to the legatee for life, and the principal, after his death, to the legatee in remainder.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated, see supra.]

### § 103.—Loss or depreciation.

(a) Where, by a will, certain moneys were devised for life, and at the death of the beneficiaries to their children, and the executor, under an order of the Orphans' Court, invests such fund, and turns over the securities to the beneficiaries for life, and the will imposes no duty on him to retain the fund, or pay the interest to the life tenant, he is not liable, either to the life tenant or the beneficiaries, thereafter, on depreciation of the securities.—*Oesterla v. Gaither*, 90 Md. 40, 44 Atl. 1035.

(b) Where testator directed that his executor should set aside some securities or assets valued at \$4,000, the income of which should be applied to the support of his grandsons during minority, and the principal paid, as previously directed, on their becoming of age, and the executor did not set aside any securities or assets, though there were securities sufficient for that purpose, but invested \$4,000 of the moneys of the estate in certain stock, which was afterwards sold at a loss under a decree of the court, the administrator with the will annexed was not entitled to recover the amount of the loss from the estate of the deceased executor; the investment having been made in good faith, and the stock selected in the reasonable and honest exercise of the executor's judgment.—*McCoy v. Horwitz*, 62 Md. 183. [Cited and annotated in 44 L. R. A. (N. S.)

935, 936, on personal liability of trustee for losses.]

### § 104. Interest on funds of estate.

#### Cross-References.

Administrator with will annexed, see post, § 121.  
Ancillary administrator, see post, § 519.  
Evidence, see post, § 506.  
Interest on indebtedness of executor or administrator to estate, see ante, § 88.  
Interest on legacies and distributive shares, see post, § 313.  
Liability of coexecutor, see post, § 125.  
Mode of charging interest in account, see post, § 478.  
Recovery on administration bond, see post, § 537.

#### Annotation.

Liability for interest of personal representative carrying on business on behalf of estate.—40 L. R. A. (N. S.) 220, note.  
Personal liability of executor or administrator to distributees for interest where settlement of estate is delayed.—31 L. R. A. (N. S.) 350, note.  
Rate of interest charged against executors, trustees, etc.—29 L. R. A. 651, note.

(a) Where the facts of the case show inexcusable delay on the part of an executor in returning the funds of the estate in his hands, and laches in failing to pass in his account and make distribution, he will be held chargeable with interest on the funds so retained after the lapse of 13 months from the date of his letters testamentary.—*Smithers v. Hooper*, 23 Md. 273. [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non; in 31 L. R. A. (N. S.) 352, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(b) An executor who fails to invest funds that he might have invested is chargeable with interest on them.—*Ing v. Baltimore Ass'n*, 21 Md. 426; *Monteith's Ex'r v. Same*, Id. [Cited and annotated in 31 L. R. A. (N. S.) 364, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(c) Where an executor retains assets to meet an unliquidated demand against his testator's estate, without the sanction of the Orphans' Court, he will be charged with interest on the sum so retained.—*Ing v. Baltimore Ass'n*, 21 Md. 426; *Monteith's Ex'r v. Same*, Id. (See Code, art. 93, § 10.) [Cited and annotated, see supra.]



(d) Where an executor or administrator suffers money of the estate to lie uselessly in his hands after 13 months from the date of his letters, he will be chargeable with interest.—*Chase v. Lockerman*, 11 G. & J. 185, 35 Am. Dec. 277. [Cited and annotated in 31 L. R. A. (N. S.) 351, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(e) After an estate had been 10 years in the hands of the executor, he was notified of a claim on the part of the United States, and upon his application to the Orphans' Court, they permitted him to retain a sum in his hands to abide the event of the suit commenced on such claim against the estate. The United States failed to recover, and, under the circumstances, it was held that the order of the Orphans' Court ought not to be regarded, like an injunction against payment, as a sufficient ground for the suspension of interest upon the sums due the distributees.—*Lyles v. Hatton*, 6 G. & J. 122. [Cited and annotated in 30 L. R. A. 122, on injunction against execution sales or other proceedings under final process; in 31 L. R. A. (N. S.) 352, 356, 358, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(f) Where an executor negligently leaves his testator's estate unsettled for 10 years, and then permits the accounts to remain before the auditor of the court of equity for several years before any statement is reported, he is justly chargeable with interest.—*Lyles v. Hatton*, 6 G. & J. 122. [Cited and annotated, see *supra*.]

(g) An administrator may be held to pay interest from the time he received money belonging to his estate, if he applied it to his own use and profit, and from the end of 13 months after the date of his letters, if he kept it by him without any apparent reason, and omitted to distribute it among the creditors.—*Gwynn v. Dorsey*, 4 G. & J. 453.

(h) Interest is not to be charged on money retained by an administrator, with the sanction of court and consent of parties, to meet future contingencies in the settlement of the estate.—*Wilson v. Wilson*, 3 G. & J. 20. [Cited and annotated in 31 L. R. A. (N. S.) 358, 360, on liability of executor or admin-

istrator to distributees for interest where settlement of estate delayed.]

## § 105. Deposits.

### Cross-References.

Compelling deposit of funds held by co-executor, see post, § 124.

Evidence on accounting, see post, § 506.

Preferred claim against insolvent bank, see "Banks and Banking," § 80.

Title to and disposition thereof, see "Banks and Banking," § 130.

### Annotation.

Liability for loss of money of estate deposited in bank.—45 L. R. A. (N. S.) 1, note.

Liability of executor or trustee for loss of funds through failure of bank.—14 L. R. A. 103; 7 L. R. A. (N. S.) 617, notes.

Liability of representative of deceased depositor of money in trust for third person.—32 L. R. A. 375, note.

(a) Whenever money received by an administrator has been deposited or invested by order of the Orphans' Court, under act 1831, c. 315, § 4, it is the duty of such court to hear suggestions from those interested, for the purpose of having the money removed, if in danger of being lost to the estate.—*Ex parte Shipley*, 4 Md. 493. (See Code, art. 93, § 242.)

(b) Where money received by the administrator has been deposited or invested by order of the Orphans' Court under act 1831, c. 315, § 4, such court may remove the funds ex officio, without any suggestion that there is danger of their being lost to the estate.—*Ex parte Shipley*, 4 Md. 493. (See Code, art. 93, § 242.)

## § 106. Loans.

### Cross-References.

Borrowing money, see ante, § 98.

By way of advancement to distributees, see post, § 301.

Defense to action on note, see post, § 432.

Liability of administrator de bonis non, see post, § 120.

(a) Though the courts are less disposed to distrust the title of an assignee when the assignment is made for money advanced at the time than when made for an antecedent debt, yet, if it appears in the transaction itself that the executor is about to misapply the money raised upon the assets of his testator, the mere circumstance that the advance of the money was contemporaneous with the assignment will not protect the lender.—*Williamson v. Morton*, 2 Md. Ch. 94.

## § 107. Gifts.

## § 108. Expenditures.

*Cross-References.*

- Advances to pay claims against estate, see post, § 266.  
 Advances to pay legacies, see post, § 301.  
 Breach of bond, see post, § 532.  
 By administrator de bonis non, see post, § 120.  
 By temporary or special administrators, see post, § 122.  
 Compensation of executor or administrator, see post, §§ 488-501.  
 Continuation of decedent's business, see ante, § 93.  
 Expenditures in connection with realty in general, see post, § 129.  
 Expenses as claims against estate, see post, § 218.  
 Expenses of account, see post, § 487.  
 Mode of credit in account, see post, §§ 479, 482.  
 On sale of property of decedent, see post, § 401.  
 Repairs and improvements of real property, see post, § 132.

## § 109.— In general.

*Cross-Reference.*

Under void appointment, see post. § 539.

*Annotation.*

Right to credit for amount paid to surety company for bond.—48 L. R. A. 591, note.

(a) Under Code 1904, art. 45, § 21, providing that nothing in the article should be construed to relieve the husband from liability for necessities of the wife, a husband, acting as administrator, is liable for a tombstone erected by him over his deceased wife.—*Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139. (See Code 1911, art. 45, § 21.) [Cited and annotated in 47 L. R. A. (N. S.) 283, on liability for necessities furnished wife living with husband.]

(b) A., acting as administrator of his wife, who was supposed to have died intestate, and supposing himself tenant for life of a house partly erected by his wife, completed the same with her money, and afterwards, on a will being discovered and B. being appointed administratrix with the will annexed, tendered the house to B. Held, that A. was entitled to be credited in his account with what the house cost.—*Sewell v. Slingsluff*, 62 Md. 592.

(c) Where a farm is, under a will, in the hands of the executor for sale, and is managed by him, and he charges himself with all the proceeds of the crops raised thereon, he

is entitled to be allowed for fertilizers used in their production.—*Bantz v. Bantz*, 52 Md. 686. [Cited and annotated in 33 L. R. A. 668, on liability of decedent's estate for funeral expenses; in 11 L. R. A. (N. S.) 880, 889, 904, on implied agreement to pay for services of relative or member of household; in 40 L. R. A. (N. S.) 215, 225, 232, on personal representative, testamentary trustee, or guardian carrying on business.]

(d) An administrator should have credit for the cost of the stamp on the administration bond.—*Edelen v. Edelen*, 11 Md. 415. [Cited and annotated in 56 L. R. A. 822, on burden of proof of husband's debt to wife for property received from her.]

(e) The cost of appraisement of two negroes who died is properly allowed an administratrix, provided there is proof of their deaths.—*Edelen v. Edelen*, 11 Md. 415. [Cited and annotated, see supra.]

(f) An executor should be allowed all necessary expenditures for the clothing and maintenance of slaves when working for the benefit of the estate, or when he is charged with their hire.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

(g) Where an administrator who, notwithstanding an order directing the sale of sufficient personal estate to pay an intestate's debts, retained certain personal estate, including slaves, and paid debts to the amount of their appraised value, in charging him for the increase of the slaves, and for their use, and for the value of such as run away, he should be allowed for money necessarily expended in clothing and maintaining such increase as were unable to work, and in bringing up the negroes so long as they remained a charge.—*Hall v. Griffith*, 2 H. & J. 483.

(h) Executors should be credited on an account with the amount of any fair judgment or decree against them.—*Scott v. Dorsey*, 1 H. & J. 227.

(i) Allowance to executors for funeral expenses are limited by law, and to be made by the Orphans' Court.—*Scott v. Dorsey*, 1 H. & J. 227.

### § 110.— Taxes.

#### Cross-References.

See post, § 129.

Tax as obligation of estate, see post, § 212.

Liability for legacy, inheritance and transfer taxes, see "Taxation," § 890.

Liability of property to taxation, see "Taxation," § 84.

### § 111.— Counsel fees and costs.

#### Cross-References.

Ancillary administrator, see post, § 519.

Assessment in proceedings for removal of administrator, see ante, § 35.

Assessment in proceedings to review order of distribution, see post, § 314.

Claims against estate, see post, § 216.

Costs in action by or against executors or administrators, see post, § 456.

Costs on accounting, see post, § 511.

Mode of giving credit in account, see post, § 485.

Allowance in action to construe will, see "Wills," § 707.

Allowance in proceedings or actions relating to probate or contest of wills, see "Wills," §§ 402-416.

#### Annotation.

Right of executor to allowance for attorneys' fees for services in attempt to establish or resist attack upon will.—26 L. R. A. (N. S.) 757, note.

(a) Under Code, art. 93, § 104, entitling an administratrix to costs in actions defended, if the court certify that there were probable grounds for defending the action, an administratrix against whom judgment absolute was rendered on a claim against the estate was not entitled to an allowance in her accounts for costs and counsel fees where the court trying her appeal did not certify that there were probable grounds for resisting the claim.—*Beachley v. Bollinger's Estate*, 119 Md. 151, 86 Atl. 135.

(b) While an executor is a proper party to a will contest, he must defend the will at his own expense, where the contest occurs before the issuance of letters.—*Pleasants v. McKenney*, 109 Md. 277, 71 Atl. 955.

(c) A caveat having been filed to a will, the executor retained counsel to defend it. Verdict was rendered for the caveatees, and on an appeal the rulings were affirmed, and judgment in the Orphans' Court was entered accordingly. Thereafter a petition was filed in the Orphans' Court for new issues to be sent to a court of law for trial. The issues were refused, and on appeal it was held that the issues were substantially the same as on

the prior appeal, and the order refusing them was affirmed. Letters, however, were not granted until after the second appeal was decided. *Held*, that for the purpose of defending the will its admission to probate without the grant of letters was sufficient, and hence the executor was entitled to an allowance for counsel fees in the litigation growing out of the second set of issues prayed by the caveators.—*Decker v. Fahrenholtz*, 107 Md. 515, 68 Atl. 1048, 72 Atl. 339. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(d) The fact that an administrator employed three attorneys to represent the estate in a certain matter did not warrant an allowance against the estate of greater compensation than would have been proper in case of the employment of one attorney.—*Ward v. Koenig*, 106 Md. 433, 67 Atl. 236.

(e) Where counsel are employed by administrators and render services, the administrators are entitled to be allowed reasonable counsel fees paid or to be paid, though the services proved unsuccessful, where there was reasonable ground for employing counsel.—*Ward v. Koenig*, 106 Md. 433, 67 Atl. 236.

(f) Where a caveat is filed before a will has been admitted to probate, and the services of counsel are rendered to parties interested as heirs, distributees, or devisees, the Orphans' Court has no jurisdiction to allow compensation for such services out of the estate.—*Koenig v. Ward*, 104 Md. 564, 65 Atl. 345.

(g) Where a deputy register of wills took the affidavit of the subscribing witness to the will, but nothing more was done in the matter, and no order adjudging the writing to be the last will of the testatrix was ever filed, and no letters testamentary were ever granted, and after the affidavits had been taken a caveat was interposed, the residuary legatee, who was also named as executrix, and who was made defendant in caveat proceedings, was not defending the will in her capacity as executrix, and had no claim to be reimbursed out of the estate for the attorney's fee she may have contracted.—

*Tilghman v. France*, 99 Md. 611, 59 Atl. 277. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(h) It being the duty of an executor, after the probate of a will, to defend the will when assailed, he will be allowed reasonable counsel fees to compensate the attorneys whom he may employ for that purpose.—*Tilghman v. France*, 99 Md. 611, 59 Atl. 277. [Cited and annotated, see supra.]

(i) Letters of administration were granted appellant on the personal estate of his brother, supposed to have died intestate. In his own interest as distributee, though in good faith, he unsuccessfully resisted a will executed and offered for probate in another state, and his claim for expenses incurred thereby was, upon revocation of his authority, disallowed, as not incurred to recover or secure part of the estate, as provided for in Code 1860, art. 93, § 5, cl. 5, and the bona fides of prosecuting such action not having been certified to as provided in § 105, same article. Held, that the claim was properly disallowed.—*Dalrymple v. Gamble*, 68 Md. 156, 11 Atl. 718. (See Code 1911, art. 93, §§ 5, 104. [Cited and annotated in 14 L. R. A. 103, on liability of executor or trustee for loss of funds by failure of bank.]

(j) No allowance will be made to an executor for counsel fees paid and costs incurred in carrying on a controversy in the Orphans' Court growing out of the first administration account, and in an attempt to maintain his claims against the estate, in which he was unsuccessful.—*Billingslea v. Henry*, 20 Md. 282.

(k) A widow who, by an ante-nuptial agreement, had relinquished her rights to her husband's estate by virtue of her marriage, having obtained letters of administration upon it, cannot charge costs, expenses, and counsel fees incurred in opposing the probate of a paper alleged to have been the will of the deceased.—*Edelen v. Edelen*, 11 Md. 415. [Cited and annotated in 56 L. R. A. 822, on burden of proof of husband's debt to wife for property received from her.]

(l) All ordinary and necessary costs incurred by a widow who, by antenuptial

agreement, had relinquished her rights to her husband's estate in virtue of her marriage, in administering upon his estate, will be allowed against the estate.—*Edelen v. Edelen*, 11 Md. 415. [Cited and annotated, see supra.]

(m) Where, on the trial of issues framed upon a caveat to a will, a verdict was rendered setting aside the will and imputing fraud to the executors in its procurement, on the settlement of the executors' account they were, nevertheless, entitled to counsel fees and costs incurred in resisting the caveat to the will.—*Glass v. Ramsay*, 9 Gill 456. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(n) An administrator is entitled to be allowed out of the estate money paid as counsel fees in establishing his controverted right to administer.—*Ex parte Young*, 8 Gill 285.

(o) After probate of a will and grant of letters testamentary, it is the duty of executors to appear and defend a caveat to the will under which they are acting, and make all necessary preparations for its trial upon its merits; and they are entitled to an allowance for the expenses incurred by them for counsel fees therefor.—*Compton v. Barnes*, 4 Gill 55, 45 Am. Dec. 115. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(p) Executors' employment of counsel to defend a contest of a will under which they are acting is incidental to their duty, and a necessary expense.—*Compton v. Barnes*, 4 Gill 55, 45 Am. Dec. 115. [Cited and annotated, see supra.]

## § 112. Submission to arbitration.

*Cross-Reference.*

Allowance of claims, see post, § 246.

## § 113. Confession of judgment.

## § 114. Estoppel.

*Cross-References.*

See post, § 328; "Wills," § 59.

Effect of inventory, see ante, § 72.

Sale of land, see post, § 149.

Validity of sale, see post, § 377.

By acts of decedent, see "Estoppel," § 98.

By assumption of authority, see "Estoppel," § 64.

### § 115. Individual interest in transactions.

#### Cross-References.

- See post, § 398; "Adverse Possession," § 61.  
 Administrator as guardian for minor heir in proceedings for sale of real estate, see post, § 335.  
 Defense against action by administrator, see post, § 432.  
 Expenditures for costs of litigation, see ante, § 111.  
 Interest on funds of estate, see ante, § 104.  
 Property acquired by executor or administrator from legatees, distributees, or third persons, see post, § 172.  
 Property acquired by executor or administrator in general, see post, § 152.  
 Purchase at sale under order of court, see post, § 365.  
 Purchase by administrator of insolvent estate, see post, § 413.  
 Purchase by executor or administrator at his own sale, see post, §§ 144, 163.  
 Purchase of claims against estate, see post, § 220.  
 Purchase of distributive share, see post, § 303.  
 Creation of constructive trust, see "Trusts," § 102.  
 Purchase from heirs, see "Descent and Distribution," § 84.

(a) Where an executor assigned a mortgage belonging to the estate to third persons to secure a debt due to the latter from the firm of which he was a member, they acquired no title to the mortgage; the fact that the assignment was to secure the firm's debt being sufficient notice that the executor was about to apply the money received in the transaction to his own private use.—*Miller v. Williamson*, 5 Md. 219.

(b) In equity an executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of, his own debts, because the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty.—*Williamson v. Morton*, 2 Md. Ch. 94.

(c) An executor is not allowed to purchase or speculate in the property of the testator for his own benefit.—*Scott v. Burch*, 6 H. & J. 67.

### § 116. Fraud.

#### Cross-References.

- Actions for deceit, see post, § 119.  
 Ground for removal, see ante, § 35.  
 Collusion as giving right of action to heirs, see "Descent and Distribution," § 91.

### § 117. Waste, conversion, or embezzlement of assets.

#### Cross-References.

- See ante, § 115.  
 Action against foreign executrix, see post, § 525.  
 By administrator with will annexed, see post, § 120.  
 Deprivation of compensation, see post, § 500.  
 Ground for removal, see ante, § 35.  
 Grounds for charging executor or administrator with interest, see ante, § 104.  
 Insolvent estate, see post, § 413.  
 Joint liability of coexecutors or coadministrators, see post, § 123.  
 Jurisdiction of action, see post, § 435.  
 Power of representative of deceased executor, see post, § 128.  
 Remedy, see post, § 429.  
 Criminal responsibility, see "Embezzlement," §§ 2, 18, 26, 39, 44.  
 Liability of heirs in respect to real estate inherited by them, see "Descent and Distribution," § 125.

(a) Testator directed that \$1,200 be invested in a first mortgage by his executors, and the interest paid to his widow during her life, and at her death the principal to go to his heirs. The executors invested \$1,100 of it in a mortgage, which they took in their own names as individuals, one-half to each; and the attorney who drew it up testified that they said nothing about making the loan as executors. Before maturity of the mortgage they assigned it as collateral for their own debt, and afterwards, the mortgagor becoming insolvent, they bought the equity of redemption, and took a deed in their own names. The land afterwards sold for less than the mortgage. *Held*, that, having used the legacy for their own benefit, the executors are liable to account for it, and cannot turn into the estate the proceeds of the property.—*Miller v. Miller*, 73 Md. 442, 21 Atl. 821.

(b) Failing to keep the funds of the estate earmarked and separate from his own does not constitute wasting of the assets of an estate by an executor. He will not be held to have wasted the assets if he has in hand, or under his immediate control, a sufficient sum to meet all his liabilities as executor.—*State v. Cheston*, 51 Md. 352. [Cited and annotated in 16 L. R. A. (N. S.) 209, on transfer of funds or securities from one estate to another by common trustee.]

(c) The only remedy against an adminis-

trator or his representatives for any waste or misapplication of the effects of the deceased is by an action at law upon his administration bond by any one interested.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate; in 15 L. R. A. 491, on necessity for administration in devolution of decedent's personality; in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

### § 118. Loss of assets.

#### Cross-References.

See post, § 480.  
Coexecutors and coadministrators, see post, § 123.  
Continuation of decedent's business, see ante, § 93.  
Deprivation of compensation, see post, § 500.  
Failure of bank, see ante, § 105.  
Failure to collect assets, see ante, § 89.  
Investments, see ante, § 103.  
Payments on mortgage, see post, § 133.

(a) Where an administratrix delays selling stock which she was by the will directed to sell, there having been a suit begun against her immediately after accepting the trust, the stock seeming safe, and legatees, able and interested to enforce a sale, neglecting to do so, she is not liable for a depreciation in value of the stock, as a devastavit.—*Dugan v. Hollins*, 11 Md. 41. [Cited and annotated in 4 L. R. A. (N. S.) 923, on order of abatement to pay debts, as between demonstrative and specific legacies.]

### § 119. Torts.

#### Cross-References.

See "Animals," § 33; "Master and Servant," § 88.  
Form of action, individual or representative capacity, see post, § 430.  
Form of judgment, see post, § 453.  
Liability of special administrators, see post, § 122.  
Injuries by vicious dog, see "Animals," § 72.

#### Annotation.

Liability of executor or administrator for personal injury resulting from negligence in care or management of property of estate.—38 L. R. A. (N. S.) 379, note.

In what capacity may an executor or administrator be sued for his personal tort.—51 L. R. A. 261, note.

(a) Redress for an invasion by an executor of a devisee's possessory right to crops grow-

ing on the devised land, under a claim by such executor that he is, as executor, entitled to possession thereof, must be sought in a tribunal other than the Orphans' Court in the same manner as if the injury had been perpetrated by a private individual.—*Spencer v. Ragan*, 9 Gill 480.

### § 120. Administrators de bonis non.

#### Cross-References.

See post, § 138.  
Accounting, see post, § 464.  
Action on bond of predecessor, see post, § 537.  
Conclusiveness of settlements, see post, § 513.  
Conveyance of land sold by predecessor, see post, § 394.  
Duty to pay debts, see post, § 258.  
Power to present claim against estate of other decedent, see post, § 228.  
Recovery of payments made by predecessor, see post, § 287.  
Rights of action, see post, § 426.  
Right to object to account of predecessor, see post, § 504.  
As party to proceedings to enforce mechanic's lien, see "Mechanics' Liens," § 263.

#### Annotation.

Right of continuing or surviving executor or administrator against former co-executor or coadministrator or latter's representatives.—47 L. R. A. (N. S.) 995, note.

(a) The administrator de bonis non cum testamento annexo is intrusted only with the administration of property which remains in specie, and has not already been administered.—*Sydnor v. Graves*, 119 Md. 321, 86 Atl. 341.

(b) A bank account was, after the depositor's death, continued in his name by his administrator, who occasionally made deposits thereon of money derived from the estate. Held, in an action by the administrators of such administrator against the administrator d. b. n. of his intestate, to recover the balance standing to the credit of such account at the administrator's death, that if such balance was a part of the assets of the estate of the original decedent, and his deceased administrator did not distribute the same nor finally settle the estate, then it was an unadministered asset of the original decedent, and plaintiff could not recover.—*Getty v. Long*, 82 Md. 643, 33 Atl. 639. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(c) A testator appointed his wife his executrix, and bequeathed to her a life interest in his estate, with power to convey and lease the same, and directed the manner in which she should invest the proceeds, the remainder to go to their children and grandchildren. The executrix filed an inventory of the personal property, but failed to include therein certain lands subject to a yearly rent of one cent, believing them to be in fee. Afterwards, thinking she had power to do so under the will, she obtained an order from the Circuit Court, and conveyed the lands in fee to another, who divided them into lots and leased them, and conveyed the ground rents therein back to her, and the Circuit Court ratified the transaction. *Held*, that the failure of the executrix to file an inventory of such property gave the Orphans' Court no power to issue an order to administrators de bonis non with the will annexed, appointed after the death of the executrix, to sell the ground rents, since they were not a part of the original estate, and the Circuit Court, as a court of equity, had jurisdiction of the subject-matter.—*Myers v. Forbes*, 74 Md. 355, 22 Atl. 410.

(d) Code 1888, art. 93, § 72 (Rev. Code 1878, art. 50, § 109), provides that the administrator of a deceased administrator shall, on order of the court, turn over to the administrator de bonis non all the bonds, notes, and accounts the deceased administrator may have taken, received, or had, as such, at the time of his death. *Held*, that where an executrix, who is also residuary legatee, pays the legacies, practically all the debts, and converts a portion of the estate to her own use, the estate is so far administered by her as that an administrator de bonis non of the testator is entitled to receive from her executor only such of the estate as she had not collected or appropriated at her death.—*Baker v. Bowie*, 74 Md. 467, 22 Atl. 133. (See Code 1911, art. 93, § 72.)

(e) An administrator de bonis non cannot maintain an action for the recovery of money in the hands of a former executor of the estate without first obtaining from the Orphans' Court an order for payment to him.—*State v. Hart*, 57 Md. 234. [Cited and annotated in 40 L. R. A. 45, on assets pass-

ing to administrator de bonis non.] *State v. Robinson*, 57 Md. 486. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(f) Money remaining in the hands of an administrator in that character at the time of his death is subject to an order of court to pay over to the administrator de bonis non, notwithstanding any action against the sureties on the bond of the first administrator may have become barred by the statute of limitations.—*Donaldson v. Raborg*, 26 Md. 312.

(g) Where an executor sells the testator's real estate as directed by will, but takes no steps to distribute the fund in his hands for a period of five years, at which time he dies, leaving the estate still undistributed, the interest due on the funds thus unlawfully retained in the hands of the executor comes properly into the hands of the administrator de bonis non.—*Smithers v. Hooper*, 23 Md. 273. [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non; in 31 L. R. A. (N. S.) 352, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(h) Act 1820, c. 174, § 3, modifies act 1798, c. 101, subc. 14, § 2, so far as to make the money in the hands of a deceased administrator or executor the subject of an order to pay over to the administrator de bonis non, unless it has been retained by the order of the Orphans' Court.—*Lemmon v. Hall*, 20 Md. 168. (See Code, art. 93, §§ 70-72.) [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(i) An administrator who employed an attorney to collect demands due the intestate having died after the attorney had put the demands in suit, the administrator de bonis non may change his attorney; but the commissions must be equally divided between the attorney first employed and the one who collects the money.—*In re Young's Estate*, 3 Md. Ch. 461.

(j) An administrator de bonis non is entitled only to the assets of the testator or intestate which remain in specie, unadministered by the executor or administrator in

chief.—*Neale v. Hagthorp*, 3 Bland 551. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

(k) Act 1820, c. 174, authorizing the court to pass an order for the delivery over to the administrator de bonis non of property, etc., impliedly clothes that court with authority to inquire as a preliminary to such order into the fact whether the property is unadministered or not, and, until an order directing the delivery of a bill payable to W. administrator of R. over to the administrator de bonis non of R., is made, the title to the bill remains in the executor or administrator of W.—*West v. Chappell*, 5 Gill 228. (See Code, art. 93, §§ 70-75.) [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non.]

(l) The administrator de bonis non of R. has no right to a single bill payable to W. administrator of R. until the Orphans' Court, under act 1820, c. 174, § 3, on application has directed the administrator of W. to deliver such bill to him.—*West v. Chappell*, 5 Gill 228. (See Code, art. 93, §§ 70-72.) [Cited and annotated, see supra.]

(m) Where the fund represented by a bill payable to W., administrator of R., has been administered, it will be unjust to the obligee's estate to order it to be delivered up to the administrator de bonis non of R.—*West v. Chappell*, 5 Gill 228. [Cited and annotated, see supra.]

(n) Under act 1798, c. 101, and act 1820, c. 161, conferring jurisdiction on Orphans' Courts to compel the delivery of property by the representative of the executor or administrator to an administrator d. b. n. of the first deceased, such courts can compel the representative of an executor to deliver over only such property as remained in his hands as executor, but cannot compel the delivery of the estimated value of such property.—*Gardner v. Simmes*, 1 Gill 425. (See Code, art. 93, §§ 70-75.) [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(o) It is the duty of an administrator de bonis non appointed by the proper authority to take possession of the effects of the testator existing, specifically to return an in-

ventory thereof to the Orphans' Court, and distribute the same among the persons entitled thereto, according to their respective rights; and no tribunal can rightfully interfere with the just, legal, safe, and diligent exercise of this lawful authority and duty.—*Alexander v. Stewart*, 8 G. & J. 226. [Cited and annotated in 15 L. R. A. 492, on necessity for administration in devolution of decedent's personality; in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(p) An administrator de bonis non cannot disturb the title of a purchaser, or claim the specific property acquired, under an agreement with his predecessor in the administration which it was competent for such predecessor to make. The remedy of all interested for any loss or injury by such agreement is against the first administrator.—*Hagthorp v. Neale*, 7 G. & J. 13.

(q) An administrator de bonis non cannot sue for anything but the chattels real and personal property of his intestate which remain undisposed of by previous administrators, or which have been and continue to be held unaccounted for by any one as trustee or agent of his intestate.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate; in 15 L. R. A. 491, on necessity for administration in devolution of decedent's personality; in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

## § 121. Administrators with will annexed.

### Cross-References.

See post, § 138.

Administrator de bonis non with will annexed, see ante, § 120.

Evidence in action to recover assets, see post, § 172.

### Annotation.

Right to carry on business under testamentary power.—40 L. R. A. (N. S.) 208, note.

Will special power, other than power of sale, conferred on executor by will, pass to an administrator with the will annexed.—29 L. R. A. (N. S.) 264, note.

## § 122. Temporary or special administrators.

### Cross-References.

Accounting, see post, §§ 461, 504.



Actions, see post, § 420.

Compensation, see post, §§ 488, 494.

Conclusiveness of account, see post, § 513.  
Proceedings for payment of claims, see post, § 283.

Contempt of court, see "Contempt," § 72.

(a) An administrator appointed under Code 1888, art. 93, § 68, pending a will contest, may discharge the debts of the decedent, though without power to distribute the residue.—*Baldwin v. Mitchell*, 86 Md. 379, 38 Atl. 775. (See Code 1911, art. 93, § 68.)

(b) The administrator pendente lite of a deceased lunatic is entitled to the possession of the personal estate of the intestate, and may receive the same from the receiver in chancery appointed during the intestate's life-time.—*Cain v. Warford*, 7 Md. 282.

(c) The powers of an administrator pendente lite are coextensive with those of a general administrator, except as to the authority of selling goods. He is entitled and bound to collect the effects of the deceased, to sue for debts due the deceased, and to bring ejectment for leasehold estate, even against the heir or next of kin.—*In re Colvin*, 3 Md. Ch. 278.

### § 123. Coexecutors and coadministrators.

#### Cross-References.

Actions against foreign coexecutors, see post, § 525.

Appeal from allowance of claim, see post, § 256.

Compensation, see post, § 498.

Conclusiveness of settlements, see post, § 513.

Disqualification of coexecutors, see ante, § 34.

Duty to account, see post, § 463.

Estoppel, see ante, § 114.

Form of account, see post, § 502.

Grounds for removal, see ante, § 35.

Joinder on appeal, see post, § 455.

Liability on administration bond, see post, § 527.

Objections to account, see post, § 504.

Rights of action between coexecutors and coadministrators, see post, § 424.

Service of process, see post, § 441.

Services of separate counsel, see ante, § 111.

Service of summons in proceedings for allowance of claim, see post, § 236.

Joinder of causes of action on refunding bond, see "Action," § 50.

Revocation by coexecutor of proxy given by one of several executors, see "Corporations," § 198.

### § 124.— Joint or several authority.

(a) Coexecutors are regarded in law as an

individual person, and the acts of one in the administration of the effects are the acts of all, and the possession of one the possession of all.—*Crothers v. Crothers*, 121 Md. 114, 88 Atl. 114. (For second appeal see *Same v. Same*, 123 Md. 603, 91 Atl. 691.)

(b) In an action of debt on a bond given to several executors, a plea that one of them released the debt sued on is a bar to the action, since, where there are more than one executor, any one of them may raise money on decedent's property, or give a release of a debt due to the estate.—*Mitchell v. Williamson*, 6 Md. 210. [Cited and annotated in 25 L. R. A. (N. S.) 139, on failure to present claim against estate of deceased or bankrupt principal, as releasing surety.]

### § 125.— Joint or several liability.

#### Annotation.

Liability of executor not participating in management of business for debts contracted by coexecutor in carrying on business in behalf of estate.—40 L. R. A. (N. S.) 215, note.

Liability of coexecutor for default of one permitted to manage estate.—11 L. R. A. (N. S.) 296, note.

(a) An administrator cannot maintain a bill in equity against his coadministrator to compel the latter to account for and pay over money alleged to be due from him to the estate.—*Whiting v. Whiting*, 64 Md. 157, 20 Atl. 1030. (See *Beall v. Hilliary*, 1 Md. 186.) [Cited and annotated in 11 L. R. A. (N. S.) 347, on coexecutor's liability for default of one permitted to manage estate.]

### § 126.— Acting executor or administrator.

### § 127.— Surviving executor or administrator.

#### Cross-Reference.

Accounting, see post, § 471.

### § 128. Representatives of deceased executors or administrators.

#### Cross-Reference.

Duty to account, see post, § 464.

(a) Where an executor dies without making a full distribution and delivery of the assets of the estate, his executor is not competent to interfere with such assets, and an administrator de bonis non must be appointed.—*Lawson v. Burgee*, 121 Md. 203, 88 Atl. 121.

(b) An administrator of A., the latter having been at his death executor of B., improperly blended the two estates. The parties interested in B.'s estate, however, authorized in writing the administrator to sell the personal property of B., and afterwards, by their counsel, consented to a distribution of the proceeds. *Held*, that they thereby waived all objection to the proceedings of the administrator.—*Brown v. Rowles*, 21 Md. 11. [Cited and annotated in 28 L. R. A. (N. S.) 842, on relief from mistake of law as to effect of instrument.]

(c) A., as administrator of B., took possession of various articles of personal property left by him, part of which he held as executor of C., and sold them. Afterwards letters of administration de bonis non upon C.'s estate were granted to D., who brought trover against A. for the part of the property which had originally belonged to C. *Held*, that, though D. was present at such sale and purchased some of the property, he was not thereby precluded, as such administrator, from recovering from A. for conversion.—*Glenn v. Smith*, 2 G. & J. 493, 20 Am. Dec. 452.

(d) Where the owner of a negro died testate, appointing four executors, and one of them died, appointing defendant his executor, and the negro was in defendant's possession, such possession, being that of one of the executors of the owner's estate, was the possession of all, and hence replevin could not be maintained against him for its possession.—*Montgomery v. Black*, 4 H. & McH. 391. [Cited and annotated in 47 L. R. A. (N. S.) 997, on right of continuing or surviving against former coexecutor or co-administrator or latter's representatives.]

## (B) REAL PROPERTY AND INTERESTS THEREIN.

### Cross-References.

Disbursements for benefit of real property, as credit in account, see post, § 483.

Duty to account, see post, § 465.

Liabilities on administration bond, see post, § 528.

Property available for payment of debts, see post, § 272.

Special administrators, see ante, § 122.

Consent to construction of street railroad, see "Street Railroads," § 26.

Enforcement of municipal taxes, see "Municipal Corporations," § 978.

Protest against public improvement, see "Municipal Corporations," § 297.

Right of executor to proceed for appointment of new trustee under trust deed, see "Mortgages," § 342.

Right of executor to take property at appraised value in partition proceedings, see "Partition," § 98.

Rights of action by devisees, see "Wills," § 747.

Rights of devisee as against executor, see "Wills," § 726.

Right to maintain action for partition, see "Partition," § 32.

Signature of executor to petition for municipal improvements, see "Municipal Corporations," § 292.

Statute taking away power in regard to real estate as impairing vested rights, see "Constitutional Law," § 106.

Subject and title of act relating to care and management of estate, see "Statutes," § 115.

## § 129. Title and authority in general.

### Cross-Reference.

Right to appeal from decree affecting realty, see post, § 455.

(a) Executors may sue for injuries done to real estate in the life of the testator.—*Lake Roland El. Ry. Co. v. Frick*, 86 Md. 259, 37 Atl. 650.

## § 130. Possession and use.

### Cross-Reference.

Administrator with will annexed, see ante, § 121.

(a) Where a will devised a life estate to testator's widow, with remainder to his children, executors cannot maintain ejectment, though the will gives them the power to sell such portions of testator's land as they may think advantageous to dispose of, and to execute papers giving title.—*Fredericks v. Cisco*, 72 Md. 393, 20 Atl. 190.

(b) Where an executor assents to a bequest of an estate and gives up possession, he cannot support ejectment for such estate, although he continues to live with the legatee on such estate after such assent.—*Cole v. Cole*, 1 H. & J. 572.

## § 131. Rents and profits.

### Cross-References.

Insolvency of estate, see post, § 413.

Powers of court, see ante, § 76.

Rents and profits as assets, see ante, § 41.

Rents and profits as charge in account, see post, § 477.

Rights of widow in occupancy under quarantine, see post, § 175.

Special administrator, see ante, § 122.

**Annotation.**

Rights to rents on lease of intestate's property.—40 L. R. A. 321, note.

(a) The personal representative of a decedent has no title to the rents and profits of his real estate accrued since his death.—*Getzandaffer v. Caylor*, 38 Md. 280. [Cited and annotated in 40 L. R. A. 329, on rights to rents on lease of intestate's property.]

(b) Though, ordinarily, the debts of an estate are payable by executors only, where a will devised to testator's son a certain quarry, and provided that the rents arising from the quarry should be applied to discharge the incumbrance of the same, the son was entitled to the rents, in order to make the application to the debt, and they did not go to the executors.—*Emery v. Cwings*, 6 Gill 191.

(c) An administratrix of her husband's estate engaged in trade and became indebted, and mortgaged real property of the estate to an indorser of her own notes, the proceeds of which she paid on her deceased husband's debts, and then applied for relief under the insolvent laws. Held, on injunction against her collection of the rents of such real property, that, the husband's estate not having been distributed, she still held the property in her character as administratrix, and was bound to account for the rent in that capacity.—*Schwenniski v. Glenn*, 4 Gill 23.

(d) Under a mere naked power to sell, the executors have no title to the rents and profits.—*Guyer v. Maynard*, 6 G. & J. 420.

**§ 132. Repairs and improvements.****Cross-References.**

See ante, § 129.

Determination of questions on accounting, see post, § 504.

Contracts affecting right to mechanics' liens, see "Mechanics' Liens," §§ 70, 76, 77.

(a) A., acting as administrator of his wife, who was supposed to have died intestate, and supposing himself tenant for life of a house partly erected by his wife, completed the same with her money, and afterwards, on a will being discovered and B. being appointed administratrix with the will annexed, tendered the house to B. Held, that A. was entitled to be credited in his account

with what the house cost.—*Sewell v. Slingluff*, 62 Md. 592.

**§ 133. Mortgaged and incumbered property.****Cross-References.**

Insolvent estate, see post, § 413.

Sale under order of court, see post, § 329.

Payment by executrix with her own money of mortgage on property in which she is interested as gift, see "Gifts," § 5.

Rights of devisees, see "Wills," § 840.

**§ 134. Leaseholds of decedent.**

(a) An executrix of a will cannot support ejectment for the recovery of a leasehold of property bequeathed by will to the defendant if she assented to such bequest.—*Cole v. Cole*, 1 H. & J. 572.

**§ 135. Contracts of decedent.****Cross-References.**

Contract in favor of personal representative, see post, § 219.

Submission of matters to arbitration, see ante, § 112.

Remedy by specific performance in general, see "Specific Performance," §§ 24, 131.

State land certificate, see "Public Lands," § 178.

**§ 136. Sale.****Cross-References.**

Foreign and ancillary administration, see post, § 519.

Grounds for removal of executor or administrator, see ante, § 35.

Loss resulting from failure to make sale, see ante, § 118.

Sales under order of court, see post, §§ 319-407.

Estoppel to attack sale by acceptance of proceeds, see "Estoppel," § 92.

**§ 137.— Authority and duty in general.****Cross-Reference.**

Administrator with will annexed, see ante, § 121.

(a) An administrator of the estate of an attorney to whom a mortgage was assigned, for the purpose of foreclosure, cannot exercise a power of sale conferred by the mortgage.—*Taylor v. Carroll*, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479.

(b) Where an executor, authorized by his testator's will to sell lands, sold them in 1814, and put the purchaser in possession, but obtained no security for the purchase money, and made no effort to enforce payment thereof until 1819, it was held prima facie evidence of gross negligence, and sufficient,

unless satisfactorily accounted for by the executor, to make him liable as a trustee for the proceeds of the land from the time of sale, deducting reasonable expenses and commissions; and it was not a sufficient excuse for this neglect that the purchaser required a deed from the executor before making the payment, which the latter could not give without authority from the Court of Chancery, when he neglected to apply to that court for four years after he was informed that a deed would be required, unless there were circumstances to justify such delay, which he is then bound to show.—*Hurt v. Fisher*, 1 H. & G. 88.

(c) Where two executors were authorized by a will to sell and convey lands, it was held that they could not convey to a person to enable him to bring an ejectment for the lands, and after recovery to reconvey the same to the grantors, and deliver possession thereof.—*Carroll v. Andrew*, 4 H. & McH. 485.

### § 138.—Power under will.

#### Cross-References.

- Administrators de bonis non, see ante, § 120.
- Administrator with will annexed, see ante, § 121.
- Coexecutors, see ante, §§ 123, 124.
- Conveyance as security, see post, § 151.
- Conveyance, see post, § 145.
- Effect as to power of court to order sale, see post, § 327.
- Liability of sureties on general administration bond, see post, § 528.
- Powers before appointment as executor, see ante, § 77.
- Surviving executor, see ante, § 127.
- What law governs, see ante, § 2.
- As importing trust, see "Wills," § 672.
- Guardian of devisee, see "Powers," § 30.
- Power of sale coupled with trust, see "Wills," § 672.
- Sufficiency of memorandum to satisfy statute of frauds, see "Frauds, Statute of," § 106.
- Working equitable conversion, see "Conversion," §§ 15-19.

#### Annotation.

Implied power of executor or trustee to sell real property.—32 L. R. A. (N. S.) 676, note.

(a) Under Code 1904, art. 93, §§ 36, 341, declaring that all acts done by any executor "according to law," before any revocation of his letters, shall be valid, and providing that, on the court deciding against the probate of a will, the letters testamentary shall be re-

voked, and the power of the party under the letters shall cease, the power of an executor continues, notwithstanding the actual filing of a caveat to revoke the probate of the will, and a sale by an executor under a power in the will, made before the filing of the caveat, though not ratified until thereafter, is valid; such being an "act done according to law."—*Pacy v. Safe Deposit & Trust Co.*, 113 Md. 315, 77 Atl. 1114; *Same v. Cosgrove's Ex'r*, Id. (See Code 1911, art. 93, §§ 36, 348.) [Cited and annotated in 43 L. R. A. (N. S.) 635, on validity of act done under letters testamentary or of administration afterward revoked or held invalid.]

(b) Where a will directed the sale of all testator's property for the benefit of the widow, but nominated no executor to make the sale, there was no implied power of sale in any one, and the only way a sale could have been legally authorized was by application to a court of equity.—*Baumeister v. Silver*, 98 Md. 418, 56 Atl. 825.

(c) Where a testator devised real estate to his wife for life, and then to be sold by his executor, the failure of the executor to give counter security after administering the personalty was a refusal or declination to act further.—*Wright v. Williams*, 93 Md. 66, 48 Atl. 397.

(d) Testatrix devised to her son in trust a certain farm, to be held for seven years for the use of her children, providing, however, that the farm might be sold at any time within such period if a majority of the children should elect. Held, that the executor had no power of sale over such real estate at the request of a majority of the children, but they alone could exercise control over the transfer of the title.—*Porterfield v. Porterfield*, 85 Md. 663, 37 Atl. 358.

(e) If the will directs the executor to sell the real estate left by the testator, he may sell without procuring an order of sale from the probate court.—*Brooks v. Bergner*, 83 Md. 352, 35 Atl. 98.

(f) A testator has power to require a power of sale to be exercised jointly by the executors and trustees, and such intention must be given full force and effect.—*Poole v. Anderson*, 80 Md. 454, 31 Atl. 207. [Cited and annotated in 50 L. R. A. (N. S.) 623, as to

whether less than all the donees or grantees named may exercise power of sale.]

(g) An administrator c. t. a. succeeds to the power conferred on an executor who refuses to act under a will conferring power to sell any portion of the estate on such terms as may be deemed proper, under Code 1888, art. 93, § 283.—*Bay v. Posner*, 78 Md. 42, 26 Atl. 1084. (See Code 1911, art. 93, § 291.) [Cited and annotated in 50 L. R. A. (N. S.) 613, as to who, aside from person expressly named, may exercise power of sale of realty.]

(h) There being a code provision that executors directed by will to sell real estate shall report their sale to the Orphans' Court for ratification, the question of whether the will confers the power to make the sale may be there passed on, and it is not necessary for the executor to administer his trust in a court of equity.—*Ogle v. Reynolds*, 75 Md. 145, 23 Atl. 137. (See Code 1911, art. 93, § 285.)

(i) Where a fund is bequeathed to executors and trustees, to be paid over to such Presbyterian institution in a city as they may determine, for charitable or religious purposes, the power to select is personal to the trustees named, and, in the absence of express words, will not, on their death without selecting, pass to one who is appointed administrator d. b. n. c. t. a.—*Gambell v. Trippe*, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235. [Cited and annotated in 12 L. R. A. (N. S.) 1183, on validity of legacy for such charitable purposes as executor or trustee may select; in 14 L. R. A. (N. S.) 125, 134, on enforcement of general bequest for charity or religion.]

(j) Testator devised his property in trust, and gave the trustees full discretion and authority to lease, sell or dispose of any and all the property "as in their judgment may be deemed for the best interests of the trust estate." The will further provided that the discretion and authority so given should be exercised by the survivor of the trustees, "and the heirs, executors, and administrators of the survivor." Held, that the power so conferred was annexed to the office of trustee, to be exercised by any one who might be appointed in the place of the origi-

nal trustees.—*Safe Deposit & Trust Co. v. Sutro*, 75 Md. 361, 23 Atl. 732. [Cited and annotated in 50 L. R. A. (N. S.) 644, as to when power of sale deemed annexed to office, or given *ratione officii*; in 50 L. R. A. (N. S.) 607, as to whom aside from person expressly named, may exercise power of sale of realty.]

(k) Code 1888, art. 93, § 283, provides that whenever a testator shall direct his real estate to be sold for payment of debts, or any other purpose, and the executor declines to act, the court may appoint an administrator with the will annexed "to execute the trusts of the will in the same manner and to the same extent as the executor could or might do." Held, that where a will confers a mandatory power of sale on an executor, who declines to act, the administrator c. t. a. succeeds thereto.—*Venable v. Mercantile Trust & Deposit Co.*, 74 Md. 187, 21 Atl. 704. (See Code 1911, art. 93, § 291.) [Cited and annotated in 50 L. R. A. (N. S.) 613, as to who, aside from person expressly named, may exercise power of sale of realty.]

(l) Where an estate is conveyed to two trustees as joint tenants, with power to sell, such power is coupled with an interest, and survives to the surviving trustee.—*Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635. [Cited and annotated in 50 L. R. A. (N. S.) 634, as to when power of sale deemed to be coupled with an interest; in 50 L. R. A. (N. S.) 624, as to whether less than all the donees or grantees named may exercise power of sale.]

(m) A will gave the executors a power of sale in a certain contingency, and appointed the same persons executors and trustees of the estate of one of the life tenants. One of them declining and the other dying, a third person was appointed "trustee in the place of L. W., the surviving trustee, with all the power and authority of the original trustee," etc., and afterwards still another was appointed in the place of the latter. Held, that the last named person had no authority to execute the power of sale.—*Keplinger v. Maccubbin*, 58 Md. 203. [Cited and annotated in 50 L. R. A. (N. S.) 608, as to who, aside from person expressly named, may exercise power of sale of realty.]

(n) Where the will gave executors a power

of sale in certain contingencies, and one of the executors declines to act and the other dies, an administrator de bonis non could execute the power of sale, under Code 1860, art. 93, § 280.—*Keplinger v. Maccubbin*, 58 Md. 203. (See Code 1911, art. 93, § 290.) [Cited and annotated, see supra.]

(o) Testator, by will, named G. and K. executors and trustees, with power to them and their heirs, executors, and administrators to sell at public or private sale or to lease land for the purpose of providing a fund for the benefit of his wife and daughter after administering the estate. G. and K. gave bond, and afterwards K.'s letters were revoked, and he renounced participation in the trusts of the will, and G. died, leaving an infant son as his heir. G.'s administrators declined to execute the trusts of the will, and, upon petition, all parties in interest in esse being brought in, the Circuit Court appointed M. trustee, and ordered him to sell the land, and his sale was ratified and confirmed by the court. *Held*, that the power of sale contained in the will, which attached to the office of trustee, passed by the terms of the decree to M., trustee; and that the ratification of the sale by the court perfected the purchaser's title.—*Druid Park Heights Co. v. Oettinger*, 53 Md. 46. [Cited and annotated in 50 L. R. A. (N. S.) 644, as to when power of sale deemed annexed to office, or given *ratione officii*; in 8 L. R. A. (N. S.) 63, on divestiture of estates of persons not in being.]

(p) The omission of the word "assigns" from the language used in a will to designate the successors of the trustee appointed by the will in the event of the trustee's death does not exclude the idea that testator intended that the discretion conferred upon the trustee relative to the manner of selling the trust property was intended to have been attached to the office.—*Druid Park Heights Co. v. Oettinger*, 53 Md. 46. [Cited and annotated, see supra.]

(q) A testator devised property to three trustees, by name, to be converted into money and invested in "some safe and profitable stock," and to be held in trust for his two daughters. *Held*, that the power granted was coupled with an interest, and, on the

death of one, survived to the remaining trustees, although the principles of joint tenancy had been abrogated by statute.—*Gray v. Lynch*, 8 Gill 403.

(r) Testator gave his property to his executors in trust, directing them under certain circumstances to sell and make certain disposition of the property. *Held*, that the power to sell, being coupled with a trust, survived on the death of one of the executors.—*Gray v. Lynch*, 8 Gill 403.

(s) Where a will provided for the sale of certain land in order to pay debts, the executors had a right at common law to make the sale, and power to pass legal title to the purchaser on payment of the price.—*Magruder v. Peter*, 11 G. & J. 217. [Cited and annotated in 50 L. R. A. (N. S.) 625, as to whether less than all the donees or grantees named may exercise power of sale; in 32 L. R. A. (N. S.) 679, on implied power of executor or trustee to sell realty.]

(t) Under a power to sell real estate of a testator and apply the proceeds to payment of debts, the power of so applying the proceeds of such sale survives to a surviving executor.—*Magruder v. Peter*, 11 G. & J. 217. [Cited and annotated, see supra.]

(u) Where lands are devised to be sold for payment of debts, and no person is appointed to execute the trust, the practice is to apply to the chancellor, under act 1785, c. 72, to appoint the trustee to make the sale and convey the estate.—*Magruder v. Peter*, 4 G. & J. 323. (See Code, art. 16, § 94.)

(v) Where two executors were authorized by a will to sell and convey lands, and one of them relinquished the trust after letters granted, and the other sold and conveyed, the conveyance was good.—*Digges' Lessee v. Jarman*, 4 H. & McH. 485. [Cited and annotated in 50 L. R. A. (N. S.) 628, as to whether less than all the donees or grantees named may exercise power of sale.]

§§ 139-142.—(See Analysis.)

§ 143.—Validity.

(a) The chancellor may ratify an unauthorized sale of land by an executor for the payment of debts where the sale was one which he would have directed on application.—*Ex parte Black*, 1 Bland 142, note.

### § 144.—Purchase by executor or administrator.

#### Cross-References.

At foreclosure or other judicial sale, see ante, § 115.  
 Ground for setting aside, see post, § 149.  
 Property acquired by executor or administrator in general, see post, § 152.  
 Purchase at tax sale, see ante, § 116.  
 Sale under order of court, see post, § 365.  
 Sufficiency of title to support contract of sale, see "Vendor and Purchaser," § 130.

(a) An executor cannot make the property of his testator his own by paying the debts of the testator out of his own funds, to the amount of the appraisement of the estate.—*Haslett v. Glenn*, 7 H. & J. 17. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(b) A purchase of land at an executor's sale under a will by a third person for the benefit of one of the executors was void.—*Singstack v. Harding*, 4 H. & J. 186, 7 Am. Dec. 669.

### § 145.—Conveyance.

#### Cross-References.

Coexecutors, see ante, § 124.  
 In execution of decedent's contracts, see ante, § 135.

(a) Where the lessee in a lease of a city lot for 99 years, renewable forever, having a house standing thereon, afterwards found to extend a few inches beyond the line designated in the lease, goes into possession thereunder, and occupies the house until his death, occurring more than 35 years after the execution of the lease, thereby acquiring the fee title to the additional strip by adverse possession, he having in the meantime bequeathed the house to his wife for life, and then to be sold and the proceeds paid to his adopted daughter by his executor, who accordingly sold and conveyed the property by a deed describing the lot as in the original lease, and making reference thereto, to be held for the residue of the term created by the lease, with the benefit of renewal forever, the only title or interest passing by the executor's sale is his testator's leasehold interest, and not the strip of ground acquired by testator by adverse possession.—*Hiss v. McCabe*, 45 Md. 77.

### § 146.—Payment or recovery of purchase money.

### § 147.—Application of proceeds.

#### Cross-Reference.

Liabilities of purchaser, see post, § 148.

(a) The title of the purchaser of real estate sold by an executor under a power will not be affected by reason of any failure on the part of the executors to have the proceeds distributed among the legatees.—*Seldner v. McCreery*, 75 Md. 287, 23 Atl. 641.

(b) Where an executor sells real estate of his testator to pay his debts under a power in the will, the conversion of the realty into personalty is complete, to all intents and purposes, only to the extent to which the purchase money is required for the particular objects for which the sale takes place, and the excess, though in the form of money, remains impressed with the character of real estate, for the purpose of determining who is entitled to receive it, but for that purpose only.—*Cronise v. Hardt*, 47 Md. 433.

(c) Where land is properly sold by an executor or a trustee, and there is only a partial disposition of the proceeds of sale, in fulfillment of the objects for which the sale was made, then the surplus belongs to the heir or devisee, as the case may be, as money; and this vests from the time of the conversion in fact.—*Cronise v. Hardt*, 47 Md. 433.

(d) Testator devised his estate to his son, who was also made executor, directing him to pay debts and legacies, and providing, further, that he "must find his mother a comfortable living on the farm they now live upon during her single life, and also a home for his sisters during their single lives," and give his mother a portion of the produce of the farm. *Held*, that upon a sale of the lands by the son, the purchasers were not bound to see to the application of the purchase money as to creditors.—*Alther v. Barroll*, 22 Md. 500. [Cited and annotated in 5 L. R. A. (N. S.) 371, on testamentary trusts to pay debts.]

(e) Testator devised his estate to his son, who was also made executor, directing him to pay debts and legacies, and providing, further, that he "must find his mother a comfortable living on the farm they now live upon during her single life, and also a home for his sisters during their single

lives," and give his mother a portion of the produce of the farm. *Held*, that a sale of the lands made by the son was not subject to the provisions of act 1831, c. 315, relating to sales made by executors authorized to sell, as no power of sale was conferred on him as executor; such power in an executor being a naked trust, while the son's power was a trust coupled with an interest.—*Alther v. Barroll*, 22 Md. 500. (See Code, art. 93, § 290.) [Cited and annotated, see supra.]

(f) Since a testator has no power to alter the legal character of real estate by directing that it shall be considered a part of his personal estate, money arising from the sale of such real estate, when paid to the executors in pursuance of the provisions of the will, is held by them as trustees, and treated as equitable assets, though the testator had declared such proceeds applicable by the executors to the payment of legacies.—*State v. Nicols*, 10 G. & J. 27.

#### § 148.— Title and rights of purchasers.

##### Cross-References.

Right of purchaser to subrogation, see "Subrogation," § 16.

Sufficiency of title of purchaser to support contract of sale, see "Vendor and Purchaser," §§ 129, 130.

(a) Property in the hands of a bona fide purchaser from executors who have power to sell will be protected by compelling the executors, if they have assets, to pay the claims against it.—*Latrobe v. Tiernan*, 2 Md. Ch. 474.

(b) On a petition by the widow for the sale of the infant's real estate, the separate consent of the widow to the sale, because of her right of dower in the premises, is not necessary.—*In re Williams*, 3 Bland 186. [Cited and annotated in 20 L. R. A. 374, on right to strict foreclosure.]

(c) Where realty is sold to pay the debts of the decedent and to save the personalty, such sale will not affect the right of dower of the widow in the realty.—*Waring v. Waring*, 2 Bland 673.

(d) Where the land of which a husband died seised is sold by a court of equity, free from the claim of dower, for the payment of debts, by reason of the insufficiency of the personal estate to pay them, and his widow is a party to such proceeding, she will be

barred of her right of dower so long as the decree remains unreversed.—*Gardiner v. Miles*, 5 Gill 94.

(e) A testator devised lands to his nephew, and his residuary estate, after the debts had been paid, and directed his executor to sell lands in A. and convey the same. *Held*, that, by the sale and conveyance of the lands in A. by the executor, the legal estate was divested out of the devisee and acquired by the vendee.—*Jenifer's Lessee v. Beard*, 4 H. & McH. 73.

#### § 149.— Setting aside.

##### Cross-References.

See post, § 152.

Waiver of right to equitable relief against judgment, see "Judgment," § 448.

(a) Where a purchaser of realty, under an unauthorized sale by the executor, in his answer to a bill by a claimant of the land under the will, praying for restitution of the same, alleged that not only the personal estate of testator, but also all the real estate, was insufficient for the payment of his debts, and that the purchase money paid the executor was applied in payment of such debts, a court of equity decreed the restitution prayed for on the reimbursement to the respondent of the amount to which he should be found entitled by way of substitution to the rights of the testator's creditors.—*Young v. Twigg*, 27 Md. 620.

#### § 150. Lease.

##### Cross-References.

See ante, § 129.

Leases to decedent, see ante, § 134.

Rents as assets of estate, see ante, § 41.

Under order of court, see post, § 399.

#### § 151. Mortgage.

##### Cross-References.

See ante, § 138; post, § 158.

Action in individual or representative capacity, see post, § 430.

Coexecutors, see ante, § 124.

Powers before qualification as executors, see ante, § 77.

Temporary administrator, see ante, § 122.

Under order of court, see post, §§ 321, 398.

#### § 152. Property acquired by executor or administrator.

##### Cross-References.

Application of rents to payment of debts, see post, § 271.

Purchase by executor or administrator at his own sale, see ante, § 144.

Purchase on individual account, see ante, § 115.



Purchase at sale of property under power in trust deed, see "Mortgages," § 362.

Purchase at sale under execution in his favor, see "Execution," § 228.

Purchase from heirs, see "Descent and Distribution," § 84.

Sufficiency of title of administrator purchasing at foreclosure sale of land of estate to support contract of sale, see "Vendor and Purchaser," § 129.

Tax deed to executor, see "Taxation," § 747.

(a) Where a legatee and her husband mortgage her interest as such legatee to the executor to secure a debt of the husband to him, it will be set aside, unless it is clearly shown by the mortgagee that it was freely made by such legatee with full information as to her rights, and that no unfair advantage was taken of her circumstances.—*Pairo v. Vickery*, 37 Md. 467.

(b) An administrator who has recovered judgment for the unpaid price of a house and lot sold by his intestate, on the purchase of the same on a sale by the sheriff, under an execution to enforce a judgment, should not be regarded as a purchaser in his representative capacity, but as an individual, entitled to the same protection as if he were a stranger.—*Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568.

(c) Where an executor compounded with creditors of his testator for debts due on certain mortgages, vesting in the mortgagees a power of sale upon a contingency which had occurred, for a sum much below the value of the mortgaged property, and took a conveyance of the premises from the mortgagees, it was held that he took in trust for the other creditors and the representatives of his testator.—*Turner v. Bouchell*, 3 H. & J. 99.

### (C) PERSONAL PROPERTY.

#### Cross-References.

Property available for payment of debts, see post, § 272.

Right of administrator of bailee to possession of bailed property, see "Bailment," § 22.

Rights of action by legatees, see "Wills," § 748.

Rights of distributees as against administrators, see "Descent and Distribution," § 76.

Rights of legatee as against executor, see "Wills," § 726.

### § 153. Title and authority in general.

(a) An executor has no power to execute

deeds of manumission unless authorized by the will.—*Rozier v. Holliday*, 8 Md. 381.

(b) Apart from act 1843, c. 304, an executor might sell or raise money on the property of the deceased in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object.—*Miller v. Williamson*, 5 Md. 219. (See Code, art. 93, § 284.)

(c) The title to personal property of a decedent vests in the personal representative until distributed.—*Neale v. Hagthorp*, 3 Bland 551. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.] *Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate; in 15 L. R. A. 491, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(d) An executor has no power to execute a deed of manumission.—*Anderson v. Garrett*, 9 Gill 120.

### § 154. Possession and use.

(a) As a general rule a legacy for life should be invested by the executor; but this depends upon the terms of the will, and, even though the will does not relieve the executor from the necessity of making the investment, whether he shall retain the securities or deliver them to the legatee depends upon the provisions of the will or in some cases upon the orders of the court.—*Foley v. Syer*, 121 Md. 79, 88 Atl. 38.

(b) Testator, who gave property to his wife for life, and appointed her executrix, held to have intended that the personal property should be delivered to her as life tenant, and not held by her as executrix.—*Sydnor v. Graves*, 119 Md. 321, 86 Atl. 341.

(c) Independently of the statute, an executor is bound to protect the interests of a legatee in remainder by so investing the fund that, not only may the life tenant receive the income, but that the remainderman may certainly come into the ultimate enjoyment of the fund.—*State v. Robinson*, 57 Md. 486. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(d) A testator's appointment of his daughter M. guardian of certain children, to whom he bequeathed \$1,000, "to be equally divided among the same when they shall arrive at lawful age," indicated his intention that M. should receive this legacy from the executor, or collect it from the estate on which it was charged, and hold it for the benefit of the wards; the interest or income from it to be applied to their joint support and maintenance during their minority, and the principal to be divided equally between them when they arrived at lawful age.—*Budd v. Garrison*, 45 Md. 418.

(e) Where a mortgage debt was devised to the separate use of a married woman during her life, and then over, it was *held* that the executor should have applied to the Orphans' Court for an order to invest the money secured by the mortgage, and not have paid it over to the legatee for life.—*Miller v. Williamson*, 5 Md. 219.

(f) Where a testator bequeathed certain slaves to B., "should she attain the age of 18 years," and the same slaves, if she should die before attaining that age, were given to another, and the income thereof to support her and another person, the legatee not being yet 18, it was *held* that the executor, and not the guardian, was entitled to the possession thereof.—*Hanson v. Brawner*, 2 Md. 90.

(g) Not in all cases where a legacy is vested is the legatee entitled to present possession.—*Hanson v. Brawner*, 2 Md. 90.

(h) A devise of lands by a father in trust for the use and benefit of his married daughter, with direction to the trustee not to pay any part of the proceeds to the husband, but providing that any "receipts or writings witnessing the payment of such proceeds to his daughter shall be a sufficient discharge of such trustee," entitles the daughter to receive and dispose of the proceeds, at least, for the support of herself and children.—*Gill v. Claggett*, 4 Md. Ch. 153.

(i) Where a testator devised to a party, who was appointed his administrator, "\$10,000, to be at his disposition and for his use, free of interest, during his natural life, but after his death to be invested in bank stock in the name of, and for account jointly and equally of, the children of A.," and the children of A. filed a bill as infants to obtain

security for the application of the fund to their benefit, an averment and proof that the fund was in danger in the hands of the legatee for life was *held* indispensable to warrant the court in placing it in a different situation from that directed by the testator, or in requiring security from the legatee.—*Boyd v. Boyd*, 6 G. & J. 25. [Cited and annotated in 15 L. R. A. 635, on letter as will; in 23 L. R. A. (N. S.) 719, on right to require legatee of life interest in money or its equivalent to give security.]

(j) A. devised all his real estate to his wife, and then as follows: "After her death I will the tract of land called H., together with all the personal property which may belong thereto at her death, to B. and her heirs forever. Item. I give to my wife for life all my personal property not hereinbefore disposed of, together with all the money of which I may die possessed. After her death I give the one-half part of all my said personal property to the children of C. and D., to be equally divided among them immediately or in a convenient time after the death of my said wife. The other half shall go to and be vested in whomsoever my said wife shall by her will direct." The widow appointed B. to take under the power so given to her after her death; and a bill was filed by certain of the residuary legatees in remainder of A. against the personal representatives of A. and his wife, and B., and others of the said residuary legatees, for an account and distribution of A.'s personal estate among the parties entitled. Upon the construction of the will it was *held* that the mere fact of giving the personal estate or the residue thereof to the widow for life, with remainder over to another, did not destroy the right of the legatee for life to the enjoyment of the property specifically under the testamentary system of the state.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

#### § 155. Pledged and mortgaged property.

##### Cross-References.

Application of proceeds of sale, see post, § 166.

Insolvent estate, see post, § 413.

### § 156. Contracts of decedent.

#### Cross-Reference.

Remedy by specific performance in general, see "Specific Performance," § 24.

### § 157. Sale.

#### Cross-References.

Constituting conversion, see ante, § 117.

Foreign and ancillary administrations, see post, § 519.

Grounds for removal of executor or administrator, see ante, § 35.

Loss resulting from failure to sell assets, see ante, § 118.

Power of special administrator, see ante, § 122.

Sales under order of court, see post, §§ 319-407.

Constitutionality of act validating private sales by executors or administrators, see "Constitutional Law," § 194.

Mining lease, see "Mines and Minerals," § 74.

### § 158.— Authority and duty in general.

(a) Under Code 1904, art. 93, §§ 282, 284, providing that no executor shall sell any property of his decedent without an order of the Orphans' Court, and that any sale without obtaining an order shall be void, and no title shall pass to the purchaser, etc., an executor, directed by the will of testator to keep the estate invested during the lifetime of the beneficiary and pay her the income therefrom, has no authority without leave of court to sell reinvested proceeds of portions of the estate, and a sale without order of the court of a mortgage purchased by him is void, and the purchaser having notice of the facts acquires no claim on the proceeds of a sale of the mortgaged premises superior to that of the persons interested in the estate.—*Alexander v. Fidelity & Deposit Co.*, 108 Md. 541, 70 Atl. 209; *Fidelity & Deposit Co. v. Alexander*, Id. (See Code 1911, art. 93, §§ 285, 287.)

(b) A mortgage is "property," within Code 1904, art. 93, § 282, prohibiting an executor from selling any "property" of his decedent without first obtaining an order of the court, since the laws recognize the right of property in mortgages and regulate the acquisition and transfer of the same, and since art. 66, § 21, provides that on the death of a mortgagee his interest in the mortgaged lands and his right to the mortgage debt shall devolve on his executor; the word "property" ordinarily embracing every species of valuable right and interest including

real and personal property, easements, franchises, and hereditaments.—*Alexander v. Fidelity & Deposit Co.*, 108 Md. 541, 70 Atl. 209; *Fidelity & Deposit Co. v. Alexander*, Id. (See Code 1911, art. 66, § 21; art. 93, § 285.)

(c) An executor is presumed to hold the assets in his hands not for sale, but for distribution, it being the policy of the law to require a distribution in kind of the estates of deceased persons unless a sale is necessary for a satisfactory division or payment of debts, and it being for the court to determine whether such necessity exists.—*Alexander v. Fidelity & Deposit Co.*, 108 Md. 541, 70 Atl. 209; *Fidelity & Deposit Co. v. Alexander*, Id.

(d) In the will of the testator, the following item: "I will and devise to my wife that she have the election to purchase at the sale of my personal estate to the amount of \$700, without being required to give security for the same, and she is to pay the interest on the same annually for the support and use of my two children, Thomas and Edgar,"—was by an order of the Orphans' Court, adjudged in settlement of the estate, to be charged to the executors to the amount of \$701.54, "being the amount of goods purchased by the widow at the sale of the personal estate of the testator, with interest from her death." On appeal, by one of the executors, it was held that, if the above sum had been collected by the executors, they were chargeable therewith; but, if the widow's estate was insolvent, the executors could not be held responsible for more than they could recover.—*Watkins v. Bevans*, 6 Md. 489.

(e) Before act 1843, c. 304, executors might dispose absolutely of the whole personal estate of a deceased person, and neither creditors nor legatees could pursue the property in the hands of the purchaser, except where collusion was proved between the purchaser and the executor.—*Lark v. Linstead*, 2 Md. Ch. 162. (See Code, art. 93, § 284.)

(f) It is not the duty of executors and administrators to collect and speedily reduce into money the personal assets when not otherwise directed. Such a course of proceeding is wholly inconsistent with the policy and provisions of the testamentary system of this state.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A.

(N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

§§ 159-161.— (See Analysis.)

§ 162.— **Validity.**

(a) Plaintiff was appointed executrix by decedent's will. A caveat was issued against the probate of the will, and a citation issued to plaintiff to prove the same. She did not appear, and administration was granted to defendant's wife and others, who disposed of certain negroes belonging to the estate. Thereafter the letters were revoked, and testamentary letters granted to plaintiff. Testator left sufficient estate besides the negroes to pay the debts. *Held*, that the defendant's wife had power to dispose of the negroes by virtue of her administration.—*Phippard v. Forbes*, 4 H. & McH. 481.

§ 163.— **Purchase by executor or administrator.**

*Cross-References.*

As conversion, see ante, § 117.

Property acquired by executor or administrator from legatees, distributees or third persons, see post, § 172.

Sale under order of court, see post, § 365.

§§ 164-166.— (See Analysis.)

§ 167.— **Title and rights of purchasers.**

*Cross-Reference.*

See "Fraud," § 31.

(a) The assignment of a mortgage, which shows on the face thereof that it is made by the assignor as executor, notifies the assignee that the assignor does not hold the mortgage in his own right, but in the capacity of executor, and furnishes information of the particular estate to which it belongs, and the assignee is not a bona fide purchaser without notice of any infirmity in the title.—*Alexander v. Fidelity & Deposit Co.*, 108 Md. 541, 70 Atl. 209; *Fidelity & Deposit Co. v. Alexander*, *Id.*

(b) Apart from act 1843, c. 304, an executor might sell or raise money on the property of the deceased in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object.—*Miller v. Williamson*, 5 Md. 219. (See Code, art. 93, § 284.)

(c) A party dealing with an executor, as

such, has notice of the existence of the will and its contents; the will being open to inspection upon the public records.—*Williamson v. Morton*, 2 Md. Ch. 94.

(d) When a person dealing with an executor must, from the very nature of the transaction, necessarily know that the executor was applying the assets to objects in conflict with his duty, he deals with him at his peril; and a transfer or an assignment made under such circumstances will, in equity, be set aside at the suit of a creditor, a specific, residuary, or general legatee.—*Williamson v. Morton*, 2 Md. Ch. 94.

(e) In order to defeat the title of the alienee of an executor in a court of law, it is necessary to show actual collusion between the executor and the purchaser or creditor.—*Williamson v. Morton*, 2 Md. Ch. 94.

§ 168.— **Setting aside.**

*Cross-Reference.*

See ante, § 167.

§ 169. **Mortgage or pledge.**

*Cross-References.*

Ancillary administrator, see post, § 519.

Individual interest of executor, see ante, § 115.

Rights of administrator de bonis non, see ante, § 120.

(a) Where an administrator mortgages the personal property of his intestate to secure the debt of another, the mortgagee knowing that the property is assets of the estate, the mortgage may be avoided by a party interested in the estate of the intestate, as a creditor or the next of kin; but it will be valid as against the administrator.—*Salmon v. Clagett*, 3 Bland 125.

(b) An inventory of the estate of one A., an intestate, was returned to the Orphans' Court in 1816, by his administratrix, who settled an account in that court, which she termed "final," in 1823. In 1827, the administratrix and several children of the intestate united in a mortgage of the personal property belonging to the estate. *Held*, that a court of equity would presume that all the debts were paid before the mortgage, after such a lapse of time.—*Clagett v. Salmon*, 5 G. & J. 314.

(c) Decedent's widow, six years after the settlement of her account as his administratrix, united with several of decedent's chil-

dren in mortgaging certain personal property which the decedent had left to secure the payment of a debt for which they were responsible. The mortgage did not appear to be executed by the widow as administratrix, nor did it appear that any debts were unpaid. *Held*, in an action by an administrator de bonis non to recover the goods from the mortgagee, that as strong circumstances induced the presumption that the intestate's debts had been satisfied, the court would presume that the administratrix had made distribution of the remaining assets, and had made the mortgage as distributee, and hence plaintiff could not recover.—*Allender v. Riston*, 2 G. & J. 86. [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non.]

#### § 170. Indorsement and transfer of bills and notes.

(a) An administrator, by virtue of his appointment, obtains the title in promissory notes or other written evidences of debt held by the intestate at his death and coming to administrator's possession, and may sell, transfer, and indorse the same.—*Lucas v. Byrne*, 35 Md. 485.

#### § 171. Assignment and transfer of rights of action.

##### Cross-Reference.

As title sufficient to support trover, see "Trover and Conversion," § 16.

(a) Where T. at his death was owner of a mortgage and the debt secured thereby, the debt is part of his estate, and may be assigned by his executor, though the note was lost, and never came into the executor's hands.—*McCauseland v. Baltimore Humane Imp. Soc.*, 95 Md. 741, 52 Atl. 918.

(b) An assignment by a party as "executor and devisee" is notice to the assignee of the will and its contents.—*Miller v. Williamson*, 5 Md. 219.

(c) A party who was executor and devisee, acting in those capacities, assigned a mortgage debt, part of the assets of his testatrix, to certain assignees, to secure the payment of his own debt, due to the latter. *Held*, that the assignees, by taking such an assignment, were aiding the executor in committing a devastavit, and acquired no title thereby.—*Williamson v. Morton*, 2 Md. Ch. 94.

#### § 172. Property acquired by executor or administrator.

##### Cross-References.

Actions in personal or representative capacity, see post, § 427.  
 Defense in action by administrator on assigned claim, see post, § 432.  
 Property accruing to estate after death of decedent as assets, see ante, § 58.  
 Purchase by executor or administrator at his own sale, see ante, § 163.  
 Purchase by executrix of chattel mortgage, see "Chattel Mortgages," § 215.  
 Purchase from heir, see "Descent and Distribution," § 84.

(a) Executors are entitled to no profits on the proceeds of sale made by them beyond the commission allowed by law. The premium received by them on the sale of coin received as the proceeds of the sale belongs to the estate of the testator.—*Gephart v. Strong*, 20 Md. 522.

(b) An administrator, who, notwithstanding an order directing a sale of personal estate to pay an intestate's debts, retains certain personal estate, including slaves, paying debts to the amount of their appraised value, will be accountable for the increase of the slaves, and for their use, and for the value of such as run away.—*Hall v. Griffith*, 2 H. & J. 483.

#### V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

##### Cross-References.

As claim required to be presented, see post, § 224.  
 Effect of widow's receipt, see post, § 297.  
 Necessity of administration, see ante, § 3.  
 Purchase of property in payment of allowance, see post, § 365.  
 Rights of assignee of widow's award from assets of insolvent estate, see post, § 414.  
 Rights of purchasers, see post, § 388.  
 Rights of widow or surviving husband on sale of land by administrator, see post, § 387.  
 Sale of real estate to pay allowance, see post, § 326.  
 Set-off against price of land purchased by widow from administrator, see post, § 368.  
 What law governs, see ante, § 2.  
 Adverse possession by surviving spouse as against heirs, see "Adverse Possession," § 62.  
 Allowance as defense to foreclosure of mortgage, see "Mortgages," § 415.  
 Allowance as limiting right to homestead, see "Homestead," § 137.

Allowance to widow and children of bankrupt, see "Bankruptcy," § 403.

Assignment of dower by probate court incident to administration, see "Dower," § 69.

Bequest of maintenance, see "Wills," § 276.

Dissent from allotment for infant widow, entered by next friend, see "Infants," § 84.

Effect of unsatisfied judgment for year's support on widow's right to homestead, see "Homestead," § 138.

Election between year's support and homestead, see "Homestead," § 138.

Election to take under or against will of decedent, see "Wills," §§ 778-803.

Implied repeal of statutes, see "Statutes," § 167.

Right of widow to set up usury as defense to conveyance made by decedent, see "Usury," § 107.

Title of guardian to ward's allowance, see "Guardian and Ward," § 34.

### § 173. Nature and purpose in general.

### § 174. Constitutional and statutory provisions.

#### Cross-Reference.

Implied repeal by adoption of code, see "Statutes," § 167.

### § 175. Quarantine or other occupation or use of property.

### § 176. Maintenance and support.

#### Cross-Reference.

Bequest of maintenance, see "Wills," § 276.

#### Annotation.

Widow's right to year's support or allowance out of insurance money.—46 L. R. A. (N. S.) 788, note.

Widow's right to year's support or allowance out of fund recovered for the negligent killing of husband.—42 L. R. A. (N. S.) 725, note.

(a) No allowance is made to executors for articles furnished to the family of the deceased for their support within 12 months after her decease.—*Scott v. Dorsey*, 1 H. & J. 227.

### § 177. Specific articles.

(a) Under Code 1860, art. 93, §§ 291, 292, entitling the widow to make a selection of household and kitchen furniture "or other personal property" in "all cases where administration shall be granted," held, that the widow might select a watch, though the estate was settled by an executor.—*Crow v. Hubbard*, 62 Md. 560. (See Code 1911, art. 93, § 308.)

### § 178. Amount or value.

### § 179. Additional to dower or other interest.

### § 180. Persons entitled.

#### Annotation.

Widow's right to exemption or allowance for support out of personal assets of deceased husband, who was a nonresident.—11 L. R. A. (N. S.) 361, note.

Right of nonresident widow to statutory allowance.—21 L. R. A. 241, note.

### § 181. Property subject to allowance.

#### Cross-Reference.

Property accruing by lapse of legacy, see "Wills," § 849.

#### Annotation.

Widow's right to year's support or allowance out of insurance money.—46 L. R. A. (N. S.) 788, note.

Widow's right to year's support or allowance out of fund recovered for negligent killing of husband.—42 L. R. A. (N. S.) 725, note.

(a) Where the personal estate of a deceased person, after payment of his debts, was insufficient to compensate his widow for her thirds, negroes, bequeathed to be free were allotted to her as slaves for life.—*William v. Kelly*, 5 H. & J. 59.

### § 182. Priority over other claims.

#### Cross-References.

Classification, see post, § 261.

Over chattel mortgage, see "Chattel Mortgages," § 140.

Over mortgages, see "Mortgages," § 151.

Over pledge, see "Pledges," § 23.

Over state's lien for taxes, see "Taxation," § 509.

### § 183. Bar, waiver, or relinquishment.

### § 184.—In general.

(a) Under Code, art. 93, §§ 308, 309, allowing a widow \$150 and \$75 respectively, out of the personalty, where decedent dies and does not leave surviving children by the widow, she was entitled to an allowance of that sum, though absolute judgment was rendered against her personally in an action against her as administratrix upon a claim against the estate.—*Beachley v. Bollinger's Estate*, 119 Md. 151, 86 Atl. 135.

### § 185.—Antenuptial or postnuptial agreement.

#### Annotation.

Waiver of right to widow's allowance by antenuptial agreement.—25 L. R. A. (N. S.) 751, note.

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

**§ 186.—Testamentary provisions.***Cross-References.*

Election between year's support and homestead, see "Homestead," § 138.

Election to take under or against the will of decedent; see "Wills," §§ 778-803.

**§ 187.—Separate estate or homestead.***Cross-Reference.*

Receipt of allowance as barring or limiting right to homestead, see "Homestead," § 138.

**§ 188.—Misconduct, separation, or divorce.***Cross-Reference.*

See "Dower," § 51.

**§ 189.—Relinquishment after death of decedent.****§ 190.—Delay in making application.****§ 191. Selection by persons entitled.****§ 192. Setting apart by executors or administrators.****§ 193. Setting apart by appraisers.**

(a) Where commissioners were appointed to value the privilege of cutting wood and timber to which the widow and son of a testator were entitled by his will, it was held that the maxim that all things will be presumed to have been rightfully done was applicable to the proceedings of the commissioners, and that every fair intendment would be made in support of their acts.—*Crouch v. Smith*, 1 Md. Ch. 401.

**§ 194. Allowance by court.***Cross-References.*

See post, § 238.

Allowance to executor of expenses of contest of allowance, see ante, § 111.

Concurrent and conflicting jurisdiction of courts, see "Courts," §§ 472, 475.

Effect of stipulation as to allowance, see "Stipulations," § 14.

Ground for reversal, see "Appeal and Error," § 1039.

(a) Where \$75 was allowed to a decedent's widow in settling the estate under Code, art. 93, § 309, granting that sum where decedent leave no infant child, while \$150 is allowed her in case of a surviving child, it must be presumed that decedent left no infant child surviving.—*Beachley v. Bollinger's Estate*, 119 Md. 151, 86 Atl. 135.

**§ 195. Effect of allowance.***Cross-Reference.*

As defense to foreclosure of mortgage, see "Mortgages," § 415.

**§§ 196-201. (See Analysis.)****VI. ALLOWANCE AND PAYMENT OF CLAIMS.***Cross-References.*

Debts necessitating administration, see ante, § 3.

Fraud of administrator, see ante, § 116.

Liabilities of executor de son tort to creditors, see post, § 541.

Rights of action against executors or administrators, see post, §§ 429, 430.

Consideration for mortgage by devisees to secure claim against estate, see "Mortgages," § 25.

Enforcement of claims for municipal taxes, see "Municipal Corporations," § 980.

Proceedings to perfect mechanic's lien, see "Mechanics' Liens," § 120.

Remedies against estate of deceased surety, see "Principal and Surety," § 146.

Right of executor or administrator to object to usury in contract of decedent, see "Usury," § 127.

Subrogation of surety to rights of creditor, see "Subrogation," §§ 7, 31.

Transactions constituting novation, see "Novation," §§ 7, 13.

**(A) LIABILITIES OF ESTATE.***Cross-References.*

Necessity for presentation of claim, see post, § 222-224.

Questions for jury, see post, § 451.

As affected by payment in general, see "Payment."

As charge against land defeating contract of sale, see "Vendor and Purchaser," § 134.

Contracts of employment, see "Master and Servant," § 26.

Corporate debts and acts, see "Corporations," §§ 243, 245, 246.

Creation of testamentary trust for payment of debts, see "Wills," § 672.

Estate of insane decedent, see "Insane Persons," § 62.

Liabilities of devisees and legatees, see "Wills," §§ 827-848.

Liabilities of heirs and distributees, see "Descent and Distribution," §§ 119-152.

Statute of frauds as affecting liabilities, see "Frauds, Statute of," § 138.

**§ 202. Obligations of decedent in general.***Cross-Reference.*

Time for presentation, see post, § 225.

(a) Plaintiff is entitled to recover against decedent's estate on an implied assumpsit for nursing and boarding him for three years preceding his death and following his discharge from the Soldiers' Home; plaintiff not being a member of decedent's family.—*Doyle v. Gibson*, 119 Md. 36, 85 Atl. 961.

(b) A claim cannot be allowed which did not exist against the deceased in his lifetime.—*Simmons v. Tongue*, 3 Bland 341.

(c) On a creditors' bill to administer the assets of a deceased person, only such debts as were contracted by the deceased in his lifetime can be allowed.—*Watkins v. Worthington*, 2 Bland 509.

#### § 202½. Personal contracts.

#### § 203. Joint contracts.

##### *Cross-Reference.*

Evidence, see post, § 221.

(a) Where two persons executed a joint note, the estate of one will be charged with only one-half the amount, unless it is shown that he is the principal debtor or that the other is insolvent.—*Brooks v. Dent*, 1 Md. Ch. 523.

(b) Where it appears from the voucher of a creditor claiming under a creditors' bill that the deceased was in any way jointly liable with others, the creditor must show whether or not the debtors were equally bound, or whether the deceased was principal or surety in the debt, or whether he was only co-surety with others. And, if he was bound as principal, the creditor may come in for his whole debt; if as principal with another, then only for his proportion of the debt, unless the co-principal is insolvent; if as surety, then the creditor must show that the principal is insolvent, or he cannot come in at all; if as co-surety, the creditor must also show that the co-sureties are insolvent, or he can come in only for the proportion of the deceased.—*Watkins v. Worthington*, 2 Bland 509.

#### § 204. Services rendered to decedent.

##### *Cross-References.*

By executor or administrator, see post, § 219.

Evidence, see post, § 221.

Instructions, see post, § 451.

Questions for jury, see post, § 451.

#### § 205.— In general.

(a) Plaintiff is entitled to recover against decedent's estate on an implied assumpsit for nursing and boarding him for three years preceding his death and following his discharge from the Soldiers' Home; plaintiff not being a member of decedent's family.—*Doyle v. Gibson*, 119 Md. 36, 85 Atl. 961.

(b) No action will lie to recover compensation for services performed for a deceased person where such services were performed with a view to a voluntary legacy, without plaintiff's expectation of being paid therefor, or any promise of remuneration, express or implied.—*Lee v. Lee*, 6 G. & J. 316.

#### § 206.— Persons in family relation.

##### *Cross-Reference.*

Questions for jury, see post, § 451.

(a) Services rendered a decedent during his lifetime by a member of his family are presumed to have been gratuitous, but, where no such relationship exists, the law implies a promise to pay therefor, placing the burden upon one resisting payment to show an understanding that they were gratuitous, and plaintiff was a member of decedent's family within the rule where she, at his wife's request, though not related to them, went to live with them as a daughter or member of the family, and had all the privileges of a member of the family; and hence an express or implied promise to pay for services rendered decedent was essential to make his estate liable therefor.—*Harper v. Davis*, 115 Md. 349, 80 Atl. 1012.

(b) Where decedent, after retiring from business, went to reside with his sisters, and furnished a part of the coal and provisions, he was under no obligation to support any of the members of the household, including complainant, a ward of one of his deceased sisters, and was not the head of the family so as to render his estate responsible for services rendered therein by the ward.—*Pearre v. Smith*, 110 Md. 531, 73 Atl. 141.

(c) Where complainant, a ward of decedent's sister, lived in the family for several years, and rendered services as such, without expectation or promise of compensation, or contract to pay for the services, express or implied, she could not recover therefor against decedent's estate.—*Pearre v. Smith*, 110 Md. 531, 73 Atl. 141.

(d) Declarations of a father that his son should be paid for work performed for him can be regarded as referring to an account presented by the son after the father's death, or to the services claimed for therein, only where the correctness of the claim is otherwise proved according to law.—*Duckworth*



*v. Duckworth*, 98 Md. 92, 56 Atl. 490. [Cited and annotated in 11 L. R. A. (N. S.) 889, 902, 903, on implied agreement to pay for services of relative or member of household.]

### § 207. Loans or advances to decedent.

#### Cross-References.

Evidence, see post, § 221.

Questions for jury, see post, § 451.

### § 208. Covenants of decedent.

#### Cross-References.

Liabilities of devisees on covenants of testator, see "Wills," § 839.

Liabilities of heirs on covenants of ancestor, see "Descent and Distribution," § 128.

### § 209. Contracts of guaranty or suretyship by decedent.

#### Cross-References.

Joint contracts, see ante, § 203.

Remedies against estate of deceased surety, see "Principal and Surety," § 146.

### § 210. Agreements by decedent to make will.

#### Cross-References.

Evidence, see post, § 221.

Operation of statute of frauds, see "Frauds, Statute of," § 138.

### § 211. Torts of decedent.

### § 212. Taxes.

#### Cross-References.

Allowance of expenditures by personal representative, see ante, § 110.

Power and duty of executor or administrator to pay taxes levied on realty, see ante, § 129.

Lien for taxes, see "Taxation," § 507.

### § 213. Claims barred by limitation.

#### Cross-References.

Payment of barred claim of administrator, see post, § 265.

Set-off, see post, § 434.

Acknowledgment or new promise, see "Limitation of Actions," §§ 143, 146.

Bar as question for jury, see "Limitation of Actions," § 199.

Death as suspending running of statute, see "Limitation of Actions," § 83.

Estoppel to rely on limitation, see "Limitation of Actions," § 13.

Evidence on issue of limitations, see "Limitation of Actions," §§ 195-197.

Existence of trust as affecting limitations, see "Limitation of Actions," § 102.

Part payment by executor or administrator and heirs or devisees tolling limitations, see "Limitation of Actions," § 155.

Pendency of action as affecting limitations, see "Limitation of Actions," § 105.

Waiver of bar by limitation, see "Limitation of Actions," §§ 175, 182.

(a) A promise by one executor to pay the debt of the testator is sufficient to do away with the effect of the bar by limitations and authorize an action against both executors.—*McCann v. Sloan*, 25 Md. 575.

### § 214. Funeral expenses.

#### Cross-References.

Allowance of expenditures, see ante, § 109.

Compensation of administrator for use of burial lot, see post, § 219.

Form of action, personal or representative capacity, see post, § 430.

Necessity of presentations, see post, § 224.

Liability of husband for funeral expenses of wife, see "Husband and Wife," § 19.

Obligation of administrator to repay burial expenses as within statute of frauds, see "Frauds, Statute of," § 138.

#### Annotation.

Liability of decedent's estate for items and amounts for funeral expenses.—33 L. R. A. 655, 660; 28 L. R. A. (N. S.) 572, notes.

(a) Dinner and horse feed furnished persons attending a funeral of a person who had lived for some time at plaintiff's house, and died there, held not to be a part of the funeral expenses; and such claim could not be aided or controlled in any manner by neighborhood custom.—*Shaeffer v. Shaeffer*, 54 Md. 679, 39 Am. Rep. 406. [Cited and annotated in 33 L. R. A. 663, on liability of decedent's estate for funeral expenses.]

### § 215. Tombstones and monuments.

#### Cross-References.

Expenditures in general, see ante, § 109.

Liability of administrator on failure to pay, see post, § 282.

#### Annotation.

Liability of decedent's estate for monument or tombstone.—33 L. R. A. 666; 28 L. R. A. (N. S.) 572, notes.

### § 216. Services rendered to estate.

#### Cross-References.

See post, § 221.

Allowance of expenditures, see ante, § 111.

In respect to realty, see ante, § 129.

Power of executor or administrator to make contract for services, see ante, § 97.

#### Annotation.

Right to recover against estate of incompetent for legal services in attempting to secure his freedom or in resisting lunacy proceedings.—45 L. R. A. (N. S.) 67, note.

Liability of estate to attorney employed by executor or administrator.—25 L. R. A. (N. S.) 72, note.

Liability of estate for commissions of broker or agent who sells property.—64 L. R. A. 554, note.

(a) Where an attorney voluntarily gave advice and information to a prospective administrator in his individual capacity, who was thereby put on inquiry as to the existence of assets, which were discovered by the administrator through information obtained wholly from other sources because of the attorney's refusal to give such information, the attorney was not entitled to compensation as one who had rendered services beneficial to the estate, and his claim therefor could not be allowed by the Orphans' Court, under the authority conferred by Code 1904, art. 93, § 5, providing that an administrator shall be entitled to an allowance "for costs and extraordinary expenses (not personal) laid out in the recovery of any part of the estate."—*Flater v. Weaver*, 108 Md. 668, 71 Atl. 309. (See Code 1911, art. 93, § 5.)

(b) Where a widow and sole devisee made an agreement as to fees with counsel employed to defend a will and a retainer was paid, but a compromise was afterward effected and the agreement modified in view of the compromise, the Orphans' Court has no jurisdiction to enforce the agreement and authorize the allowance of the balance of the agreed fee in the next account of the executor, but the remedy of counsel is by an action at law against the widow, with whom the agreement was made.—*Gorton v. Perkins*, 63 Md. 589, 3 Atl. 291. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(c) An attorney having several judgments in his hands for collection, ordered execution on them to lie from term to term, and died before making anything from them. They then came into the hands of another attorney, and by a sale of the property levied on part of the money was made. A bill in equity was then filed to sell the residue of the defendant's real estate for their payment, and the amount realized was still insufficient for the payments of the judgment in full. *Held*, that the most which should be allowed the representatives of the deceased attorney for his services was one-half of 5 per cent. on the net amount of the

proceeds of the sale, both under the executions and the decree.—*Gordon v. Miller*, 14 Md. 204.

(d) Three judgments were placed in an attorney's hands, on which he ordered execution from term to term. He also obtained a judgment by confession for his client against the same defendant. After the attorney's death there was realized thereon, through another attorney, by sale under execution and bill in equity, the net sum of \$2,096. *Held*, that \$300 was an unreasonable fee for the first attorney, and that his representatives should be allowed only one-half of 5 per cent.—the usual commission—of the money collected.—*Gordon v. Miller*, 14 Md. 204.

(e) Where an attorney was employed to collect money by an administratrix who died after judgments were recovered on some of the claims and suit was instituted on others, and her successors refused to continue the employment of the attorney, he was entitled to one-half of 5 per cent.—the usual commission.—*In re Young*, 3 Md. Ch. 461.

(f) The counsel fee paid by a contestant of a will admitted to probate is evidence of the reasonableness of a similar fee allowed the executor to maintain it.—*Compton v. Barnes*, 4 Gill 55, 45 Am. Dec. 115. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]

(g) The register of wills of a county where letters testamentary were granted, acting as agent of an executor or administrator in the settlement of an estate, is entitled to compensation for his services as agent, though for his services in his official character he can charge nothing but what the law allows him.—*Carroll v. Tyler*, 2 H. & G. 54.

## § 217. Loans or advances to estate.

### Cross-References.

Evidence, see post, § 221.

Power of personal representative, see ante, § 98.

## § 218. Expenses of administration.

### Cross-References.

Expenditures allowable, see ante, §§ 109-111.

Liability of personal representatives of deceased administrator, see ante, § 128.

Power to make expenditures, see ante, § 109.

Allowance of costs and fees in proceedings or actions relating to probate or contest of wills, see "Wills," § 404.

Allowance of fees and costs in action to construe will, see "Wills," § 707.

As charge against residuary legatee, see "Wills," § 736.

Effect of election under will, see "Wills," § 801.

Liability of husband for costs of administration of wife's estate, see "Husband and Wife," § 19.

#### Annotation.

Liability of estate for debts contracted and expenses incurred by personal representative or testamentary trustee in carrying on business.—40 L. R. A. (N. S.) 224, note.

### § 219. Claims of executors or administrators.

#### Cross-References.

Affecting competency as executor, see ante, § 15.

Evidence, see post, § 221.

Ground for appointment of special administrator, see ante, § 22.

Limitations as against executor, see post, § 437.

Mode of giving credit in account, see post, § 486.

Priorities and payment of claim, see post, §§ 265, 266.

Statement of claim, see post, § 227.

Time for presentation, see post, § 225.

Testimony as to transactions with persons since deceased in proceedings to enforce, see "Witnesses," § 133.

(a) The personal services of a widow and administratrix after the death of her husband, in nursing his slaves and furnishing them with necessities, are a proper subject for a claim against the estate.—*Edelen v. Edelen*, 11 Md. 415. [Cited and annotated in 56 L. R. A. 822, on burden of proof of husband's debt to wife for property received from her.]

### § 220. Claims purchased by persons interested in estate.

#### Cross-Reference.

Purchase by administrator as ground for vacating settlement, see post, § 516.

### § 221. Evidence.

#### Cross-References.

See ante, § 28.

Evidence in actions by or against executor or administrator in general, see post, § 450.

Instructions, see post, § 451.

Reception of evidence in trial by probate court, see post, § 252.

Effect of receipt as acknowledgment of payment, see "Payment," § 54.

Evidence of habits of creditor in connection with lapse of time to show payment, see "Payment," § 70.

Presumption of payment by transfer of property, see "Payment," § 65.

Presumption of payment from lapse of time, see "Payment," § 66.

Receipts as evidence of payment, see "Payment," § 74.

Sufficiency of evidence of payment of lost bond, see "Payment," § 73.

(a) In an action against an executor for services rendered to testator, evidence of a conversation between plaintiff and her husband and the executor, in which plaintiff said that, if they could not get the \$1,000 promised by testator peaceably, they would sue, to which the executor replied to go ahead and sue, held immaterial.—*Giering v. Sauer*, 120 Md. 295, 87 Atl. 774.

(b) Services to a decedent by a member of his family are presumed to be gratuitous; but, where such relation does not exist, the rendition of useful services is prima facie evidence of their acceptance and a resulting obligation to pay their reasonable value, and the same rule applies to a person living in decedent's house, who is not related to him by blood or affinity.—*Giering v. Sauer*, 120 Md. 295, 87 Atl. 774.

(c) In an action against an executor for services rendered to testator by furnishing him board, etc., evidence that testator kept a cow from which he got milk was admissible on defendant's claim that plaintiff did not furnish decedent with all of his board, as well as on the question of the amount allowable to plaintiff for board.—*Giering v. Sauer*, 120 Md. 295, 87 Atl. 774.

(d) In an action against an estate, testimony of the claimant's wife held proper to show the agreement upon which the claim is based.—*Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161.

(e) In order to establish a son's claim against his father's estate for services in caring for the father, the burden is on the son to show an express or implied contract to pay.—*Lowe v. Lowe*, 111 Md. 113, 73 Atl. 878.

(f) Evidence on the hearing of a claim by a son against his father's estate held insufficient to justify a finding of a contract

between the father and son that the son should be paid for services rendered in caring for his father during his declining years.—*Lowe v. Lowe*, 111 Md. 113, 73 Atl. 878.

(g) Evidence held to show that domestic services rendered by plaintiff to defendant's ancestor were rendered under promise, and with the expectation of payment, and that plaintiff was accordingly entitled to recover therefor.—*Eirley v. Eirley*, 102 Md. 452, 62 Atl. 962.

(h) Where the son of a decedent claimed a sum as a portion of undrawn profits of a firm consisting of himself and testator, evidence that decedent had stated to his son at the close of the partnership that they "were square" showed that the son's contention was untenable.—*Justis v. Justis*, 99 Md. 69, 57 Atl. 23.

(i) In a suit to obtain a decree for the sale of real estate of the father of the parties, where a defendant answered consenting to the decree, but set up a claim against his father's estate for services rendered during the father's lifetime in performing farm labor under an agreement for cash compensation for his services, evidence examined, and held insufficient to support his claim.—*Duckworth v. Duckworth*, 98 Md. 92, 56 Atl. 490. [Cited and annotated in 11 L. R. A. (N. S.) 889, 902, 903, on implied agreement to pay for services of relative or member of household.]

(j) Where, for a number of years, a son, who was working for his father, never made any claim for his services, and year after year divided the crops without any deduction for his claim, or even stating that he had a claim, and no member of connection of the family knew that he had any claim, such claim should not be allowed against the father's estate without clear and satisfactory proof from disinterested sources.—*Duckworth v. Duckworth*, 98 Md. 92, 56 Atl. 490. [Cited and annotated, see supra.]

(k) In an action against an estate for services rendered by a young girl, evidence is admissible to show whether any one else did the sort of services plaintiff was employed to do, and whether she was sent to school during any part of the time she was with decedent.—*Gill v. Donovan*, 96 Md. 518, 54

Atl. 117. [Cited and annotated in 11 L. R. A. (N. S.) 878, 884, on implied agreement to pay for services of relative or member of household.]

(l) Where, in an action against an estate for services rendered by a young girl, defendant's proof proceeded on the theory that plaintiff was with the decedent as a member of the family, and not as a domestic, and testimony had been offered that she was a niece of decedent, there was no error in admitting evidence that the relationship was of the half blood.—*Gill v. Donovan*, 96 Md. 518, 54 Atl. 117. [Cited and annotated, see supra.]

(m) Plaintiff in an action for services rendered for decedent testified as to having performed the services, and the value thereof, which was corroborated by others. One witness testified that deceased stated that plaintiff was working for her at so much a week, and another testified that deceased stated that she was saving plaintiff's money for him. Held, sufficient evidence to go to the jury.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650. [Cited and annotated in 2 L. R. A. (N. S.) 403, on account books as evidence in case of loans or payments by owner; in 11 L. R. A. (N. S.) 882, 884, on implied agreement to pay for services of relative or member of household.]

(n) Where there was evidence that deceased was a sick man for a number of years before his death, that plaintiff nursed him, and that deceased said he would pay for such services, the case should be submitted to the jury.—*Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324. [Cited and annotated in 11 L. R. A. (N. S.) 888, on implied agreement to pay for services of relative or member of household.]

(o) Plaintiff claimed \$5,000 from his father's estate, based upon a parol promise of the father that, if plaintiff would purchase a certain mill, he (the father) would contribute the sum named towards the purchase. The agent of the property testified that the father came to him before the sale, to make inquiries in regard thereto, and proposed to exchange a farm belonging to him for the mill. After the sale he came with his son, and said that, as the latter had bought the property, he wanted to make some ar-

rangement for him about the deferred payments, and asked if he could borrow money of the witness for the purpose of meeting them. Another witness testified that the father talked to him about the purchase of the property by his son, and said that he knew his son was not able to buy it, but that he was willing to help him. Afterwards the father told the son to buy the property, and he would give him \$5,000 towards the purchase. *Held*, sufficient to show that the promise was in fact made by the father, and that the property was purchased by the son upon the strength of it.—*Steele v. Steele*, 75 Md. 477, 23 Atl. 959.

(p) Where full proof was demanded to support a claim against an estate, a certificate of the clerk of the County Court, not under oath, stating that a note for the sum claimed, in favor of the claimant and against deceased, was deposited in his office, and the ex parte deposition of his successor that no such note could be found, was not sufficient evidence to establish the claim.—*Young v. Mackall*, 4 Md. 362.

(q) If it is doubtful whether the deceased debtor was principal or surety on a claim set up, the burden is upon the creditor to show that he was principal, or that the principal was insolvent.—*Simmons v. Tongue*, 3 Bland 341.

(r) In a suit to recover a legacy due a ward, to prove payment of the legacy, the executors of the guardian offered a memorandum in the handwriting of the husband of the ward, "By amount of B.'s [the guardian's] draft, \$500." They also claimed to be credited for \$1,500, the amount of a check, drawn by the guardian on a bank, payable to the said husband or bearer, which was paid, but to whom did not appear. This evidence of payment was rejected, as too vague and uncertain.—*Barnes v. Crain*, 8 Gill 391.

(s) In assumpsit, under plea of limitations, plaintiff proved that defendant administrator, in answer to demand for payment, said he thought the debt had been paid, but, if it was correct, it should be paid. *Held*, that he must prove the debt before he could avail himself of the promise.—*Kent's Adm'r v. Wilkinson*, 5 G. & J. 497.

(t) In an action by the agent of an adminis-

tratrix, in the settlement of the intestate's estate, against her executor for his services, receipts of the distributees of the intestate for their portion of the estate taken, acknowledged and recorded according to law, are admissible to show plaintiff's right to compensation.—*Carroll v. Tyler*, 2 H. & G. 54.

(u) To disprove a plea of plene administravit, the plaintiff offered in evidence a lease, duly executed to the testator, for a lot of ground for 99 years, at annual rent. *Held*, that it might be read in evidence, although it had not been returned in the inventory to the Orphans' Court, and although no notice had been given to the defendant that it was intended to be offered in evidence, to show fraud or want of truth in the inventory.—*Dukehart v. State*, 4 H. & J. 506.

(v) In an action against an executor on a plea of no assets or plene administravit, the burden of proof is on the plaintiff to show assets applicable to the payment of his claim or noncompletion of administration.—*Morgan v. Slade*, 2 H. & J. 38.

## (B) PRESENTATION AND ALLOWANCE.

### Cross-References.

- Claims against insolvent estate, see post, § 415.
- Condition precedent to action, see post, § 431.
- Condition precedent to action to compel distributee to refund, see post, § 318.
- Condition precedent to right of set-off, see post, § 434.
- Effect as to time for bringing action on claim, see post, § 437.
- Presentation to and allowance of claims by foreign or ancillary executor or administrator, see post, § 521.
- Adoption of state statutes and practice in federal courts, see "Courts," §§ 335, 342, 361.
- As election against other remedy, see "Election of Remedies," § 7.
- Claim for taxes, see "Taxation," § 661.
- Necessity of filing judgment for purposes of preserving lien, see "Judgment," § 798.
- Necessity of presentation before proceeding against administrator of surety for costs, see "Costs," § 144.
- Necessity of presentation to administrator before suit against heirs, see "Descent and Distribution," § 140.
- Necessity of presentation to executor before suit against devisees, see "Wills," § 847.
- Necessity of revival of judgment, see "Judgment," § 860.

Presentation of claim as interrupting statute of limitations, see "Limitation of Actions," § 132.

## § 222. Necessity for presentation in general.

### *Cross-Reference.*

In administration suit, see post, §§ 473, 474.

(a) Code 1888, art. 93, § 83, prohibits an administrator from discharging any claim, otherwise than at his own risk, unless it be first passed by the Orphans' Court, or be proved in the manner prescribed by the succeeding sections. Section 107 provides that, "if a claim be exhibited against an administrator" which he shall think it his duty to dispute, he may retain assets proportioned to the amount of the claim, etc. Section 113 provides for the registration of claims, which registration shall be notice to the administrator. Section 116 provides that no administrator shall be bound to take notice of any claim against his decedent, unless it shall be exhibited legally authenticated, or unless it shall have been passed by the Orphans' Court and entered by the register on his docket, etc. *Held*, that the quoted words in § 107 do not require a physical exhibition of a particular claim which has passed the Orphans' Court, but it is sufficient to bar action thereon, if not brought within the statutory time, if the administrator knows what the claim is, and payment of it is demanded.—*Bradford v. Street*, 84 Md. 273, 35 Atl. 886. (See Code 1911, art. 93, §§ 83, 107, 113, 116.)

(b) Act 1823, c. 131, § 2, which places creditors whose claims are known to the executor, but who fail to bring them in, in pursuance of notice given as required by the act of 1798, upon the same footing with those whose claims are unknown, was never designed to apply to cases where notice to the executor or administrator had been given through the medium of a *lis pendens*, or been in due time followed by it.—*Steuart v. Carr*, 6 Gill 430. (See Code, art. 93, §§ 108, 116.)

## § 223. Statutory provisions.

(a) In many cases the authentication of claims in the particular mode required by statute is impracticable; the only alternative of the creditor being a resort to a court of justice. A literal construction, therefore,

of the act of 1823, would be fraught with inconsistency and injustice, and will not be placed upon it if it be susceptible of any other just and rational interpretation.—*Steuart v. Carr*, 6 Gill 430. (See Code, art. 93, §§ 108, 116.)

## § 224. Claims which must be presented.

### *Cross-Reference.*

Condition precedent to action, see post, § 431.

(a) Code 1860, art. 93, § 109, provides that when the assets shall have been paid away or distributed, and a claim shall be afterwards presented, of which the administrator had no notice, he shall not be answerable for the same. Section 17 declares that no administrator shall be bound to take notice of any claim unless the same shall be exhibited legally authenticated, or unless it shall have been passed by the Orphans' Court, or unless a suit shall be pending against such administrator for such claim. Section 98 provides that no administrator shall be allowed in his account for any claim discharged by him, unless he produces the claim passed by the Orphans' Court, etc. *Held*, that taxes do not constitute such claims as are within the contemplation of the foregoing sections.—*Bona parte v. State*, 63 Md. 465. (See Code 1911, art. 93, §§ 17, 98, 108.) [Cited and annotated in 29 L. R. A. 285, on priority of claims for taxes.]

(b) It appeared that claimant had contracted to sell ground to decedent for 50 pounds on credit, a deed to be given on decedent executing a bond for the money; that decedent had taken possession and died without having executed the bond, or taken a conveyance, but had paid one year's interest on the purchase price; that, after decedent's death, his creditors obtained a decree for selling his real estate under which the land in question, with improvements thereon by decedent, was sold with the other property, but claimant had never received the consideration nor executed a conveyance. *Held*, that claimant be required to exhibit his claim in the chancery court on which he would be paid.—*Millar v. Baker*, 1 Bland 147, note.

(c) Where a testator was indebted to his executor at the time of his death, the executor is entitled to retain the amount of the

debt due him from the estate out of the funds in his hands, or a due proportion of assets, without placing or presenting his claim before the probate court.—*State v. Reigart*, 1 Gill 1, 39 Am. Dec. 628.

### § 225. Time for presentation.

#### Cross-References.

Effect of vacation of settlement, see post, § 509.

Failure to present, see post, §§ 230-233.

Insolvent estate, see post, § 415.

Limitation of actions on claims, see post, § 437.

Questions for jury, see post, § 451.

Relief in general, see post, § 233.

Retroactive operation of statute, see ante, § 223.

By acknowledgment, part payment or waiver, see "Limitation of Actions," §§ 143, 155, 175.

Claims for assessments on national bank stock, see "Banks and Banking," § 250.

#### Annotation.

Right of ward to file claim against estate of guardian after termination of guardianship, but before settlement of account.—26 L. R. A. (N. S.) 793, note.

Is statute of limitations suspended during period allowed administrator to bring action.—13 L. R. A. (N. S.) 1200, note.

Contingency of claim as affecting limitation of time for its presentation.—58 L. R. A. 82, note.

(a) Where a beneficiary under a will was not entitled to receive any part of the estate of testator until another beneficiary arrived at the age of 30 years, the failure of the latter and a third person to assert their claims against the estate of the trustee before that time could not prejudice the former, and could not amount to laches as to him.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(b) The statute of limitations does not run against a claim of one or two administrators against the estate.—*Brown v. Stewart*, 4 Md. Ch. 368.

(c) The statute of limitations does not run against a claim by an executor against the estate.—*Spencer v. Spencer*, 4 Md. Ch. 456. [Cited and annotated in 30 L. R. A. (N. S.) 817, on remedies for enforcement of legacy charged upon devise.]

### § 226. Notice to creditors.

(a) Where letters pendente lite have been revoked by the grant of letters testamentary or of administration, the safer and better practice is for the succeeding administrator to give the notice to creditors prescribed by

Code 1860, art. 93, § 110, although such notice may have been given by the administrator pendente lite.—*In re Worthington's Estate*, 54 Md. 359. (See Code 1911, art. 93, § 109; Id. [vol. 3], art. 93, § 109.)

(b) An administrator will not be protected unless he has given the six-months notice to creditors under act 1798, c. 101; and these six months are calendar, and not lunar, months.—*Glenn v. Hebb*, 17 Md. 260. (See Code, art. 93, § 109; Id. [vol. 3], art. 93, § 109.)

(c) Where an executor, to show due notice to creditors, offered order of notice from the Orphans' Court dated January 25th, and publication thereof on January 26th, the said order having been actually passed on February 5th, it was held that the publication of January 26th was not by order of the Orphans' Court, that the notice was therefore defective, and should not have been allowed to go to the jury.—*Rawlings v. Adams*, 7 Md. 26.

(d) When an executor fails to give the notice to creditors to exhibit their claims required by act 1798, c. 101, subc. 8, § 13, he will not be entitled to the exemption from liability provided for in § 15 of the same subchapter of the same act.—*Stewart v. Carr*, 6 Gill 430. (See Code, art. 93, §§ 108, 109; Id. [vol. 3], art. 93, § 109.)

### § 227. Statement and verification of claim.

#### Cross-Reference.

Proof of claims in proceedings to sell property of decedent, see post, § 340.

(a) To entitle a claim of the administrator against the estate to be passed by the Orphans' Court, it must be accompanied by the proof prescribed by Code 1860, art. 93, §§ 87, 96.—*Watson v. Watson*, 58 Md. 442. (See Code 1911, art. 93, §§ 86, 95.)

(b) An affidavit that the account is just and true, and that the affiants have not, nor any other person to their knowledge for them, received any security or satisfaction for the same, is not sufficient under the statute.—*Cecil v. Rose*, 17 Md. 92. (See Code, art. 93, § 91.)

(c) Under the statute a debt due from the estate of a deceased person to six in sever-

alty cannot be verified in the probate court by the oaths of three alone.—*Cecil v. Rose*, 17 Md. 92. (See Code, art. 93, § 91.)

(d) Claims withdrawn to be restated are considered on a restatement, as an amended bill.—*Simmons v. Tongue*, 3 Bland 341.

(e) The account of a claimant against the estate of a decedent filed with an affirmation of the truth thereof without a certification that the affirmant was a Quaker or other person entitled by law to have his affirmation to be on footing with the affidavit of a common person stands for nothing.—*Ringgold v. Jones*, 1 Bland 88, note.

(f) After the claims of creditors against the proceeds of the sale of a deceased debtor's real estate, for the payment of his debts, have been filed, it is their duty to attend to them and sustain them by proper proof.—*Kent v. O'Hara*, 7 G. & J. 212.

(g) A probate of an account under act 1729, c. 20, § 9, which omits to state that the creditor had not received any security for his debt, is not evidence under that act.—*Smoot v. Bunbury*, 1 H. & J. 136. (See Code, art. 93, § 91.)

### § 228. Presentation and filing.

#### Cross-Reference.

Presentation to administrator before his appointment as such, see ante, § 77.

### § 229. Effect of presentation.

#### Cross-References.

Secured claims, see post, § 264.

As tolling limitations, see "Limitation of Actions," § 132.

### § 230. Failure to present.

#### Cross-References.

Insolvent estate, see post, § 415.

Time for presentation, see ante, § 225.

Affecting right to sell under power in deed of trust, see "Mortgages," § 334.

As discharge of surety, see "Principal and Surety," § 125.

As releasing mortgagor from personal liability for deficiency, see "Mortgages," § 558.

### § 231.— Effect in general.

#### Annotation.

Effect of failure to present claim against estate of deceased principal to release surety.—25 L. R. A. (N. S.) 139, note.

Effect of failure to present claim within the time allowed by the administration statute of the domicile as a bar to its allowance in the state of the ancillary administration, or vice versa.—19 L. R. A. (N. S.) 553, note.

### § 232.— Excuses.

#### Cross-Reference.

Knowledge of executor or administrator of existence of debt, see ante, § 222.

### § 233.— Relief.

#### Cross-References.

Extension of time, see ante, § 225.

Jurisdiction of federal court of equitable suit for relief, see "Courts," § 262.

### § 234. Allowance by executors or administrators.

#### Cross-References.

Coexecutors, see ante, § 124.

Confession of judgment, see ante, § 113.

Powers of special administrators, see ante, § 122.

Rejection as starting running of statute of limitations, see post, § 437.

Retroactive operation of statute, see ante, § 223.

Statement and verification of claim, see ante, § 227.

Waiver of bar by limitation, see "Limitation of Actions," § 175.

(a) An executor's promise to pay a claim which had been adjudicated in favor of his testator in the latter's lifetime would not bind the estate; public policy preventing such promise from being given effect, even if there was no other ground on which it could be held not binding.—*Fledderman v. Fledderman*, 112 Md. 226, 76 Atl. 85.

(b) After the claims of creditors against the proceeds of the sale of a deceased debtor's real estate, for the payment of his debts, have been filed, it is their duty to attend to them and sustain them by proper proof.—*Kent v. O'Hara*, 7 G. & J. 212.

### § 235. Allowance by commissioners.

#### Cross-Reference.

Insolvent estate, see post, § 415.

### § 236. Approval or allowance by court.

#### Cross-References.

Disputed claims, see post, § 250.

Payment before allowance, see post, § 278.

Statement and verification of claim, see ante, § 227.

Original jurisdiction of appellate courts, see "Courts," § 206.

(a) An ex parte order of the Orphans' Court allowing executors \$1,500 for attorney's fees in defending a caveat to the will is valid, in the absence of evidence to show that the amount was unreasonable, or that the court acted without authority in allowing it.—*Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032.



(b) Where decedent having been under a contract to build a wall, and having contracted with plaintiff to furnish the materials, his administrator continued the work and received the material from plaintiff, plaintiff's claim was not such as to require authentication by the Orphans' Court before the administrator would be protected in paying it.—*Coburn v. Harris*, 58 Md. 87.

**§ 237. Order or decree.**

**§ 238. Setting aside allowance or disallowance.**

*Cross-Reference.*

Application of general statute of limitations, see "Limitation of Actions," § 37.

**§ 239. Review.**

*Cross-References.*

Repeal of statute, see ante, § 223.

Review of judgment on trial of disputed claim, see post, § 256.

Courts invested with appellate jurisdiction, see "Courts," § 220.

Right to jury trial in appeal from decision by commissioners, see "Jury," § 17.

(a) An order of the Orphans' Court passing a claim of the executor or administrator against the estate may be appealed from by a creditor, where the assets of the deceased are inadequate to pay the debts.—*Stevenson v. Schriver*, 9 G. & J. 324.

(b) An order of the Orphans' Court, passing a claim of the executor or administrator against the estate, may be appealed from by a distributee.—*Stevenson v. Schriver*, 9 G. & J. 324.

**§ 240. Costs.**

*Cross-Reference.*

Actions, see post, § 456.

**§ 241. Effect of allowance or disallowance.**

*Cross-References.*

By special administrator, see ante, § 122.  
Conclusiveness on application for order for sale of real estate, see post, § 340.

Secured claims, see post, § 264.

Basis for creditors' suit, see "Creditors' Suit," § 11.

(a) The Orphans' Court passing a claim has no power to determine the rights of the claimant against the estate, or to order the payment of the claim, and its decision is only prima facie, and operates as a protection to the executor in the event of its liquidation by a disbursement of the funds

held by him in his representative capacity.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(b) The allowance of claims against a decedent's estate by the Orphans' Court does not finally establish their validity, and they should be disputed by the executor, where, from representations by the proper parties in interest, he has good reason to doubt their validity.—*Strasbaugh v. Dallam*, 93 Md. 712, 50 Atl. 417.

(c) The fact that an administrator has recognized a claim as proper to be paid is not binding upon him or the estate, if he afterwards discovers that there is no legal foundation for the claim.—*Webster v. Le Compte*, 74 Md. 249, 22 Atl. 232.

(d) The allowance of debts by the probate court is prima facie, though not conclusive, proof of them.—*Seighman v. Marshall*, 17 Md. 550.

(e) Where the claim of a creditor had been allowed by the Orphans' Court, and the allowance of the item in the administrator's account was objected to by a legatee, it was held that the first decree of allowance was merely prima facie evidence in its favor, and that the claim might be rejected if the proof of it appeared insufficient.—*Bowling v. Lamar*, 1 Gill 358.

(f) The allowance of a claim against the estate of a deceased person in the Orphans' Court and the reversal of the same on appeal constitute no bar to the recovery of the same claim at law, for the court possessed only a prima facie jurisdiction, and the exercise of the appellate jurisdiction did not increase its effect.—*State v. Reigart*, 1 Gill 1, 39 Am. Dec. 628.

(g) An account passed by the Orphans' Court allowing an executor or administrator his own claim upon the decedent's estate is only prima facie evidence of the correctness of such allowance.—*Stockett v. Jones*, 10 G. & J. 276.

**(C) DISPUTED CLAIMS.**

*Cross-References.*

Against insolvent estate, see post, § 415.

Contest of claims in proceedings to sell property of decedent, see post, § 340.

Jurisdiction of common law courts, see post, § 435.

Parties to actions on claims, see post, § 438.

Service of process, see post, § 441.

Adoption of state statutes and practice in federal courts, see "Courts," §§ 335, 342.

Competency as witnesses of persons interested in estate as to transactions with persons since deceased, see "Witnesses," § 133.

Concurrent and conflicting jurisdiction of state and federal courts of suits on claims, see "Courts," § 505.

Interpleader by administrator, see "Interpleader," § 11.

Jurisdiction of justices of rejected claims, see "Justices of the Peace," § 39.

Limitations affecting defenses, see "Limitation of Actions," § 62.

Removal of suit on disputed claim from state to federal court, see "Removal of Causes," § 9.

Right to jury trial, see "Jury," §§ 11, 19.

#### § 242. Contest of claims in general.

(a) Where a claim against a decedent's estate allowed by the Orphans' Court is disputed by the executor, it is incumbent on the claimant to institute an appropriate suit at law or in equity, and have the claim established by final judgment or decree.—*Strasbaugh v. Dallam*, 93 Md. 712, 50 Atl. 417.

(b) Where administrators and next of kin petitioned the Orphans' Court that an allowance of attorney's fees to executors be inquired into, and subsequently filed another petition, asking that issues on this question be referred to a court of law, the first petition should not be dismissed, since, though the Orphans' Court was authorized to allow attorney's fees, the reasonableness thereof could be examined on appeal.—*Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032.

(c) Where the Orphans' Court, acting within its jurisdiction, had made an allowance of attorney's fees to executors, it properly dismissed a petition to have the issue of the reasonableness of the fees referred to a court of law, since the court, and not a jury, was the proper tribunal to determine the amount of the fee.—*Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032.

#### § 243. Statutory provisions.

#### § 244. Persons who may contest claims.

##### *Cross-References.*

Setting aside allowance, see ante, § 238.

Persons to whom defense of limitations is available, see "Limitations of Actions," § 172.

(a) Claims filed on the sale of real estate of

a decedent by creditors not original parties are subject to be contested by the heirs.—*McMechen v. Chase*, 1 Bland 85, note.

(b) The plea of limitations (technically considered as such) cannot be interposed in proceedings before the Orphans' Court in relation to the claims of creditors by legatees or other creditors, that power, in this state, being vested in executors and administrators; but the court may look to the fact of such a bar as evidence, to be weighed with all other testimony in relation to any claim, in determining its justice, and the propriety of passing or rejecting it.—*Bowling v. Lamar*, 1 Gill 358.

#### § 245. Objections and exceptions to claims.

(a) Lapse of time is not a legal bar to a claim in the Orphans' Court, although it will be considered in its bearing on the justice of the claim.—*Yingling v. Hesson*, 16 Md. 112.

(b) Where a claim has been passed by the Orphans' Court, but not paid, and the claimant afterwards becomes administrator de bonis non, the distributees may contest the claim before the court at any time, without waiting for such administrator to exhibit an account including the objectionable claim.—*Cover v. Stockdale*, 16 Md. 1.

#### § 246. Arbitration or reference.

##### *Cross-Reference.*

Powers of special administrator, see ante, § 122.

(a) Code 1860, art. 7, § 7, conferring on Orphans' Courts power, with consent of the parties, to arbitrate between a claimant and an administrator, refers to claims only against the estate of a decedent which are asserted against the administrator in his fiduciary capacity, and not to those contracted by him individually.—*Browne v. Preston*, 38 Md. 373. (See Code 1911, art. 93, § 257.)

(b) After the claims of certain creditors against the proceeds of the sale of a deceased debtor's real estate for the payment of his debts had been rejected by the auditor for want of proof, the court ordered the distribution of the funds, as to those claims, to be suspended until further order. It was accordingly suspended for two months, when

the cause was again referred to the auditor to state a final account, which was reported and ratified, and the distribution of the funds ordered accordingly. *Held*, that it was then too late, in the absence of peculiar circumstances, for the creditors whose claims were rejected to apply to the court to rescind the audit and refer the case again.—*Kent v. O'Hara*, 7 G. & J. 212.

**§ 247. Hearing by commissioners.**

**§ 248. Trial by probate court.**

*Cross-Reference.*

Judgment, see post, § 255.

**§ 249.— Nature and form of proceeding.**

**§ 250.— Jurisdiction.**

*Cross-Reference.*

Undisputed claims, see ante, § 236.

(a) Probate courts have no power to investigate the merits of disputed claims against estates.—*Bowie v. Ghiselin*, 30 Md. 553.

**§ 251.— Proceedings.**

(a) The allegations that a claim preferred by an executor is unjust, spurious, stale, and should not be allowed, are equivalent to a demand for full proof.—*Hesson v. Hesson*, 14 Md. 8.

**§ 252.— Evidence.**

*Cross-References.*

Existence and validity of claims, see ante, § 221.

On accounting, see post, § 506.

(a) Plaintiff claimed \$5,000 from his father's estate, based upon a parol promise of the father that, if plaintiff would purchase a certain mill, he (the father) would contribute the sum named towards the purchase. The agent of the property testified that the father came to him before the sale, to make inquiries in regard thereto, and proposed to exchange a farm belonging to him for the mill. After the sale he came with his son, and said that, as the latter had bought the property, he wanted to make some arrangement for him about the deferred payments, and asked if he could borrow money of the witness for the purpose of meeting them. Another witness testified that the father talked to him about the purchase of the property by his son, and said that he knew his son was not able to buy it, but that he was willing to help him. After-

wards the father told the son to buy the property, and he would give him \$5,000 towards the purchase. *Held*, sufficient to show that the promise was in fact made by the father, and that the property was purchased by the son upon the strength of it.—*Steele v. Steele*, 75 Md. 477, 23 Atl. 959.

(b) Where full proof was demanded to support a claim against an estate, a certificate of the clerk of the County Court, not under oath, stating that a note for the sum claimed, in favor of the claimant and against deceased, was deposited in his office, and the ex parte deposition of his successor that no such note could be found, was not sufficient evidence to establish the claim.—*Young v. Mackall*, 4 Md. 362.

(c) If it is doubtful whether the deceased debtor was principal or surety on a claim set up, the burden is upon the creditor to show that he was principal, or that the principal was insolvent.—*Simmons v. Tongue*, 3 Bland 341.

**§ 253.— Hearing.**

*Cross-Reference.*

Right to jury trial, see "Jury," §§ 11, 19.

(a) Where there was no material evidence that complainant rendered any services to decedent personally, the court erred in instructing that, if complainant was not a member of decedent's family, and rendered useful services to him in his lifetime, the fact of their rendition was prima facie evidence of their acceptance by him, and, in the absence of proof to the contrary, or of an express contract, raised an obligation to pay what they were reasonably worth.—*Pearre v. Smith*, 110 Md. 531, 73 Atl. 141.

(b) An executor or other creditor seeking to establish his claim against the estate has the affirmative of the issue, and is entitled to open and close the case.—*Yingling v. Hesson*, 16 Md. 112. [Cited and annotated in 61 L. R. A. 540, on effect of admission to change burden of proof and right to open and close.]

**§ 254.— Findings and decision.**

**§ 255. Judgment.**

*Cross-References.*

Assignability of judgment, see "Judgment," § 835.

Jurisdiction of federal courts to set aside judgments as dependent on amount in controversy, see "Courts," § 328.

Lien of judgment, see "Judgment," § 762.

Nature and scope of equitable relief against, see "Judgment," § 403.

(a) Where a claim against the personal estate is disputed by the administrator, and the Orphans' Court allows a reduced amount, and both parties acquiesce, claimant cannot, as against the proceeds of the real estate, claim more than was allowed against the personal estate.—*Shepherd v. Bevans*, 4 Md. Ch. 408.

(b) Where a decree of the probate court establishing a creditor's claim is reversed on appeal after the executor has paid the claim, the reversal of the judgment constitutes no bar to the recovery of the same claim in an action at law against the executors, since the Orphans' Court possessed only prima facie jurisdiction, and the reversal on appeal did not increase the effect of its judgment.—*State v. Reigart*, 1 Gill 1, 39 Am. Dec. 628.

#### § 256. Review.

##### Cross-References.

Actions, see post, § 455.

Effect of revocation of letters pending appeal, see ante, § 35.

Review of matters not involving dispute of claim, see ante, § 239.

Appellate jurisdiction, see "Courts," §§ 219, 242.

Dependent on finality of decision, see "Appeal and Error," § 77.

(a) The matter of the validity of a claim against an estate cannot be conclusively determined upon an appeal to the Court of Appeals from the decision of the Orphans' Court, as proceedings before the latter court for the allowance of claims do not take the place of an action.—*Levering v. Levering*, 64 Md. 399, 2 Atl. 1.

(b) Where, on appeal from an order confirming the separate account of an executor over a protest of a coexecutor alleging the account to be unjust, spurious, and stale, the record showed no proof in support of the validity of the account, the order will be reversed.—*Hesson v. Hesson*, 14 Md. 8.

(c) Under act 1818, c. 204, § 1, prescribing that an appeal from a decision of the Orphans' Court must be made within 30 days, an appeal not made within such period will be dismissed.—*Mayhew v. Soper*, 10 G. & J.

366; *Porter v. Timanus*, 12 Md. 288. (See Code, art. 5, § 62.)

(d) An order of the Orphans' Court, passing a claim of the executor or administrator against the estate, may be appealed from by a distributee.—*Stevenson v. Schriver*, 9 G. & J. 324.

(e) An order of the Orphans' Court passing a claim of the executor or administrator against the estate may be appealed from by a creditor, where the assets of the deceased are inadequate to pay the debts.—*Stevenson v. Schriver*, 9 G. & J. 324.

#### § 257. Costs.

##### Cross-References.

Actions, see post, § 456.

Allowance to executor or administrator of expenses of resisting claims, see ante, § 111.

Payment out of proceeds of sale of real estate, see post, § 403.

(a) Executors who have failed to present at the proper time their defense to a claim made by an administratrix, and thereby postponed the adjudication of the matter in controversy, may be required to pay costs, notwithstanding that such defense is well taken.—*Donaldson v. Raborg*, 28 Md. 34.

#### (D) PRIORITIES AND PAYMENT.

##### Cross-References.

Borrowing money to pay debts, see ante, § 98.

Claims against insolvent estates of decedents, see post, § 416.

Disposition of proceeds of sale of property under order of court, see post, § 403.

Mode of giving credit in account, see post, § 481.

Payment of claims by foreign or ancillary executor or administrator, see post, § 522.

Power of special administrator, see ante, § 122.

Priority of allowance to surviving wife, husband, or children, see ante, § 182.

Priority of debts to legacies or distributive shares, see post, § 289.

Sales of property under order of court for payment of debts, see post, § 322.

Vouchers and proof of payment, see post, § 503.

Acceptance of devise in satisfaction of debt, see "Wills," § 714.

Accord and satisfaction, see "Accord and Satisfaction," § 11.

Application of payment, see "Payment," §§ 36-54.

Death as suspending limitations affecting right to subrogation, see "Limitation of Actions," § 83.

Duration of judgment lien against estate of decedent, see "Judgment," § 798.

Following trust funds, see "Trusts," § 352.

Part payment by administrator, or verbal promise to pay as sufficient to satisfy statute of frauds or make administrator personally liable, see "Frauds, Statute of," § 129.

Preference of attachment creditor on sale of attached property by executor to pay debts, see "Attachment," § 217.

Restoration of consideration as prerequisite to rescission of compromise, see "Compromise and Settlement," § 18.

Statute authorizing compromise as affecting vested rights, see "Constitutional Law," § 93.

Subrogation of personal representative to rights of creditors on payment of claims, see "Subrogation," § 10.

Subrogation of persons interested in administration making payment of claims to rights of creditors, see "Subrogation," § 19.

Superiority of homestead claim, see "Homestead," § 139.

#### § 258. Authority and duty to make payment.

##### *Cross-Reference.*

Effect of removal of administrator, see ante, § 35.

#### §§ 259-262. Statutory classification and order of payment.

(a) Under Code 1904, art. 93, § 114, judgment of a justice of the peace against a decedent is entitled to priority of payment after taxes and claims for rent.—*Newcomer v. Beeler*, 116 Md. 647, 82 Atl. 460. (See Code 1911, art. 93, § 115.)

(b) The state has the right of priority to be first paid, as a preferred creditor, out of the assets in the hands of the administrator of its deceased debtor, except where some outstanding lien stands in the way.—*Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286. [Cited and annotated in 29 L. R. A. 243, 245, on priority of state or United States in payment; in 68 L. R. A. 524, 529, 530, 541, on extinction of judgments against principals by sureties' payment; in 1 L. R. A. (N. S.) 255, on preference of claims of state over other creditors.]

(c) On the sale of mortgaged real estate of a person deceased, by a decree in equity, state and county taxes are by act 1843, c. 208, and act 1797, c. 90, first payable out of the proceeds of such sale, notwithstanding any assets in the hands of the administrator.

—*Fulton v. Nicholson*, 7 Md. 104. (See Code, art. 81, §§ 49, 68; art. 93, § 115.)

(d) Where the administrator of a deceased tenant continues the tenancy of his intestate until after the death of the landlord, the owner of the fee, the rent due up to the last day of payment prior to the landlord's decease might have been distrained for by him, and is therefore a preferred claim upon the assets of the deceased tenant found upon the demised premises, under act 1836, c. 192.—*Longwell v. Ridinger*, 1 Gill 57. (See Code, art. 93, § 115.)

(e) A judgment rendered in the state of Pennsylvania, authenticated according to the Act of Congress, was held, in Maryland, not to be entitled to a preference or priority, like judgments obtained in the latter state against the deceased in his lifetime, in the distribution of his assets.—*Brengle v. McClellan*, 7 G. & J. 434.

#### § 263. Rights of creditors to priority.

##### *Cross-References.*

As against heirs or devisees, see post, § 289.

Compromise in general, see post, § 269.

(a) Before certain legacies became due and payable under the will, the executor and his co-residuary legatee entered into an agreement in writing under seal, by which they bound themselves to pay interest on said legacies semi-annually from the time they became due until paid, the principal to be paid by the executor in due course of administration. Held, that such a contract could not impair, destroy, or change the rights or priorities of other creditors or legatees arising under a due course of administration, even if it should be regarded as expressly binding the obligors to pay the legacies therein mentioned.—*Steuart v. Carr*, 6 Gill 430.

(b) As between the state and the other general creditors of a deceased debtor, whose lands were sold for the payment of the debts in consequence of the insufficiency of his personal property, where neither the state nor the general creditors have a lien, the state is entitled to a priority of payment out of the proceeds thereof over such other creditors.—*Smith v. State*, 5 Gill 45. [Cited and annotated in 29 L. R. A. 245, on priority of state or United States in payment.]

(c) A judgment belonging to the state has priority of a judgment of an individual in the payment of the debts of the deceased debtor.—*Contee v. Chew*, 1 H. & J. 417. [Cited and annotated in 29 L. R. A. 245, on priority of state or United States in payment.]

(d) Under the common law the state is entitled to a preference of all debts due from the decedent's estate except debts of record.—*Murray v. Ridley*, 3 H. & McH. 171. [Cited and annotated in 29 L. R. A. 245, on priority of state or United States in payment.]

(e) All debts of a deceased person due to private individuals, except judgments contracted since the 11th of March, 1786, are to be paid to all creditors without preference. All debts contracted before that time are to be paid according to act 1715, c. 39. All bonds executed before that time are to be preferred to bonds executed since that time.—*Murray v. Ridley*, 3 H. & McH. 171. (See Code, art. 93, § 115.) [Cited and annotated, see supra.]

#### § 264. Secured claims.

##### Cross-References.

Disposition of proceeds of sale of property, see post, § 402.

Insolvent estate, see post, § 415.

Purchase of property constituting security, see post, § 368.

(a) Where state and county taxes are allowed out of the proceeds of the sale of mortgaged real estate of a person deceased, according to act 1843, c. 208, and act 1797, c. 90, the mortgagee or person entitled to the fund is entitled to a preference according to his proper priority in the distribution of personal estate, as substituted to the rights of state and county.—*Fulton v. Nicholson*, 7 Md. 104. (See Code, art. 81, §§ 49, 68; art. 93, § 115.)

(b) Testator entered into a contract with complainants by which they were to become his agents for the sale of his crops, and advance him money and accept his drafts, for the payment of which he pledged his crops on hand and the growing crops of the year 1847. On the faith of the agreement, complainants made advances, and in January, 1848, testator died largely indebted to them. Held, that the expenses incurred by the ex-

ecutors in getting the crops ready for market should be paid out of the proceeds of the sale of the crops on specific enforcement of the contract.—*Sullivan v. Tuck*, 1 Md. Ch. 59. [Cited and annotated in 6 L. R. A. (N. S.) 589, on specific performance of contract to give security; in 40 L. R. A. (N. S.) 230, on personal representative, testamentary trustee, or guardian carrying on business.]

(c) A personal collateral security given by an administrator for a debt due from his testator cannot operate to place the creditor in a better situation against the real estate of the deceased than he was in without such security.—*Wyse v. Smith*, 4 G. & J. 295. [Cited and annotated in 20 L. R. A. 788, 787, on accord and satisfaction by part payment.]

#### § 265. Claims of executor or administrator.

##### Cross-References.

Claims allowable, see ante, § 219.

Insolvent estate, see post, § 416.

Mode of giving credit in account, see post, § 486.

Action against heirs, see "Descent and Distribution," § 139.

Contribution from heirs, see "Descent and Distribution," § 152.

Liability of heirs, see "Descent and Distribution," § 126.

(a) In view of act 1798, c. 101, subc. 8, §§ 19, 22, declaring that no executor or administrator shall discharge any claim against the deceased, otherwise than at his own risk, unless the same shall be passed by the Orphans' Court granting the administration, and "that in no case shall an executor or administrator be allowed to retain for his own claim against the deceased, unless the same shall be passed by the Orphans' Court, and every such claim shall stand on equal footing with other claims of the same nature," he is conclusively entitled to a credit for his own claim against the estate passed by the court.—*Owens v. Collinson*, 3 G. & J. 25. (See Code, art. 93, §§ 83, 96.)

(b) An administrator who is himself a creditor of his intestate is not precluded by a judgment against him, in favor of another creditor of the intestate, from showing that the personal assets are insufficient to pay all the creditors, for the purpose of subjecting the real estate to his own claim as against

the heirs at law.—*Gaither v. Welch*, 3 G. & J. 259.

### § 266. Advances to pay claims.

(a) A widow, as administratrix of her deceased husband, has no right to appropriate the personal estate of decedent to her own use to indemnify her for money advanced to pay the debts and expenses of the estate.—*Gavin v. Carling*, 55 Md. 530.

(b) An executor, who voluntarily pays debts out of his own funds, cannot claim interest on sums so paid when he has assets in his hands at the time sufficient to pay them, which he has not chosen to convert into money.—*Billingslea v. Henry*, 20 Md. 282.

(c) If an executor has not assets, and is compelled to resort to the land in a Court of Chancery to recover for overpayments, he is treated as a creditor, subrogated to the rights of creditors whose claims he may have paid, and is entitled to interest.—*Billingslea v. Henry*, 20 Md. 282.

(d) An executor, by paying debts beyond the amount of cash received from sales, cannot thereby transfer to himself, in his own right, the title to any portion of testator's property.—*Dennis v. Dennis*, 15 Md. 73.

(e) Where an executor or administrator pays a debt or discharges a contract which constituted a just charge against the estate out of his private funds, he will be entitled to an allowance for the same in his account.—*Edelen v. Edelen*, 11 Md. 415.

(f) Where an administrator, who, notwithstanding an order directing a sale of personal estate to pay intestate's debts, retained certain personal property, including slaves, and paid debts to the amount of their appraised value, in charging him for the increase of the slaves, and for their use, and for the value of such as run away, he should be allowed for the sums paid by him to the creditors.—*Hall v. Griffith*, 2 H. & J. 483.

### § 267. Interest.

#### Cross-References.

Effect of allowance without addition of interest, see ante, § 241.

Failure to present claim, see ante, § 231.  
On claims of executor or administrator, see ante, § 265.

Acceptance of principal as waiver of right to interest, see "Interest," § 26.

On gratuitous loan, see "Interest," § 46.

(a) Where an executrix received for her own use the income on an amount due a claimant, instead of accounting for the amount due claimant under the will of the father of testator, no part of the interest on the claim from the time she settled the estate to the time claimant was entitled to the payment of the claim under such will should be charged against the share of a beneficiary under the will who received no benefit from the estate administered by the executrix.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(b) Where testator bequeathed his interest in a life policy to his son in trust to pay the proceeds to a grandson on his attaining full age, and the son received the proceeds of the policy and mingled the same with his own funds during the minority of the grandson and died before the grandson attained full age, the allowance of a claim against the son's estate for the amount of the policy, together with interest from the time the policy was paid to the son to the time the grandson attained full age, was sufficiently favorable to the estate.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(c) Where a decedent's estate sold for the payment of debts is solvent, and the sale is made for cash, no interest should be allowed on claims after the date of the sale.—*Ellicott v. Ellicott*, 6 G. & J. 35.

(d) Where the estate of a deceased person, sold for the payment of his debts, is solvent, the universal mode of auditing accounts in the Court of Chancery is to calculate interest on claims against the deceased up to the day of sale, from which time the claimants on the amounts thus ascertained become, as it were, creditors of the fund arising from the sales, and entitled respectively to their proportions of the interest it may bear.—*Ellicott v. Ellicott*, 6 G. & J. 35.

(e) Where a sale of a decedent's solvent estate is made on credit for payment of debts, the creditors are entitled to interest, compounded from the date of the sale.—*Ellicott v. Ellicott*, 6 G. & J. 35.

### § 268. Attorneys' fees and expenses of creditors.

#### Cross-References.

On allowance or disallowance of claim, see ante, §§ 240, 257.

Priority, see ante, § 263.

### § 269. Compromises by creditors.

#### Cross-References.

See "Accord and Satisfaction," § 11;  
 "Compromise and Settlement," § 18.  
 Insolvent estate, see post, § 416.  
 Statute authorizing as affecting vested rights, see "Constitutional Law," § 93.

(a) The action of the Orphans' Court under the power given it by act 1908, c. 428, to authorize and direct an executor to compromise a claim against the estate in such manner as it may approve, in authorizing and directing an executor to compromise, as he had petitioned on advice of counsel that he might, a claim of \$15,000 for services to testator by payment of \$1,000, will be sustained; the evidence as a whole showing the claim was not devoid of a substantial foundation.—*Badders v. O'Brien*, 114 Md. 451, 79 Atl. 917. (See Code, art. 93, § 261.)

### § 270. Property available for payment.

#### Cross-References.

Allowance to widow, see ante, § 181.  
 Determination as to sufficiency of personalty, see post, § 341.  
 Proceeds of sale under power in will, see ante, § 147.  
 Property subject to sale under order of court, see post, § 329.  
 Homestead, see "Homestead," § 139.

### § 271.— In general.

(a) A father deeded property to trustees to be held by them during the lifetime of his daughter, and the interest and increase to be applied to her use, and gave her the privilege of disposing of the body of the property by will. *Held*, that such property cannot be subjected to the payment of the daughter's debts at her death.—*Galard v. Winans*, 111 Md. 434, 74 Atl. 626.

(b) A mortgage creditor of one deceased cannot prove his claim against the estate without either surrendering his mortgage lien, or exhausting it by sale and applying the proceeds thereof towards the debt.—*Macgill v. Hyatt*, 80 Md. 253, 30 Atl. 710. [Cited and annotated in 23 L. R. A. (N. S.) 113, on conditions precedent to equitable remedies of creditors.]

(c) A manumitted negro may be sold for a term of years for payment of debts.—*Rozier v. Holliday*, 8 Md. 381.

(d) The whole burden of a mortgage on a decedent's real estate must be borne by the

estate, and a trustee thereof will be credited for the full amount of payments on such claim.—*Ellicott v. Ellicott*, 6 G. & J. 35.

### § 272.— Personal and real property.

#### Cross-Reference.

See post, § 274.

### § 273.— Legal and equitable assets.

### § 274.— Marshaling assets.

#### Cross-Reference.

Insolvent estate, see post, § 416.

(a) In marshaling assets, lands descended are to be applied before lands devised.—*Brooks v. Dent*, 1 Md. Ch. 523.

(b) The personal estate is the primary fund for the payment of debts, and must first be resorted to, even for the satisfaction of debts due the state.—*Hammond v. Hammond*, 2 Bland 306.

(c) If the allegation of a creditor's bill, from which the complainant's right of substitution against the realty, in the place of creditors whose claims have been paid from the personalty, appears, be proved, admitted, or a decree passed pro confesso, the result is the same as regards defendants sui juris, and a decree passes as of course for the payment of the complainant's claim out of the real estate.—*Gibson v. McCormick*, 10 G. & J. 65.

(d) The personal estate of the deceased is the primary fund for the payment of his debts.—*Hoye v. Brewer*, 3 G. & J. 153; *Wyse v. Smith*, 4 G. & J. 295.

(e) A debtor agreed with his creditors, in order to obtain a full release of their claims, to sell to them, at fixed prices, certain property, real and personal. Three trustees were appointed by the creditors, to whom the debtor executed his agreement, stipulating the sale of his property on the above terms. They authorized the debtor to sell certain real estate, which he sold by parol to one of the creditors in 1796, under an agreement that the creditor's dividend should be deducted from the purchase money. The sale was affirmed by the trustees, and the debtor assigned to the purchaser his only title, viz. a bond, from an agent of the state for the sale of the property, to convey it to the debtor. The purchaser afterwards obtained a deed from the chancellor, acting in behalf



of the state, and sold the land to other parties, who were ignorant of the trustees' claim. A portion of the purchase money being unpaid, the trustees filed a bill in 1810 against the vendees, executrix, and devisees of the first purchaser, praying that the balance due should be paid by the executrix or the land sold for the vendor's lien. The answer of the executrix admitted a sufficiency of assets, and it appeared that a large amount had been received by the deceased from his vendees. *Held*, that the debt was first payable out of the personal assets.—*Lansdale v. Ghequiere*, 4 H. & J. 257.

### § 275. Mode and sufficiency of payment.

#### *Cross-Reference.*

Compromise, see ante, § 269.

#### *Annotation.*

Commercial paper given by representative as payment of debt.—35 L. R. A. (N. S.) 63, note.

(a) A. died indebted to B., leaving C. as his executor, who came into possession of assets and gave B. certain promissory notes, signed by himself, in payment of the account. Before these notes matured C. died, and D., his executor, took possession of his estate and sold it. Letters de bonis non were granted upon A.'s estate to S., who sued D. in trover for the value of the property which belonged to A., but which D. sold as executor of C. *Held*, that the acceptance by B. of the notes was not an extinguishment of the debt due him by A., and D. was entitled to deduct that payment from the proceeds of A.'s personal property sold by him.—*Glenn v. Smith*, 2 G. & J. 493, 20 Am. Dec. 452. [Cited and annotated in 10 L. R. A. (N. S.) 512, 513, 518, 539, 540, 541, on effect of transfer, without indorsement, of worthless check or note to third person; in 35 L. R. A. (N. S.) 104, on payment by commercial paper.]

### § 276. Effect of payment.

#### *Annotation.*

Effect of payment by stranger or volunteer to give claim against estate.—23 L. R. A. 129, note.

### § 277. Time for making payment in general.

### § 278. Payment before allowance or order.

#### *Cross-Reference.*

Effect of allowance of credit in annual settlement, see post, § 513.

### § 279. Payment by mistake.

### § 280. Overpayment.

#### *Cross-References.*

Improper payments, see post, § 281.

Legacy or distributive share, see post, § 310.

#### *Annotation.*

Right of executor or administrator to recover back from creditor excessive payments made under the mistaken belief that estate was solvent.—28 L. R. A. (N. S.) 440, note.

(a) Where deceased devised his land to be sold for payment of debts, and this was done and his personal estate more than exhausted in payment of debts, and the overpayment did not appear to have been made expressly on account of any judgment creating a lien on the real estate, but there were claims on judgments paid by the executor exceeding the amount of the overpayment and the other claims exhibited were not entitled to any preference, the executor's claim for such overpayment could come in equally with others.—*Ex parte Street*, 1 Bland 532, note.

(b) Trustees for a sale of decedent's land for payment of debts, who pay to any creditor more interest than he is entitled to, must individually bear the loss.—*Ellicott v. Ellicott*, 6 G. & J. 35.

### § 281. Improper payments.

#### *Cross-References.*

See ante, § 117.

Action in personal or representative capacity, see post, § 427.

Allowance to widow and children, see ante, § 199.

Effect of setting aside of allowance of claim, see ante, § 238.

Overpayments, see ante, § 280.

Actionable fraud, see "Fraud," §§ 4, 28.

(a) In the absence of clear and positive evidence of fraud on the part of an executor in the payment of an account proven in the Orphans' Court, he should be credited with the amount of such account on the final settlement of the estate.—*Garrison v. Hill*, 81 Md. 206, 31 Atl. 794.

(b) Executors and administrators are held affected with notice of taxes due upon property in their custody, and it is their duty to

ascertain and pay them, next after funeral expenses, before proceeding to the further administration of the estate.—*Bonaparte v. State*, 63 Md. 465. [Cited and annotated in 29 L. R. A. 285, on priority of claims for taxes.]

(c) Administrators may retain for their own claims proved and passed, and are not required to plead limitations to the claims of others if they believe them to be just.—*Semmes v. Magruder*, 10 Md. 242.

(d) In 1830 A, was appointed by the court a trustee to sell the real estate of B., who had died intestate, for the payment of his debts. A sale was made and reported by the trustee, and an order of ratification nisi passed in 1831. In 1842 the heirs at law of B., having become of age, and no further proceedings having been had in the case, except to refer the same to an auditor for an account, filed a petition, praying that the proceeds of the sale might be brought into court by the trustee and distributed among them, upon the ground that the claims against B. had not been proved, and were subject to the plea of the statute of limitations. In 1846 the heirs filed another petition, suggesting the death of the trustee, and praying that his executor might be made a party, and relief had against him. *Held*, that the trustee, when called to an account, could not be allowed for the payment of the debts of B. which were barred by limitations when filed.—*Dent v. Maddox*, 4 Md. 522.

(e) Where, by a suit in chancery by any person interested in the administration of an estate, the executor pays either to creditors, legatees, or distributees any portion thereof by order of the court, he is protected by the order.—*Conner v. Ogle*, 4 Md. Ch. 425. [Cited and annotated in 21 L. R. A. 153, on validity of acts under letters probate afterwards revoked or held invalid.]

(f) The Orphans' Court being vested with the power of passing on claims against the estate of a deceased person, the executor who pays a claim previously passed on by such court is not liable, though it was not proven in the manner prescribed by the testamentary system.—*Owens v. Collinson*, 3 G. & J. 25.

(g) An executor is not justified in paying simple contract debts after notice of a debt

by specialty, though such notice was not by institution of a suit.—*Webster v. Hammond*, 3 H. & McH. 131.

### § 282. Failure to make payment.

*Cross-Reference.*

As breach of bond, see post, § 532.

(a) Executors will not be allowed interest on debts paid 12 months after testator's death, so far as they have assets.—*Scott v. Dorsey*, 1 H. & J. 227.

### § 283. Proceedings to enforce payment.

*Cross-References.*

Actions to set aside fraudulent conveyances, see post, § 423.

Enforcement of judgment against personal representative, see post, § 454.

Insolvent estates, see post, § 417.

Judgment for costs, see post, § 456.

Administrator as party aggrieved giving right of review, see "Appeal and Error," § 151.

Ancillary jurisdiction of federal court to enforce payment of judgment on claims, see "Courts," § 264.

(a) The lien created by Code Pub. Loc. Laws, art. 1, §§ 99-103, applicable to Allegany county, subjecting the personal estate of an individual indebted as therein specified for work and labor to the claim of a creditor before any proceedings are instituted or adjudication had, is, in the event of the individual's death, to be enforced in the Circuit Court for the county in accordance with the only mode given therein.—*Everett v. Avery*, 19 Md. 136. (See *Everett v. Neff*, 28 Md. 176; *Everett v. State*, 28 Md. 190.)

(b) Until the validity of claims of creditors has been passed upon by a court of law, the Orphans' Court has no power, against the protest of the administrator de bonis non, to decree their payment.—*Miller v. Dorsey*, 9 Md. 317.

(c) Although the original plaintiffs in a creditors' bill have obtained absolute judgments against the administrator, yet, having alleged in their bill an insufficiency of assets to satisfy their claims, they cannot have a decree over against the administrator for any balance which may remain due them after final distribution, under the bill.—*Post v. Mackall*, 3 Bland 486.

### § 284. Deficiency of assets in hand.

*Cross-Reference.*

Effect or order permitting issuance of execution, see post, § 454.

(a) Where the personal assets of a deceased person's estate are insufficient to pay his debts, and a balance remains to be distributed among creditors, or a distribution has been made among the creditors in partial payments, the personal representative should be called upon to account in a creditors' bill.—*Simmons v. Tongue*, 3 Bland 341.

**§ 285. Reservation of assets to meet contingencies.**

**§ 286. Release by creditors.**

**§ 287. Liability to refund.**

**Cross-References.**

Effect of insolvency of estate, see post, § 411.

Liability of widow and children in respect to payments made on statutory allowance, see ante, § 198.

**VII. DISTRIBUTION OF ESTATE.**

**Cross-References.**

Authority of representative of deceased executor, see ante, § 128.

Compromise by administrator with distributee improperly receiving distributive share, see ante, § 87.

Defenses to action for distributive share, see post, § 433.

Distribution by foreign or ancillary executor or administrator, see post, § 523.

Distribution of money accruing from penalties imposed on administrator, see ante, § 104.

Distribution of proceeds of sale of property, see ante, § 147; post, §§ 400-407.

Effect of pendency of contest of will, see ante, § 78.

Insolvent estates, see post, §§ 414, 418.

Mode of giving credit in account, see post, § 434.

Necessity of administration, see ante, § 3.

Power of surviving executor, see ante, § 127.

Priority of allowance to surviving wife, husband, or children, see ante, § 182.

Private accounting and settlement, see post, § 515.

Right of executor or administrator to commissions, see post, § 495.

Rights of action for legacies or distributive shares, see post, §§ 429, 430.

Sale of property under order of court for payment of legacies or distribution, see post, § 326.

Selection and setting apart of allowance to surviving wife, husband, or children, see ante, §§ 191-194.

Admissibility of evidence of distribution in suit to foreclose mortgage, see "Mortgages," § 461.

Appellate jurisdiction of decree for distribution, see "Courts," § 250.

Attack on validity of provisions of will after distribution of estate, see "Wills," § 428.

Awarding note to joint maker as extinguishment of obligation, see "Release," § 28.

Capital and income of trust estate, see "Wills," § 684.

Concurrent and conflicting jurisdiction to distribute estate, see "Courts," §§ 472, 475, 505.

Distribution of damages recovered for causing death, see "Death," § 101.

Distribution of estate of absentee, see "Absentees," § 6.

Establishment and determination of heirship, see "Descent and Distribution," § 71.

Jurisdiction of federal courts, see "Courts," § 260.

Property included in trust estate, see "Wills," § 687.

Property or fund from which legacies are payable, see "Wills," § 782.

Recovery of payment made under mistake, see "Payment," §§ 84, 85.

Right to appointment as administrator, see "Executors and Administrators," § 17.

Settlement of estate as prerequisite to partition, see "Partition," § 25.

Validity of assignment of interest in note by executor to heir, see "Assignments," § 30.

**§ 288. Authority and duty to make in general.**

(a) A testator bequeathed to his grandson a certain sum of money, to be paid to him on his majority, the interest in the meantime to be paid to the daughters. No special direction was given by the testator as to who should invest the fund, and pay the interest to the daughters. The executors, under an order of the Orphans' Court, paid the legacy to the guardian of the minor legatee. *Held*, that the Orphans' Court had no power to relieve the executors of the duty, incident to the office, of investing the legacy and paying the interest to the daughters.—*Hindman v. State*, 61 Md. 471.

(b) A bill was filed by a distributee against the administratrix for her distributive share of the intestate's estate, alleging herself to be one of the four children of the deceased. The bill was taken pro confesso against the administratrix, and upon the suggestion of the death of one of the four children intestate, and without issue, the estate was decreed to be distributed among the three remaining children. *Held*, that the decree was erroneous, as the complainant was entitled only to one-fourth of the intestate's estate, her share of the estate of the deceased child

being obtainable only from his administrator.—*Buckley v. Buckley*, 9 Gill 497.

**§ 289. Priority of debts to legacies or distributive shares.**

(a) A bond, made in consideration of love and affection, by a testator, during life, takes precedence of legacies given by her will.—*Gordon v. Small*, 53 Md. 550.

(b) Where letters of administration were granted in 1830, and, an order of court notifying creditors to bring in their claims obtained and published in 1831, and an account proved and passed in 1832, by which it appeared that a number of creditors had been paid, it was held, in 1842, no unsatisfied creditors appearing in proof, that all the creditors of the estate were paid and discharged.—*Mitchell v. Mitchell*, 1 Gill 66.

(c) It is the duty of executors and administrators to pay creditors within 13 months from the date of their letter, and any surplus then remaining should be divided among the distributees according to law.—*Coward v. State*, 7 G. & J. 475.

**§ 290. Admission of or charging with assets.**

*Cross-Reference.*

Form of decree, see post, § 315.

(a) An administrator who retains money, in accordance with the provisions of Code 1860, art. 93, § 104, to meet claims not properly exhibited, does not thereby acknowledge that anything is due, and is not precluded from disputing the validity of the claim.—*Pole v. Simmons*, 49 Md. 14. (See Code 1911, art. 93, § 103.)

**§ 291. Assent to legacy or devise.**

*Cross-Reference.*

Assent before qualification, see ante, § 77.

(a) An admission by an executor in an account that the estate was subject to distribution held an admission that all debts of testator were paid and was an assent to the bequest.—*Sloan v. Sloan*, 117 Md. 141, 83 Atl. 38.

(b) Testator left leasehold property to his wife for life, with the remainder to his children, charging it, as well as other property, with the payment of legacies to the children, and appointed his wife executrix. Held, that the executrix's assent to this legacy

vested the life estate in her, with remainder to the children.—*Kopp v. Herrman*, 82 Md. 339, 33 Atl. 646.

(c) No action will lie at law to recover a specific legacy, unless the executor has assented thereto, or, in the case of a pecuniary legacy, unless the executor has promised to pay it, but a court of equity, regarding the executor as a trustee, will compel him to assent and pay the legacy.—*Lark v. Linstead*, 2 Md. Ch. 162.

(d) Where testator gave his wife the use of a female slave, the assent of the executor was necessary to perfect the title of the legatee to the slave, and to the issue of the slave, born while the legatee was in possession.—*Sutton v. Crain*, 10 G. & J. 458.

(e) A legacy does not vest in the legatee until assented to by the executor.—*Wilson v. Rine*, 1 H. & J. 138.

**§ 292. Executor as legatee.**

*Cross-References.*

Amount of recovery on administration bond, see post, § 537.

Requirement of security, see ante, § 26.

Vesting of title before probate of will, see "Wills," § 733.

(a) When a final account has been passed, or the time limited by law for the settlement of an estate has elapsed, and the same person who is executor or administrator is also guardian to the parties entitled to the surplus, the law will adjudge such surplus in his hands in that character in which his duty requires that he should hold it. The transfer in such cases is effected by operation of law, and requires no act of the party himself.—*In re Williams' Estate*, 1 Md. Ch. 25.

(b) As to legacies bequeathed to an executor, the law will assume that he holds as legatee, after the lapse of a sufficient period allowed for the settlement of the estate, and 15 years are amply sufficient.—*Gardner v. Simmes*, 1 Gill 425. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

**§ 293. Administrator as distributee.**

*Cross-Reference.*

See ante, § 292.

**§ 294. Liabilities of legatee or distributee to estate.**

*Cross-References.*

See ante, § 49; "Wills," § 715.

Distribution of surplus proceeds of sale, see post, § 404.

Effect of settlement, see post, § 513.

Set-off in action against distributee, see post, § 434.

Set-off of indebtedness to executor in individual capacity, see post, § 434.

Rights and liabilities of devisees and legatees indebted to estate, see "Wills," § 731.

Rights and liabilities of heirs and distributees indebted to estate, see "Descent and Distribution," § 80.

#### Annotation.

Indebtedness of heir or devisee to estate as conterclaim or set-off against distributive share in proceeds of real estate.—L. R. A. 1915A, 1179, note.

(a) In an action by an executor to recover of defendants on an accounting of a partnership between them and testator, who was their father, it appearing that the father had been lenient in respect to enforcing the demands against them in his lifetime, interest would not be allowed on the sums due from the date of the ascertainment and entry on the books of the firm of the balances respectively due by them.—*Safe Deposit & Trust Co. v. Turner*, 98 Md. 22, 55 Atl. 1023.

(b) An heir's distributive share of the personal estate may be applied by the administrator in payment of a debt due the estate by such heir.—*Hoffman v. Hoffman*, 88 Md. 60, 40 Atl. 712.

(c) The share of a distributee, who, as administrator, is indebted to the estate, does not pass to the trustee of the insolvent distributee, but is applied to the debt of the distributee to the estate.—*Gosnell v. Flack*, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158. [Cited and annotated in 23 L. R. A. 313, on set-off against claim in hands of receiver, assignee, or trustee for creditors.]

(d) Under Code 1860, art. 47, § 27, providing that if, in the descending or collateral line, a father or mother be dead, the children of such father or mother "shall receive the same share of the estate as the father or mother if living would have been entitled to, and no more," where B. dies intestate, leaving K., a sister, and the children of M., a deceased sister, as her only surviving heirs, the children of M. are entitled to the full share that their mother would have taken if living, without being subject to the payment of a judgment obtained by

the intestate against M. in her lifetime, or the payment of any of the mother's debts.—

*Kendall v. Mondell*, 67 Md. 444, 10 Atl. 240.

(See Code 1911, art. 46, § 27; art. 93, § 130; Id. [vol. 3], art. 46, § 27; art. 93, § 130; act 1916, c. 224, p. 461; c. 325, p. 683.) [Cited and annotated in 47 L. R. A. (N. S.) 1030, on descent and distribution: deduction of indebtedness owing to remote ancestor by predeceased immediate ancestors.]

(e) Where a testator is at the time of his death a surety for one of the beneficiaries under his will, and the claim is subsequently reduced to judgment and paid from out the assets of the estate, the amount thus paid is a valid offset in the hands of the executor against the claim of such judgment debtor under the will.—*Stieff v. Collins*, 65 Md. 69, 5 Atl. 294.

(f) In a case where the testator was surety on a note with a legatee, and his estate is obliged to pay such note, equity will enforce contribution against the defaulting legatee by requiring the executor to charge the proper sums over against the distributive share of such legatee.—*Stieff v. Collins*, 65 Md. 69, 5 Atl. 294.

#### § 295. Time for delivery or payment of legacy.

##### Cross-References.

Evidence of payment, see post, § 305.

Time of taking proceedings, see post, § 314.

Time of accrual of right to devise or legacy under provisions of will, see "Wills," § 733.

#### § 296. Time for making distribution.

##### Cross-References.

Payment from proceeds of sale, see post, § 400.

Time for partition of homestead, see "Partition," § 25.

(a) The passage of a complete account of an executor is not a jurisdictional prerequisite to an order of distribution by the Orphans' Court, where the past accounts of the executor show a balance in favor of distributees after the payment of debts.—*Clarke v. Sandrock*, 113 Md. 422, 77 Atl. 644.

(b) Where the accounts of an executor show a balance in his hands after the payment of known and proved debts, and where he expressed his readiness to distribute the

estate, and offered to do so on condition that disputed claims were allowed, the Orphans' Court could order a distribution notwithstanding the existence of the disputed claims and without allowing them, by allowing the executor to retain the sum deemed necessary to meet the disputed claims.—*Clarke v. Sandrock*, 113 Md. 422, 77 Atl. 644.

(c) Where a sole executor is at the same time guardian, the law will adjudge his ward's proportion of the estate to be in his hands as guardian, after the expiration of the time fixed by law for the settlement of the estate, whether he has passed a final account as executor or not.—*Lark v. Linstead*, 2 Md. Ch. 162.

(d) After the return of an inventory of the unadministered property of a decedent, existing specifically by an administrator de bonis non, it is his duty to pay over the estate in his hands to the persons entitled, without delay, if the debts are all paid.—*Alexander v. Stewart*, 8 G. & J. 226. [Cited and annotated in 15 L. R. A. 492, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

### § 297. Requirement of receipt or release.

#### Cross-References.

Release from liability to account, see post, § 466.

Validity of release in general, see "Release."

### § 298. Security from legatee for life.

#### Cross-Reference.

Liability of executors for failure to take security, see post, § 308.

### § 299. Refunding bond or other indemnity.

#### Cross-References.

Liability of executor or administrator for failure to require bond, see post, § 308. Security from surviving wife as usufructuary, see ante, §§ 200, 201.

Joinder of causes of action on refunding bond, see "Action," § 50.

### § 300. Delivery of specific legacy.

(a) Where a testator bequeathes personal property other than money for life, the executor is required to deliver the legacy to the legatee and not merely to invest it, and

pay the interest thereon to the legatee during life.—*Woods v. Fuller*, 61 Md. 457.

### § 301. Advances by executor or administrator.

(a) A testatrix directed her executor "to hold in trust the sum of \$10,000 for the use and maintenance of my father, \* \* \* as long as he shall live. At the death of my father, I want the whole amount of the ten thousand dollars paid over, free of trust, to the trustees of the Church Home and Infirmary. \* \* \*" Held, that pending settlement of the estate, the executor was authorized to make advances for the support of the father, not to exceed the amount of interest earned by the \$10,000 during that period.—*Chester County Hospital v. Hayden*, 83 Md. 104, 34 Atl. 877; *Howard v. Same*, Id.

(b) The rents and profits of a testamentary trust estate are not chargeable with cash advances made by the executrix after her final account has been allowed and an order of distribution of the trust estate been made, even though the account as allowed showed that the trust estate was indebted to her for such advances, and the court transferred the property subject to the charge.—*Black v. Herring*, 80 Md. xviii, memorandum case, 30 Atl. 917, full report; *Herring v. Black*, Id.

### §§ 302-304. Mode and sufficiency of payment.

#### Cross-References.

Delivery of specific legacy, see ante, § 300. Necessity of sale of personalty, see ante, § 158.

(a) Legacies out of the estate over which testatrix had the power of appointment should be paid in kind.—*Harrison v. Denny*, 113 Md. 509, 77 Atl. 837.

(b) The shares of specific property in distributions made by the Orphans' Court need not be exactly equal, but the balances may be made up in money.—*Williams v. Holmes*, 9 Md. 281.

(c) An administrator, in his settlement with a distributee, may assign the choses in action of his intestate by parol.—*Mitchell v. Mitchell*, 1 Gill 66.

(d) Executors and administrators are required to divide specifically or "in kind" between the legatees and distributees, except

so far as a sale may have been necessary for the security of the estate or the payment of debts or funeral charges.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

### § 305. Evidence of payment.

#### Cross-Reference.

Conclusiveness of accounting, see post, § 513.

### § 306. Payment of annuities.

#### Cross-Reference.

Reservation of assets, see post, § 316.

### § 307. Effect of payment or distribution.

(a) Where an executor neglects to make an investment of money given to one for life by a will, and permits the legatee to consume the property, he will be liable therefor to the legatees in remainder.—*Wooten v. Burch*, 2 Md. Ch. 190. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use.]

### § 308. Improper payment in general.

(a) A testator bequeathed to his grandson a certain sum of money to be paid to him on his majority, the interest in the meantime to be paid to the daughters. No special direction was given by the testator as to who should invest the fund, collect the interest, and pay it to the daughters. The executors paid the legacy to the guardian of the minor legatee, and, that guardian becoming insolvent, was removed, and another appointed in his place. Held, in an action by the second guardian against the first guardian's surety to recover the legacy, that, as the duty was not imposed by the testator on any other person, it was the duty of the executors, as incident to their office, to invest the fund, and pay the interest to the daughters; and hence the action against the surety of the guardian could not be maintained.—*Hindman v. State*, 61 Md. 471.

(b) A testator gave to one of his executors the sum of \$10,000, in trust to support his widow from the income during her life, and after her death the principal to be equally divided between the children of his daughter who should be then living. He also directed

that the power of investing the trust fund should be a continuing power during the requisite continuance of the trust, and by a codicil he provided that the bequest for the benefit of his wife should be "in lieu and bar of all her right, thirds, and dower." The widow elected to take her dower renounced the provision in the will, and died pending the settlement of the estate. Upon her renunciation the estate was distributed by the executors as if the bequest of \$10,000 had not been made, and plaintiffs received, as residuary legatees, each one-eighth of said bequest, while as legatees in remainder under the will they would have been entitled to one-quarter each. Held, that the trustee was liable to plaintiffs for their share of the trust fund beyond what they had received as residuary legatees, with interest on such share from the time of the last wrongful payment to the residuary legatees.—*Hanson v. Worthington*, 12 Md. 418. [Cited and annotated in 21 L. R. A. 153, on validity of acts under letters probate afterwards revoked or held invalid; in 27 L. R. A. (N. S.) 602, on effect of spouse's election to take against, upon rest of, will.]

(c) If an executor departs from the due course of administration, by paying legacies after he has acquired knowledge of the claim of a creditor, he will not be exempt from liability for such claim, even though he had previously given the requisite notice to creditors.—*Steuart v. Carr*, 6 Gill 430.

(d) Payment of a legacy, voluntarily made on a mistaken ground of fact, may be reclaimed; and a mere agreement to refund does not, in such a case, affect the rights of the parties.—*Buchanan v. Pue*, 6 Gill 112.

(e) An executor who, upon his own knowledge only, admits that lands charged with the payment of debts are of sufficient value to satisfy the creditors, the personal estate being insufficient, permits the manumitted slaves of the testator to go free, and assents to the legacy of freedom, commits a devastavit.—*Cornish v. Willson*, 6 Gill 299. [Cited and annotated in 30 L. R. A. (N. S.) 824, on remedies for enforcement of legacy charged upon devise.]

### § 309. Payment before order or decree.

(a) Evidence held to sustain a finding that the administrator's assignment of a note to

the widow of deceased payee was authorized by order of the Orphans' Court.—*Fuhrman v. Fuhrman*, 115 Md. 436, 80 Atl. 1082; *Fuhrman v. Wantz*, Id.

(b) Where an administrator pays their proper shares to the right parties, he is protected whether he did the same under the sanction of the court or not; and it makes no difference whether such payments be made before or after the passing of the account, showing a balance for distribution.—*Donaldson v. Raborg*, 28 Md. 34.

### § 310. Overpayment.

#### Cross-References.

Assignment of right to recover money overpaid in distribution, see "Assignments," § 23.

Rights of purchaser from distributee, see "Descent and Distribution," § 87.

(a) Where executors have distributed to an insolvent legatee indebted to their testator his share under the will, without deducting therefrom his indebtedness to the estate, and the share thus distributed has been sold by the legatee's trustees in insolvency to third parties for value, and without notice, the executors should not be allowed to restate their account, in order to enable them to make a claim against the purchasers.—*Hoffman v. Armstrong*, 90 Md. 123, 44 Atl. 1012. [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

(b) Where an executor sues a legatee, alleging that, from inadvertence and mistake, he overpaid her the sum of \$600, and the legatee answers that she intended to renounce interest under the will as the testator's widow, and take all that the law would allow her, and that the executor and the residuary legatee offered, if she abided by the will, she should have a third of the personal estate after payment of the debts and legacies, and that she so agreed, and that the payment was made in accordance with such agreement, it is not enough of itself to be ground for the dissolution of the temporary injunction granted under the bill, but the defense must be made out by proof.—*Hutchins v. Hope*, 12 G. & J. 244.

### § 311. Payment to wrong person.

#### Cross-References.

Limitations affecting liability of payee, see "Limitation of Actions," § 102.

Payment to joint agent, see "Principal and Agent," § 105.

### § 312. Failure to make payment or distribution.

#### Cross-Reference.

As breach of bond, see post, § 532.

### § 313. Interest on legacies and distributive shares.

#### Cross-References.

Decree on accounting, see post, § 508.

Rights of legatees as to interest, see "Wills," § 734.

(a) As a general rule, executors and administrators are liable to the distributees for interest on a balance admitted to be in their hands, and due to the distributees in a legal course of distribution; and where an administratrix had retained in her hands a sum of money due to a distributee, without applying to the court, pending a controversy in relation to the title thereto, for permission to deposit or dispose of it so as to prevent the further accumulation of interest she was held liable to pay interest.—*Thomas v. Frederick County School*, 9 G. & J. 115. [Cited and annotated in 31 L. R. A. (N. S.) 358, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(b) A bequest was in the following words: "I give and bequeath to my executors, or the survivor of them, the sum of \$6,000, to be put at interest, or to be vested in some stock or funds, within one year after my decease; and the interest arising therefrom I direct my said executors to pay annually to my daughter A. for and during her natural life, if, in the opinion of my said executors, or the survivor of them, it should be necessary for her decent support; and, upon the decease of my said daughter, I direct the said sum, with the interest accrued thereon, if any should remain unexpended, to be equally divided among the children of the said A., or the survivors of them." Held, on a bill by A. and her husband against the executors to enforce the trust created by the bequest, that, though the executors had abused their trust by not paying the interest to A. when it was necessary for her decent support, and



by not investing the principal as directed, they were not liable to pay compound interest, unless they had appropriated any of the bequest or the proceeds to their own use, or in some other way made profit therefrom, or subjected them to hazard.—*Darne v. Catlett*, 6 H. & J. 475. [Cited and annotated in 8 L. R. A. (N. S.) 399, on equitable control or discretion vested in trustee.]

### § 314. Proceedings for payment or distribution.

#### Cross-References.

Actions, see post, §§ 437, 438.

Distribution of proceeds of sale under order of court, see post, § 406.

In action to recover distributive share, see post, § 450.

Proceedings for accounting, see post, §§ 468-474.

Requirement of refunding bond, see ante, § 299.

Action by committee of incompetent, see "Insane Persons," § 93.

Appealability of order denying motion to vacate order of distribution as final order in special proceedings, see "Appeal and Error," § 83.

Disabilities affecting limitations, see "Limitation of Actions," § 72.

Interpleader by executor, see "Interpleader," § 11.

Jury trial on appeal from order directing payment of legacy, see "Jury," § 17.

Limitation of actions in general, see "Limitation of Actions," § 65.

Partition by probate court in distribution of estate, see "Partition," § 36.

Right to jury trial, see "Jury," § 19.

Splitting cause of action, see "Action," § 53.

(a) On appeal by distributees from a decree of distribution under which they were awarded nothing because of advances charged against their shares under the will, the only question the Court of Appeals will consider is the identity of the charges and the proof submitted to support them.—*Nalle v. Safe Deposit & Trust Co.*, 120 Md. 187, 87 Atl. 770.

(b) After assent to legacy by executor, legatees held entitled to sue the executor at law, without further action by the Orphans' Court, making it improper to submit issue to the Superior Court as to the indebtedness of the executor to the estate.—*Sloan v. Sloan*, 117 Md. 141, 83 Atl. 38.

(c) The Orphans' Court, in proceedings for an order directing the executor to distribute the net residue of the estate to the sole distributee, may not inquire into the merits of

claims disputed by the sole distributee.—*Clarke v. Sandrock*, 113 Md. 422, 77 Atl. 644.

(d) In proceedings under Code 1904, art. 93, § 142, for an order directing executors to distribute the net residue of the estate of testatrix to the sole distributee, who is a nonresident of the country, appearance may be by guardian, solicitor, or agent, and the beneficiary need not personally appear for the purpose of establishing her identity as the beneficiary described in the will.—*Clarke v. Sandrock*, 113 Md. 422, 77 Atl. 644. (See Code 1911, art. 93, § 143.)

(e) Plaintiffs made claim in the Orphans' Court, as next of kin of deceased, to money received by the administrator from the railroad company causing his death, and that court sent to the Circuit Court issues as to plaintiffs' claims. Held, that, on the trial of those issues, evidence of what the railroad company first offered in settlement, and why the Orphans' Court granted letters of administration to the stepfather of deceased, and what the administrator did with the money received, and whether he had stated an account in the Orphans' Court, was inadmissible, as it could not have aided the court, sitting as a jury, to reach a finding.—*Dronenburg v. Harris*, 108 Md. 597, 71 Atl. 81.

(f) Where plaintiffs' claims, as next of kin, to money in the hands of the administrator, are submitted by the Orphans' Court to the Circuit Court for trial, plaintiffs are in the attitude of charging the administrator with having money belonging to the estate which he has failed to account for, and the burden of proof is on them to establish the charge.—*Dronenburg v. Harris*, 108 Md. 597, 71 Atl. 81.

(g) A former resident of Ireland, after living here for more than 35 years, died, leaving one who was apparently his widow, and some relatives. There was nothing to suggest to any one that he had a lawful wife and child in Ireland who were not aware of his death in time to assert their claims. A question arose as to who was entitled to the remainder of his estate after his supposed widow's portion was set apart, and the administrator adopted the method prescribed by Code 1904, art. 93, § 142, to have the

rights of the parties judicially determined. All requirements of the statute were complied with. All persons who apparently had claims on the estate appeared in response to the statutory notice. There was no question as to who the collateral relations were, and the only doubt was as to whether two who claimed to be children of deceased were such as the law would recognize. Pending the proceeding, the claimants agreed in court on a settlement of the controversy between themselves. The administrator gave his consent subject to the approval of the court, which appeared to have been verbally expressed. A claim by an attorney for services in effecting such settlement was allowed, and accounts of the administrator and his successor referring to the agreement and the distribution pursuant thereto were allowed, and expressly approved by the court. *Held*, that the distribution was made "under the direction and control" of the court as the law requires, and the administrators were not liable to account to the lawful wife and child because the court did not pass a more formal order, as it was requested to do.—*Garrett v. Kerney*, 107 Md. 501, 68 Atl. 1051. (See Code 1911, art. 93, § 143.)

(h) The Orphans' Court has no jurisdiction to pass on the validity of releases given executors by legatees.—*Potts v. Potts*, 88 Md. 640, 42 Atl. 214.

(i) The Orphans' Court has no jurisdiction to inquire into the consideration, or to pass on the validity, of releases given by distributees to the executor.—*Shafer v. Shafer*, 85 Md. 554, 37 Atl. 167.

(j) To make a distribution an entire protection to an executor or administrator, such action must be taken and such notice be given as the statute provides, to justify the court in making it.—*Wilson v. McCarty*, 55 Md. 277. (See Code, art. 93, §§ 109, 139, 143, 235.) [Cited and annotated in 37 L. R. A. (N. S.) 369, on notice of distribution in probate proceedings as jurisdictional.]

(k) Under Code 1860, art. 93, § 230, conferring on the Orphans' Court jurisdiction to superintend the distribution of estates of decedents, the court has authority to determine what is to be distributed, who are the legatees, and what they are entitled to re-

cover, and may hear evidence and construe instruments bearing on such questions.—*Pole v. Simmons*, 45 Md. 246. (See Code 1911, art. 93, § 235.)

(l) Where the Court of Appeals decided that a certain marriage was valid, and that the children of the parties were entitled to share in a certain estate as heirs of the decedent, and thereafter other persons, alleging themselves to be heirs of the decedent, claimed a share in the estate, if their claim appeared after the decision of the Court of Appeals, the administratrix was entitled to have orders passed on her petition, so as to enable her to make a proper distribution of the estate among all those entitled thereto.—*Jones v. Jones*, 36 Md. 459. (See *Same v. Same*, Id. 447.)

(m) The Orphans' Court passed an account in which the administratrix charged herself with the balance due the estate by her former account, and claimed credits for payments made to each of the distributees in full of their shares, except one, whose share was placed to his credit in bank, and for which, also, she claimed credit in her account. It did not appear that any meeting of the distributees was appointed, or any notice of such meeting given, or that the distributee whose share was so placed in bank ever received it or assented to the distribution thus made. *Held*, that the passage of such an account could not be regarded as a final distribution of the estate made by the Orphans' Court, under the provisions of the testamentary system.—*Scott v. Fox*, 14 Md. 388. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(n) An administrator pendente lite is responsible to the Orphans' Court, which court has full powers to protect the interest of those concerned; and a court of equity has no right to interfere with him in a suit with one of the heirs, or with the funds in his hands belonging to the estate.—*Lee v. Price*, 12 Md. 253.

(o) Under act 1798, c. 101, subc. 7, providing that the inventory of a decedent's estate shall include leases for years, and that they shall be considered as assets in the hands of an executor or administrator, and subc. 11, § 16, providing that, in case

the surplus remaining in the administrator's hands after payment of debts shall consist of specific property, the administrator, if he cannot satisfy the parties, may apply to the Orphans' Court to make a distribution, and the court may appoint a day for making distribution, and at the appointed time proceed to distribute, or, if the court shall deem a sale of such property more advantageous, a sale shall be directed accordingly, the Orphans' Court has authority, without sale, to divide specifically, or make distribution of leasehold property remaining in the hands of administrators after payment of debts.—*Williams v. Holmes*, 9 Md. 281. (See Code, art. 93, §§ 137, 224, 235.)

(p) Under act 1798, c. 101, subc. 15, § 1, declaring that the matter of superintending the distribution of the assets of intestates and securing the rights of orphans and legatees shall be within the jurisdiction of the Orphans' Court, the authority of such court to distribute leasehold estates specifically or by partition after the debts of the intestate have been paid, given by act 1798, c. 101, subcs. 7, 16, may be exercised, even though the parties interested are infants, for whom such court has no authority to appoint a guardian ad litem.—*Williams v. Holmes*, 9 Md. 281. (See Code, art. 93, §§ 137, 224, 235.)

(q) Where an estate is sold under a decree for the purpose of making distribution among those who shall appear on the final hearing to be entitled, a purchaser of the interest of one of the parties may come in by petition and claim his share.—*Balch v. Zentmeyer*, 11 G. & J. 267.

(r) Where the property of testator remains specifically after the death of testator, the Court of Chancery cannot vest the title to such property in the distributees, except by co-operating with the administrator.—*Alexander v. Stewart*, 8 G. & J. 226. [Cited and annotated in 15 L. R. A. 492, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

### § 315. Order or decree for distribution.

#### Cross-References.

Payment of legacy before order or decree, see ante, § 309.

Conclusiveness of judgment, concurrent jurisdiction, see "Judgment," § 638.

Evidence in proceedings for equitable relief against, see "Judgment," § 461.

Limitations on suit to open decree, see "Limitation of Actions," § 105.

Remedy by appeal as bar to equitable relief, see "Judgment," § 407.

Restraining distribution under order, see "Injunction," § 28.

Waiver of right to open default, see "Judgment," § 147.

(a) The Orphans' Court cannot, by its order directing executors to pay a legacy, relieve them of the active and continuing duty imposed on them by the will of investing the amount of the legacy and paying the income thereof for a certain time to another than the legatee.—*Hindman v. State*, 61 Md. 471.

(b) An order having been issued by the Orphans' Court directing an administrator to make distribution of the assets in his hands among the next of kin, excluding the complainants, who claimed adversely thereto, complainants filed a bill for injunction to prevent the distribution, alleging fraud on the part of the administrator and the distributees, and that the complainants had instituted suits at law for the recovery of their distributive share as next of kin, which were still pending. The proceedings of the Orphans' Court which led to the passage of the order were not exhibited with the bill, and the order did not purport to have been passed after notice to the parties interested. Held, that the injunction was properly granted.—*Blackburn v. Craufurd*, 22 Md. 447.

(c) An allotment of a negro slave, made by the Orphans' Court to "A., who intermarried with B., the sister of the deceased," plainly designates the right in which the allotment was made, and, in legal intendment and effect, passes the title to B.; giving to her husband only such interest as is provided for by act 1842, c. 293, § 4.—*Davis v. Patton*, 19 Md. 120. (See Code, art. 93, § 137.)

### § 316. Reservation of assets.

(a) The protection given by Code 1904, art. 93, §§ 105, 106, 118, authorizing an administrator to retain in his hands sums to meet claims which he thinks it is his duty to dis-

pute or reject as the Orphans' Court shall allow, and providing that on the payment of all the debts of an intestate as exhibited the administrator shall make distribution, etc., must be extended to distributees contesting claims which the executors decline to contest, especially where a large part of the disputed claims are those of the executors.—*Clarke v. Sandrock*, 113 Md. 422, 77 Atl. 644. (See Code 1911, art. 93, §§ 106, 107, 119.)

(b) The retention of assets to satisfy a legacy bequeathed by the will under which the executor acts is an imperative legal duty in discharge of his official obligation, if there are assets sufficient to pay preferred claims. The retention of assets to meet an unliquidated demand against the estate of the testator is not the right of the executor, but rests in the discretion of the Orphans' Court.—*Ing v. Baltimore Ass'n*, 21 Md. 426. [Cited and annotated in 31 L. R. A. (N. S.) 364, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

### § 317. Restitution on reversal of order or decree.

#### Cross-Reference.

See ante, § 315.

### § 318. Liability to refund on deficiency of assets.

#### Cross-References.

See "Adverse Possession," § 62.

Set-off in action by legatee, see post, § 434.  
Liability of devisees to executor for balance in his favor found due on accounting, see "Wills," § 827.

(a) Where a will which has been admitted to probate has been declared void by the Court of Appeals, a partial distribution made under an administration with the will annexed is void.—*Smith v. Stockbridge*, 39 Md. 640. [Cited and annotated in 21 L. R. A. 153, on validity of acts under letters probate afterwards revoked or held invalid.]

(b) On a contest between an executor and a specific legatee, it appeared that the executor, before settling his accounts, had delivered to the legatee the personal property, which had been devised to her under an agreement that she should refund it, if there should not be sufficient assets in the estate to pay the debts, and that such assets were

insufficient, and that the legatee had been ordered to refund. *Held*, that, on a showing that testator intended to exempt his personal estate from payment of debts, such legatee was entitled to be subrogated to the rights of creditors.—*Buchanan v. Pue*, 6 Gill 112.

(c) A legacy, delivered by an executor to a legatee upon the entire confidence, sincerely entertained, that the assets of his testator would be sufficient for the payment of debts, but which proved to be inadequate without default in the executor, may be recovered in equity.—*Buchanan v. Pue*, 6 Gill 112.

(d) In a contest between an executor and a specific legatee, it appeared that the former, before the settlement of his accounts, had delivered to the latter the personal property devised to her, upon an agreement on her part to refund if it should turn out that there was a deficiency of other assets to pay debts. The personal assets and some real estate, devised to be sold for payment of debts, proved insufficient when the legatee was decreed to refund. As between such parties, the court refused to entertain the question whether the testator intended to charge other portions of his real estate, which he had also devised to other parties, with the payment of his debts.—*Buchanan v. Pue*, 6 Gill 112.

(e) Where an executor has paid specific legacies, and thereafter discovers a deficiency of assets to pay creditors, and a consequent overpayment to legatees, he cannot maintain an action at law to recover such overpayment, since a court of law cannot take into consideration the mode in which the funds of the estate have been applied by the executor, as might be done by suit in equity.—*Somervell v. Somervell*, 3 Gill 276, 43 Am. Dec. 340.

(f) Where distributees of personal estate of a deceased person entered into an agreement to refund to the administrator the amount paid by him to creditors of the deceased beyond the assets, the administrator's action on such agreement is a special action at law and not a bill in equity.—*Gibbs v. Clagett*, 2 G. & J. 14.

(g) Where an executor paid a legacy and took a refunding bond in April, 1797, providing for repayment on deficiency of assets after demand, an action in 1816 on the bond was not barred by limitations, as the cause of action first accrued when the deficiency of assets was ascertained, in 1814.—*Salisbury v. Black*, 6 H. & J. 293, 14 Am. Dec. 279. [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non.]

## VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

### Cross-References.

By foreign or ancillary executor or administrator, see post, § 520.  
Invalidity of appointment of administrator de bonis non affecting validity of sale, see ante, § 37.  
Sales without order of court, see ante, §§ 137-149, 158-168.  
Validity of contract for services of broker dependent on existence of order of sale, see ante, § 97.  
Affecting rights of creditors of heirs, see "Descent and Distribution," § 153.  
Affecting rights of subsequent mortgagees, see "Mortgages," § 154.  
Complete relief in equity, see "Equity," § 39.  
Constitutionality of statute, vested rights, see "Constitutional Law," § 93.  
Effect of election of widow, see "Wills," § 802.  
Implied license to use invention as passing under administrator's sale, see "Patents," § 213.  
Notice of pendency of action, see "Lis Pendens," §§ 3, 15.  
Record of proceedings as notice to subsequent purchaser from heir or devisee, see "Vendor and Purchaser," § 231.  
Validity of sale dependent on presumption as to bar of debts by limitation, see "Limitation of Actions," § 195.

### (A) WHEN AUTHORIZED.

### Cross-Reference.

Effect of assent of executor to devise, see ante, § 291.

### § 319. Nature of remedy.

(a) Where the personal estate of a decedent is insufficient for the payment of his debts the land may be sold on creditors' bill therefor.—*Corrie v. Clarke*, 1 Bland 85, note.

### § 320. Statutory provisions.

### § 321. For purposes of administration in general.

#### Cross-Reference.

Effect of confirmation of sale, see post, § 375.

(a) Where the rights of those claiming to be the distributees of an estate are disputed and unsettled, the delay incident to the trial of these questions, connected with the character and wasting condition of the property, justifies the Orphans' Court, on the application of the administrator, in ordering the sale of personal property.—*Crawford v. Blackburn*, 19 Md. 40.

### § 322. For payment of debts.

### § 323.—Necessity in general.

#### Cross-Reference.

Requisites of mortgage, see post, § 398.

(a) To authorize a sale of the deceased's real estate, there must be an indebtedness existing during his lifetime, though the debt need not be then payable.—*Carey v. Dennis*, 13 Md. 1.

(b) Where a mortgagee, defendant to a creditors' bill against devisees of a decedent for sale of the decedent's real estate for payment of his debts, the mortgaged premises among the rest, assents to a sale in his answer, the condition of the mortgage having been broken, a sale of such premises may be decreed for the payment of the mortgage debt, as well as of the other debts of the deceased.—*Gibson v. McCormick*, 10 G. & J. 65.

(c) Where an executor or administrator pays debts of the deceased to a greater amount than the assets received by him, and the personal estate proves insufficient for the payment of debts, the administrator may be substituted in equity to the rights of the creditors so overpaid, and may proceed against the real assets of the deceased, but only upon the same terms, conditions, and proofs, and subject to the same defenses, as the creditors themselves.—*Collinson v. Owens*, 6 G. & J. 4.

(d) The real estate of a deceased debtor, in case of a deficiency of personal assets, is liable to be sold for the payment of a debt due from him; but, where a party had obtained a decree against executors for the payment of certain rents received by them

after the death of their testator, it was held that the real estate of the testator in the possession of his devisees was in no way responsible for it.—*Carnan v. Turner*, 6 H. & J. 65.

### § 324.—Existence and validity of debts.

#### Cross-References.

Requisites of mortgage, see post, § 398.  
Presumption as to bar of debts by limitation, see "Limitation of Actions," § 195.

### § 325.—Insufficiency of personalty.

#### Cross-References.

See ante, § 323.  
Determination as to sufficiency of personalty, see post, § 341.

(a) A license to sell real estate will be granted if the personalty is insufficient for the payment of the debts.—*Griffith v. Frederick County Bank*, 6 G. & J. 424; *Macgill v. Hyatt*, 80 Md. 253, 30 Atl. 710.

(b) Where the personal estate of a decedent becomes insufficient to pay the debts in consequence of a devastavit by the administrator, or his neglect of duty, the remedy primarily is on his bond before the real estate can be sold.—*Wyse v. Smith*, 4 G. & J. 295.

### § 326. For payment of legacies or distribution.

#### Cross-References.

Property subject to sale, see post, § 329.  
Dependent on general or specific character of bequest, see "Wills," § 754.

(a) It was error to decree a sale of property to pay legacies pending an appeal from a decree construing a will by legatees who were largely interested.—*Harrison v. Denny*, 113 Md. 509, 77 Atl. 837.

(b) The land of an intestate will not be turned into money for purpose of division, unless for the interest and advantage of all the parties.—*Spurrier v. Spurrier*, 1 Bland 475, note.

### § 327. Effect of testamentary provisions.

(a) Where a will has worked an equitable conversion by directing land to be sold by the trustee, and the proceeds invested, a sale is valid though infant distributees are not made parties to the suit therefor, and though the petition sought a sale on an incorrect theory, sufficient cause for sale having been

alleged, and general relief prayed for.—*Sloan v. Safe Deposit & Trust Co.*, 73 Md. 239, 20 Atl. 922; *Atkinson v. Same*, Id.

(b) Upon a bill in equity to sell the real estate of a deceased debtor, on the ground that his personalty was insufficient, chancery does not take testimony, or receive admissions from the executor, that the real estate is sufficient for the payment of debts of a testator, and, upon being satisfied thereof, ratify the exemption by the testator of his personal estate, adjudicate its disposition as directed by the will, there terminate its power, and leave the creditors to recover their debts as they may; but it will decree a sale of the real estate charged with the payment of debts, and apply the proceeds to their extinguishment.—*Cornish v. Willson*, 6 Gill 299. [Cited and annotated in 30 L. R. A. (N. S.) 824, on remedies for enforcement of legacy charged upon devise.]

### § 328. Persons entitled to apply.

#### Cross-Reference.

Collateral attack, see post, § 383.

(a) Code 1888, Supp. art. 16, § 188, provides that where any person dies, leaving real estate, and not leaving personal estate sufficient to pay his debts, the court, at the suit of his creditors, may decree that the real estate shall be sold to pay his debts. A husband and wife contracted to give plaintiffs an option for six months on a certain tract of land lying outside the state, and within the six months, but after the death of the husband, plaintiffs elected to buy, but the wife and heirs of the husband refused to convey. Held, that, as plaintiffs had not elected to buy during the husband's life, their claim for damages for refusal to convey was not a debt due from the husband, entitling plaintiffs to sue under the statute quoted.—*McGaw v. Gortner*, 96 Md. 489, 54 Atl. 183. (See Code 1911, art. 16, § 218; art. 93, § 293.)

(b) A sale of real estate for the payment of debts of a deceased person, to save the personalty, can only be made at the instance of those interested in both estates, and will not be made to the injury of other persons.—*Waring v. Waring*, 2 Bland 673.

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

### § 329. Property or interests subject to disposal.

#### Cross-References.

Assets for payment of debts, see ante, §§ 38-73.

Effect of sale of property not belonging to estate and title and rights of purchaser, see post, § 388.

Operation and effect of order of sale, see post, § 349.

Requisites of mortgage, see post, § 398.

Effect of election of widow, see "Wills," § 802.

Homestead entry on public lands, see "Public Lands," § 140.

(a) The Orphans' Court has no right to authorize the sale, to pay debts, of negroes emancipated by the will of the deceased, until the assets of the estate have been marshaled, and the liabilities of the legatees to contribute to the payment of debts adjusted by a court of equity, prior to the determination of the slaves' petition for freedom.—*Sheriff v. Charles*, 12 Md. 280.

(b) Where the land of a deceased debtor is decreed to be sold for the payment of his debts upon the application of a creditor whose claim is for the purchase money of certain land bought by such debtor, the land so purchased should be first sold.—*Spencer v. Pearce*, 10 G. & J. 294.

(c) Where a person was in possession when a bill was filed to sell real estate to pay debts, claiming adversely, and was not a party to the decree, he is not affected by it, and cannot be removed from the possession thereof under the decree until his title is adjudicated in proper proceedings.—*Tongue v. Morton*, 6 H. & J. 21.

### § 330. Amount to be sold or otherwise disposed of.

### § 331. Payment or security to prevent disposal of property.

#### Cross-Reference.

Rights of purchaser. see post, § 388.

#### (B) APPLICATION AND ORDER.

#### Cross-References.

Appointment of guardian ad litem for minors, see "Infants," § 78.

Mandamus to compel issuance of order, see "Mandamus," § 4.

Right to jury trial in proceedings for sale, see "Jury," § 25.

### § 332. Form of proceeding.

### § 333. Jurisdiction.

#### Cross-References.

Action for sale, see post, § 356.

Contest of claims, see post, § 340.

Appellate jurisdiction of proceedings as involving freehold, see "Courts," § 219.

Concurrent and conflicting jurisdiction, see "Courts," §§ 475, 508, 517.

Implied repeal of special by general act, see "Statutes," § 162.

(a) Under Code 1904, art. 93, § 290, and in view of art. 81, § 129, the Orphans' Court of the City of Baltimore held to have jurisdiction to order the sale of land lying in the county which belonged to an intestate who resided in the city; this power not being impaired by art. 16, § 83.—*Cain v. Miller*, 117 Md. 45, 82 Atl. 1055. (See Code 1911, art. 16, § 87; art. 81, § 132; art. 93, § 293.)

(b) A proceeding by an administrator for the sale of his testator's land to pay unsecured debts held not a proceeding to enforce a "charge," and hence not within the provisions of Code 1904, art. 16, § 83.—*Cain v. Miller*, 117 Md. 45, 82 Atl. 1055. (See Code 1911, art. 16, § 87.)

(c) The only record evidence of an attempted distribution of intestate's estate was a credit taken by the husband in his account as administrator for balance of estate retained by himself for life, "with remainder to his children." Held, that it was insufficient distribution of the remainder to intestate's children, and therefore, on the death of the husband, the unadministered part was properly ordered sold, under the provisions of Code 1888, art. 93, § 137, for the purposes of final distribution.—*Woelfel v. Evans*, 74 Md. 346, 22 Atl. 71. (See Code 1911, art. 93, § 137.) [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(d) Before the passage of act 1865, c. 162, the Orphans' Court had no jurisdiction to authorize the sale of a testator's lands for the payment of debts, when his will contained no express provision for such sale. The creditor's remedy was by bill in equity.—*Young v. Twigg*, 27 Md. 620. (See Code, art. 16, § 218; art. 93, § 293.)

### § 334. Time for application.

#### Cross-References.

Action for sale, see post, § 356.

Collateral attack on sale, see post, § 383.

Amendment of petition as affecting limitations, see "Limitation of Actions," § 127.

(a) The statute of limitations as to a sale of decedent's estate, does not begin to run until letters of administration have been issued.—*Rockwell v. Young*, 60 Md. 563. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

### § 335. Parties.

#### Cross-References.

In actions for sale, see post, § 356.

Appointment of guardian ad litem for minors, see "Infants," § 78.

§§ 336-339. (See Analysis.)

### § 340. Proof and contest of claims.

#### Cross-References.

Collateral attack, see post, § 383.

Effect of decree, see post, § 349.

In actions for sale, see post, § 356.

On sale without order of court, see ante, § 138.

(a) A decree for sale of hotel property to carry out provisions of a will should not be made subject to trust deeds securing stock certificates issued by testator, where it appears that the greater portion of such certificates had been canceled by payment, and that the number which remained and formed an incumbrance on the property was not ascertained.—*McLaughlin v. Barnum*, 31 Md. 425.

(b) In a case of sale of real estate of a decedent to pay debts, the court ordered the petition of a claimant to be set down for hearing on a future day fixed; a copy having been first served on the parties in interest. No answer to the petition was filed, and it was sent to an auditor to state the claim. Held, that the statements in the petition were not, therefore, to be taken pro confesso, but that a trial on the merits might be had.—*Kent v. Waters*, 18 Md. 53.

(c) If the insufficiency of the personal estate to pay debts is alleged, and a bill for sale of the realty is filed, an account must be taken, and the creditors must file the vouchers of their claims, so that that fact may be determined, before there can be a decree for a sale of the realty.—*Hammond v. Hammond*, 2 Bland 306.

(d) Where the personal assets of a decedent,

sufficient only to pay the debts in part, are devoted to payment of part, to the exclusion of the rest, of the creditors, an excluded creditor, claiming the right to be substituted to the right which a creditor paid in full would have had, as against devisees, to have the decedent's realty sold to pay the balance of the debt, if he had only received his pro rata share of the personal assets, must, if the claims paid are not admitted by the devisees, prove them, before he will be entitled to substitution.—*Gibson v. McCormick*, 10 G. & J. 65.

### § 341. Determination as to sufficiency of personalty.

#### Cross-Reference.

Collateral attack on order of sale, see post, § 349.

### § 342. Account of administration.

### § 343. Determination as to necessity for sale, mortgage, or lease.

#### Cross-Reference.

Insolvent estate, see post, § 414.

(a) When estates are sold to pay debts, and in which the interests of minors are generally deeply involved, it becomes the duty of the court to see that no claim be allowed, in which the deceased, with others, stands indebted, without satisfactory proof being produced that the other persons joined in the obligation were insolvent.—*Edmondson v. Frazier*, 1 Bland 92, note.

### § 344. Claims to property.

#### Cross-Reference.

Actions to quiet or remove cloud from title, see ante, § 129.

(a) It is no ground of objection to a decree for the sale of real estate, for the purpose of distributing the proceeds among the parties entitled, that the interest of one of the parties to the proceedings in the proceeds has not been established by proof, although a title to the land must be shown in the parties litigant.—*Calwell v. Boyer*, 8 G. & J. 136.

(b) A party in possession of land cannot be ejected for refusing to obey an order of court to surrender the land to a purchaser at a sale under a decree in favor of persons claiming adversely to the possessor, and to which he was not a party.—*Frazer v. Palmer*, 2 H. & G. 469.



**§ 345. Order or decree.***Cross-References.*

In actions for sale, see post, § 356.

Complete relief, see "Equity," § 39.

Mandamus to compel issuance of order, see "Mandamus," § 4.

**§ 346.—Requisites in general.**

(a) An order of the Orphans' Court, requiring an executrix to sell so much of the personal estate of her testator as will satisfy all debts, claims, and commissions against the estate, will not be reversed as too general and vesting too much discretion in the executrix, since relief may be obtained by an injunction in a court of equity on an application to the Orphans' Court to stop the sale if it will be oppressive to the legatees.—*Lowe v. Lowe*, 6 Md. 347.

(b) Sale under a decree that the real estate of a decedent, or so much as might be necessary to pay his debts, be sold, passes the title of the parties to the suit, though such decree does not in terms declare that such shall be the effect of the sale.—*Cunningham v. Schley*, 6 Gill 207.

**§ 347.—Description of property.***Cross-References.*

Liability of bidder at sale dependent on sufficiency of description, see post, § 372.

Report or return, see post, § 374.

**§ 348.—Modification, amendment, or vacation.****§ 349.—Operation and effect.***Cross-Reference.*

On sale in general, see post, § 383.

(a) In a suit to establish a claim against a decedent's estate and for a sale of the property of the estate to pay the claim and distribute the balance of the proceeds, a decree for the sale of the property without making any reference to the claim rendered on the agreement of the parties that all questions as to the allowance of the claim were to be reserved to be disposed of in the distribution of the proceeds, and that the decree should not affect the validity of the claim, did not preclude the allowance of the claim out of the proceeds.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(b) A. acquired property in fee, under the rule in Shelley's Case, by will devising the real estate to her, remainder to her heirs;

but it also contained an invalid provision that the property should pass to another in case A. died without issue. A bill was filed for the sale of the property which did not ask for a construction of the will, though it was set out and described as one giving a life estate to A. The decree directed the sale of the lands, and that the proceeds should be held by a trustee until it was determined whether A. died without issue, though the decree did not state that A. only had a life interest in the property. *Held*, not an adjudication that A. only took a life interest under the will, and thus render the trustee liable to the heirs for the proceeds of the sale, which he paid to A.—*Travers v. Wallace*, 93 Md. 507, 49 Atl. 415. (See Code [vol. 3], art. 93, § 332A, abolishing the Rule in Shelley's Case.) [Cited and annotated in 29 L. R. A. (N. S.) 1044, 1123, 1163, on rule in Shelley's Case.]

(c) Under Code 1888, art. 93, §§ 285, 286, providing that an Orphans' Court may direct and ratify sales of real estate of intestates of which the appraised value does not exceed \$2,500, and may appoint a trustee to make such sales, which trustee may be the administrator, and that he shall give bond and proceed with the sale as in courts of equity, such a sale by an administrator under a decree of an Orphans' Court cannot be impeached collaterally because he was authorized to make the sale as administrator, and not as trustee, and the sale was so made.—*Simpson v. Bailey*, 80 Md. 421, 30 Atl. 622. (See Code 1911, art. 93, §§ 293, 294.)

(d) A sale under an order of the Orphans' Court is not subject to collateral attack because made on application of the administrator in behalf of creditors, instead of being made on application of the creditors themselves.—*Simpson v. Bailey*, 80 Md. 421, 30 Atl. 622.

(e) Where a decedent's estate is sold for the payment of a claim, one claiming under a party to the proceeding, who had information sufficient to enable him to contest the validity of the claim as a purchaser pendente lite, is bound by the decree entered as to such claim.—*Boulden v. Lanahan*, 29 Md. 200.

(f) A decree on a creditors' bill, to subject

the realty of the deceased debtor, is conclusive of the deficiency of personal assets; and the heir cannot afterwards impeach the account of the administrator for the purpose of turning the creditors back to the personalty in his hands.—*Mackubin v. Brown*, 1 Bland 410.

(g) An order of the Orphans' Court to sell the balance of the testator's personal estate, which included negroes, it being necessary for the payment of debts, does not restrict the sale of manumitted slaves to terms for years.—*Cornish v. Willson*, 6 Gill 299. [Cited and annotated in 30 L. R. A. (N. S.) 824, on remedies for enforcement of legacy charged upon devise.]

(h) An order passed by the Orphans' Court, directing the administrator to sell slaves of a testatrix, is not evidence of the insufficiency of other personal assets, in opposition to the right of freedom of a slave who, by the will, was entitled to freedom if the residue of the personal estate was sufficient to pay the debts.—*Wilson v. Barnet*, 8 G. & J. 159.

(i) A decree for the sale of the real estate of a decedent and the distribution of the proceeds among his heirs, when the only questions adjudicated on the cause were with regard to the propriety of the sale and the distributive portion of the heirs, is no bar to a claim of a creditor of the deceased against the proceeds of the real estate.—*Collinson v. Owens*, 6 G. & J. 4.

#### § 350. Oath.

#### § 351. Special bond for sale.

##### Cross-References.

By executor selling under power in will, see ante, § 138.

Liabilities on special bonds, see post, § 892.

Sale without order of court, see ante, § 138.

(a) It was objected to the sale that the trustee's bond was not on stamped paper, as required by act 1845, c. 193, which went into operation on the 1st of May, 1846. The bond was dated on the 29th of April, 1846, but was not filed and approved until the 7th of July following. Held, that, this bond having been approved by the chancellor, as required by the decree, it would be of dangerous consequence to say that the pur-

chaser should not have the benefit of his purchase, if the bond for any reason was defective.—*Gibbs v. Cunningham*, 1 Md. Ch. 44.

§§ 352-354. (See Analysis.)

#### § 355. Proceedings to compel application.

##### Cross-Reference.

Actions, see post, § 356.

(a) In a suit against an executrix to have real estate of testatrix sold because of the insufficiency of the personal estate to pay her debts under the evidence, the bill held properly dismissed because of insufficiency of the evidence to establish any debts of the estate.—*Worthington v. Worthington*, 112 Md. 135, 76 Atl. 46.

#### § 356. Actions for sale.

(a) On a creditors' bill for the sale of realty of a decedent to pay creditors, evidence considered, and held to establish that the wife was a creditor of the estate for money paid in the construction of a building on the premises, which the deceased husband had promised to repay, and entitled to relief.—*Rullman v. Winterling*, 101 Md. 35, 60 Atl. 468.

(b) Where, on creditors' bill filed, a sale was made of real estate of a decedent to pay his debts, which real estate had been devised to one for life, and at her death to the youngest son of each of two brothers of the testator who might be living, the sale was void as to the right of such son, where he was not made a party to the proceedings.—*Bowen v. Gent*, 54 Md. 555.

(c) The plaintiff in a creditors' suit need not allege and show that he has used any degree of active diligence in seeking to obtain satisfaction of his claim out of the personal assets of his deceased debtor, or that such assets are insufficient to pay the debts of the deceased, in order to obtain an order to sell the real estate for that purpose.—*Tessier v. Wyse*, 3 Bland 28.

(d) A claim of a solicitor for his fee for drawing the answers of the defendants on a creditor's bill to have the real estate of a decedent sold to pay his debts was no debt due from the decedent, and could not come in by way of costs.—*Hulse v. Cradock*, 2 Bland 543, note.

(e) Where the personal estate is insufficient to pay the debts, a bill by creditors to subject the realty must allege that the debtor's personal estate has been exhausted or is insufficient, and that he left real estate.—*Hammond v. Hammond*, 2 Bland 306.

(f) Devisees or heirs and executors or administrators must be made parties to a bill by creditors to sell real estate of a decedent.—*Hammond v. Hammond*, 2 Bland 306.

(g) Act 1785, c. 72, directing sale of lands of a deceased debtor where the personalty was insufficient to pay debts, not having prescribed an act for establishing the debts, the manner is left to the discretion of the chancellor, and every disputed claim will not be directed to be tried by a jury, though in difficult cases an issue may be sent out to be tried between the claimant and the party alleging, if the party chooses to be considered as plaintiff on the trial of the issue.—*Ringgold v. Jones*, 1 Bland 88, note (u). (See Code, art. 16, § 218; art. 93, § 293.)

(h) Allegations, in a creditors' bill against devisees for a sale of the testator's realty to satisfy their claims, that complainant's claims are unpaid and that the personal assets are exhausted, accompanied by an exhibit of an accounting of the executor showing application of all the personal estate to pay the debts of the decedent, and that part of the debts were paid off only in part, sufficiently show, as required by law, insufficiency of the personal assets to pay the decedent's debts.—*Gibson v. McCormick*, 10 G. & J. 65.

(i) A creditors' bill for sale of a decedent's realty to pay his debt, which alleges the existence and nonpayment of his debt and the exhaustion of the debtor's personal estate in the payment of other debts, and exhibits an account, passed by the Orphans' Court, showing the name of each creditor and the amount paid him out of the personal assets, in effect alleges that the deceased died indebted to each creditor in the amount stated to have been paid to each, respectively, and that such payment had been made out of the personal assets of deceased; and the bill, containing a prayer for general relief, entitles complainant to be substituted to the rights of the creditors so paid, without any

direct allegation of his right of substitution,—that right being a conclusion of law drawn by the court from the alleged facts.—*Gibson v. McCormick*, 10 G. & J. 65.

(j) In order that a creditor may maintain a bill in equity for the sale of the real estate of his deceased debtor, on the ground that the personal estate is insufficient for payment of debts, such insufficiency must be alleged in the pleadings.—*Griffith v. Frederick County Bank*, 6 G. & J. 424. [Cited and annotated in 23 L. R. A. (N. S.) 14, on conditions precedent to equitable remedies of creditors.]

(k) Where a creditor of a decedent filed a bill, alleging an insufficiency of personal estate to pay debts and that the decedent's personalty had been seized and expended by defendants, who were his brothers and sisters, without administration, and that the debtor had died without heirs of his body, and praying for a sale of real estate to pay debts and for general relief, an answer alleging that defendants were not the heirs at law of deceased debtor did not amount to a disclaimer by defendants of all interest in the real estate intended to be affected thereby, so as to authorize a dismissal of the proceedings as to them.—*Bentley v. Cowman*, 6 G. & J. 152.

(l) Where a bill is brought for the sale of the real estate of an intestate for the payment of his debt, on the ground that the personal estate has been exhausted, the administrator of the deceased must be made a party.—*Tyler v. Bowie*, 4 H. & J. 333.

(m) Where there is a deficiency of assets in the hands of an administrator, the Court of Chancery will declare a sale of the real estate devolving on the heirs of full age.—*Tyson v. Hollingsworth*, 1 H. & J. 469.

#### § 357. Restraining sale.

#### § 358. Review.

#### Cross-References.

Of order directing application for order of sale, see ante, § 355.

Appellate jurisdiction as dependent on amount or value in controversy, see "Courts," § 231.

Appellate jurisdiction as dependent on whether case involves freehold, see "Courts," § 213.

Courts invested with appellate jurisdiction, see "Courts," § 240.

Dependent on formality of decision, see "Appeal and Error," §§ 69, 77.

(a) Where the reversionary interest of a decedent was decreed to be sold, and it was to the interest of all concerned that the property be sold clear of the widow's interest, to which she consented, the cause will be remanded for a new decree according to the adjudicated rights of the parties.—*Rullman v. Winterling*, 101 Md. 35, 60 Atl. 468.

(b) An administrator pendente lite cannot, as such, appeal from an order of the Orphans' Court directing him to sell the personal property of the deceased. He is not a party "aggrieved" by the order.—*Johns v. Caldwell*, 60 Md. 259.

(c) An appeal from an order of the Orphans' Court, requiring the executrix to sell so much of the personal estate of her testator as will satisfy all debts, claims, and commissions against the estate, imposes upon the appellant the duty of showing that such an order was unnecessary and improper.—*Lowe v. Lowe*, 6 Md. 347.

### § 359. Failure to procure sale.

#### Cross-References.

Ground for appointment of administrator d. b. n., see ante, § 37.  
Ground for removal, see ante, § 35.  
Loss resulting from failure to sell assets, see ante, § 118.

### (C) SALE.

#### Cross-References.

Delegation of power, see ante, § 80.  
As equitable conversion, see "Conversion," § 6.  
Color of title, see "Adverse Possession," § 77.  
Contract of heirs to abandon right of redemption as within statute of frauds, see "Frauds, Statute of," § 74.  
Limitation of actions on bonds for purchase money, see "Limitation of Actions," § 22.

### § 360. Authority and powers in making sale in general.

#### Cross-References.

Employment of agents, see ante, § 97.  
Joint or several authority of coadministrator, see ante, § 124.

### § 361. Statutory provisions.

### § 362. Notice.

#### Cross-References.

Defects as ground for collateral attack, see post, § 383.  
Defects as ground for setting aside sale, see post, § 379.  
Effect of confirmation of sale, see post, § 375.

Expenditures, see ante, § 109.

Liability of bidders, dependent on sufficiency of notice, see post, § 372.

### § 363. Manner and conduct.

(a) Where a trustee, directed by a decree to sell property in a certain manner, has offered it in the market once in the mode prescribed, and has not been able to sell it, he may dispose of it in a different manner; but it is for the court then to decide whether to ratify the sale or not.—*Glenn v. Wootten*, 3 Md. Ch. 514.

### § 364. Terms and conditions.

#### Cross-References.

Collateral attack, see post, § 383.  
Grounds for setting aside sale, see post, § 379.

### § 365. Persons who may purchase.

#### Cross-References.

Collateral attack, see post, § 383.  
Evidence, see post, § 380.  
Liability of executor or administrator purchasing at own sale, see post, § 391.  
Setting aside sale, see post, § 380.  
Who may question validity of sale, see post, § 376.

(a) A court of equity may grant a petition for the substitution of the petitioner as purchaser of property sold under its decree for payment of debts, notwithstanding objection by the creditors, having a proper regard for his ability to comply with the terms of sale.—*Farmers' Bank v. Clarke*, 28 Md. 145.

(b) A purchase by an executor at his own public sale, 10 years previous, with the knowledge and assent of all the representatives of the deceased, and no objection appearing to have been since made by any of the parties interested, will not be set aside.—*Williams v. Marshall*, 4 G. & J. 376.

### § 366. Bids or offers.

#### Cross-References.

After report of sale, see post, § 375.  
Grounds for setting aside sale, see post, § 380.

(a) After land at an executors' sale was knocked down to one, another person claimed the bid, and it was therefore immediately put up again by the executors. *Held*, that the first bidder having thereafter increased his bid, and the property being again knocked down to him as the highest bidder, he was bound to take it at his last bid.—

*Warehime v. Graf*, 83 Md. 98, 34 Atl. 364. [Cited and annotated in 36 L. R. A. (N. S.) 928, on auction: right to resell property struck off.]

### § 367. Validity in general.

#### *Cross-Reference.*

Opening or vacating, see post, §§ 379, 380.

#### *Annotation.*

Validity of sale to surety on executor's bond.—4 L. R. A. (N. S.) 820, note.

(a) Under the rule that a fiduciary is presumed to have faithfully performed his trust, it will not be presumed, in the absence of a contrary showing, that an administrator transferred property of the estate without an order of the Orphans' Court, contrary to statute.—*Fuhrman v. Fuhrman*, 115 Md. 436, 80 Atl. 1082; *Fuhrman v. Wantz*, Id.

(b) Where creditors, objecting to the validity of an administrator's sale on account of the inadequacy of the price, were informed of the time and place of sale, and might by their presence, with reasonable diligence and effort, have caused a better price to be obtained, the sale will not be set aside.—*Farmers' Bank v. Clarke*, 28 Md. 145.

### § 368. Payment of purchase money.

#### *Cross-References.*

Breach of bond, see post, § 532.

Conclusiveness of recitals in decree of confirmation, see post, § 375.

Denial to action for possession, see post, § 388.

Right to conveyance on entry of judgment for price, see post, § 395.

Judgment before maturity of notes given for price, see "Judgment," § 13.

Lapse of time in connection with other circumstances as evidence of payment, see "Payment," § 73.

Rights of judgment creditor of purchaser before payment of price, see "Judgment," § 779.

(a) Where a sale is made under the authority of court, upon credit, the purchase money to be on interest until the expiration of the term of credit, it is not improper in the administrator to receive the money after the sale, before the expiration of the credit and thus stop the interest.—*Gwynn v. Dorsey*, 4 G. & J. 453.

### § 369. Failure of bidder to complete purchase.

#### § 370.— In general.

#### § 371.— Resale.

(a) Where a judicial sale of the estate of

a deceased person was not completed because of a failure of the purchaser, the resale could not be ordered in a summary way, but was to be by repeating notice and inserting any further provisions that might be made.—*Monroe v. Monroe*, 2 Bland 465, note.

### § 372.— Liabilities of bidder.

#### *Cross-Reference.*

Liabilities in general, see post, § 390.

(a) Misrepresentation by the auctioneer, at an auction sale by an executor of a ground rent, that a certain responsible person was the tenant, though innocently made, the leasehold having been sold without the landlord's knowledge, releases the purchaser.—*Doyle v. Whitridge*, 97 Md. 711, 55 Atl. 459.

(b) The misdescription, in the advertisement of an auction sale by an executor of a ground rent, that it is on the "Calverton Stockyards," is material, releasing the purchaser, though innocently made, and though it is correctly described by courses and distances and as bounded on certain streets, and reference is made to a plat in the possession of the auctioneer, where the sale is made a distance from the premises.—*Doyle v. Whitridge*, 97 Md. 711, 55 Atl. 459.

(c) A purchaser having refused to comply with terms of executor's sale, the property was resold at his risk by order of the Orphans' Court, under act 1870, c. 82, at an amount greater than that bid at the first sale, and he claimed so much of the excess as might remain after payment of all proper expenses, costs, and charges for which he was liable by reason of his default, which claim was resisted by the executor. *Held*, that, as the property at the resale was sold as that of the first purchaser and at his risk, he was entitled, although without funds with which to comply with his bid, or to pay a deficiency, had there been one, to whatever balance might remain of the proceeds of the resale, after deducting the costs and expenses attending the resale, including a reasonable fee for services of counsel in filing the petition and procuring the necessary orders thereon for the resale, the executor's commissions on the whole amount of the proceeds of the resale, and the amount of the original purchase money, with interest thereon from the date of the first sale to

the time of the receipt of the purchase money by the executor from the purchaser at the second sale.—*Mealey v. Page*, 41 Md. 172. (See Code, art. 93, § 292.) [Cited and annotated in 21 L. R. A. 45, on purchaser at judicial sale as bona fide purchaser.]

### § 373.—Actions on bids.

#### Cross-Reference.

Action by heir, see "Descent and Distribution," § 90.

### § 374. Report or return.

#### Cross-References.

Defects ground for collateral attack, see post, § 383.

As sufficient memorandum to satisfy statute of frauds, see "Frauds, Statute of," § 103.

### § 375. Confirmation.

#### Cross-References.

Collateral attack, see post, § 383.

Sale under power in will, see ante, § 138.

Unsuccessful bidder as person aggrieved giving right of review, see "Appeal and Error," § 151.

(a) Where an order refusing to confirm an executor's sale, and directing a resale, is made at the instance of the purchaser, others than the executors, having an interest in the matter, may be permitted to appear in the case, and appeal from the order.—*Warehime v. Graf*, 83 Md. 98, 34 Atl. 364. [Cited and annotated in 36 L. R. A. (N. S.) 928, on auction: right to resell property struck off.]

(b) Executors empowered by testator's will to sell his real estate, and directed to hold part of the proceeds as a trust fund and to distribute the residue, may appeal from an order refusing to confirm a sale, and directing a resale.—*Warehime v. Graf*, 83 Md. 98, 34 Atl. 364. [Cited and annotated, see supra.]

(c) A chancellor cannot direct payment or discount of any claim against the estate of a decedent payable out of the proceeds of the sale of the land before the ratification of the sale.—*Spurrier v. Spurrier*, 1 Bland 475, note.

(d) Act 1831, c. 315, § 10, requiring sale of testator's property by an executor to be confirmed by the Orphans' Court, does not apply to sales made before the statute went into effect; and a sale so made was valid, without confirmation.—*Harlan v. Brown*, 2

Gill 475, 41 Am. Dec. 436. (See Code, art. 93, § 290.)

### § 376. Persons who may question validity.

(a) The objection that the trustees did not sell the interest of the parties to the suit, but only the interest and title of which A. died seised and possessed, is an objection which only the purchasers themselves can make, as they alone are injured by it.—*Gibbs v. Cunningham*, 1 Md. Ch. 44.

(b) A defendant in a proceeding for the sale of the real estate of a decedent cannot object that the trustee did not, in fact, sell the interest of the parties to the suit, but only one of them. Such an objection might come from a purchaser, who is alone injured by it.—*Cunningham v. Schley*, 6 Gill 207.

### § 377. Ratification of invalid sale.

### § 378. Curative statutes.

#### Cross-Reference.

Defects in notice of application for order of sale, see ante, § 337.

### § 379. Opening or vacating.

#### Cross-References.

Collateral attack, see post, § 383.

Validity in general, see ante, § 367.

(a) An administrator's sale of a lot and building situated thereon will be set aside at the instance of the purchaser, where it did not include a tract of land and one-story building situated to the rear of the premises conveyed, which were used as a part of such premises, and which the purchaser, who had known the property for years, and had known that the one-story building was used as a part of the building conveyed, had reason to believe was included in the sale, and which was essential to the reasonable enjoyment of the premises for the purpose contemplated by the purchaser.—*Biddison v. Aaron*, 102 Md. 156, 62 Atl. 523. [Cited and annotated in 26 L. R. A. (N. S.) 328, on easements created by severance of tract with apparent benefit existing.]

(b) And the fact that the purchaser did not ask for information as to the one-story building was immaterial, where the administrators would have been unable to give such information.—*Biddison v. Aaron*, 102 Md. 156, 62 Atl. 523. [Cited and annotated, see supra.]

(c) An Orphans' Court has no power, upon vacating a sale made by an executor under an order of such court, to pass upon and adjust the rights and equities of the purchaser growing out of the order of vacation. Jurisdiction of these belongs exclusively to a court of equity.—*Eichelberger v. Hawthorne*, 33 Md. 588. [Cited and annotated in 69 L. R. A. 45, on relief of purchaser on annulling judicial sale.]

(d) Where creditors, objecting to the validity of an administrator's sale on account of the inadequacy of the price, were informed of the time and place of sale, and might by their presence, with reasonable diligence and effort, have caused a better price to be obtained, the sale will not be set aside.—*Farmers' Bank v. Clarke*, 28 Md. 145.

(e) The real estate of a decedent was sold for a certain price per acre under decree of the court, on a creditors' bill, for the payment of debts, and an order confirming the sale was entered. The survey under which the land was sold was made by the county surveyor under an order of court. Afterwards, on ex parte application by a devisee, another survey was ordered, and the tract was found to contain more acres than that shown by the first survey. The only evidence to establish the mistake was the survey made on the ex parte application of the devisee. Held, that this evidence was not sufficient to establish the mistake.—*Goldsborough v. Ringgold*, 1 Md. Ch. 239.

(f) Though a purchaser at an administrator's sale under an order of the Orphans' Court fails to comply with, or to offer to comply with, the terms of sale, or to pay the purchase money, his omission of any one of such requirements cannot constitute a ground of presumption that the sale was not a real one, but was collusive.—*Scott v. Burch*, 6 H. & J. 67.

### § 380. Actions to set aside.

#### Cross-References.

See ante, § 379.

Collateral attack, see post, § 383.

Validity in general, see ante, § 307.

Jurisdiction of federal court of equity to set aside transfer, see "Courts," § 262.

Limitations in general, see "Limitation of Actions," §§ 19, 72.

### § 381. Effect of setting aside.

### § 382. Resale on setting aside.

### § 383. Collateral attack.

#### Cross-References.

Insolvent estate, see post, § 414.

On order or decree for sale, see ante, § 349.

### § 384. Operation and effect in general.

#### Cross-Reference.

Administration on estate of person not in fact dead, see ante, § 4.

(a) Where an administrator's advertisement for the auction sale of a lot described it as containing a certain strip, and the memorandum of the sale of an adjacent lot, sold at the same auction, but after the former, includes the strip in its description of the latter lot, such strip will go to the purchaser of the former lot.—*Cherry v. Stein*, 11 Md. 1. [Cited and annotated in 22 L. R. A. 536, 539, on easements of light, air and prospect.]

### § 385. Effect on rights of creditors.

#### Cross-Reference.

Creditors of heirs, see "Descent and Distribution," § 153.

(a) A mortgagee is under no obligation to come into chancery, under proceedings for the sale of a deceased person's real estate for the payment of debts, but may cling to the property specifically pledged for the payment of the mortgage debt until he is fully paid both principal and interest.—*Ellicott v. Ellicott*, 6 G. & J. 35.

### § 386. Rights of devisees and heirs.

#### Cross-References.

Effect of settlement of estate, see post, § 513.

Estoppel and ratification, see ante, §§ 376, 377.

Notice of application for confirmation, see ante, § 375.

Contract of heirs to abandon right to redeem from sale as within statute of frauds, see "Frauds, Statute of," § 74.

### § 387. Rights of surviving husband or wife, or their successors in interest.

#### Cross-References.

Estoppel and ratification, see ante, §§ 376, 377.

Rights in respect to proceeds, see post, § 400.

Widow as purchaser, see post, § 388.

(a) The widow is entitled to dower out of real estate sold under an order of court in

order to save the personalty, or to an equivalent allowance from the proceeds of the sale, the residue therefrom going to the administrator.—*Waring v. Waring*, 2 Bland 673. (Compare *In re Williams*, 3 Bland 186.) [Cited and annotated in 20 L. R. A. 374, on right to strict foreclosure.]

(b) Where the land of which a husband died seised is sold by a court of equity, free from the claim of dower, for the payment of debts, by reason of the insufficiency of the personal estate to pay them, and his widow is a party to such proceeding, she will be barred of her right of dower so long as the decree remains unreversed.—*Gardiner v. Miles*, 5 Gill 94.

### § 388. Title and rights of purchasers and their privies.

#### Cross-References.

See ante, § 386.

Necessity of confirmation, see ante, § 375.

On avoidance of sale, see post, § 389.

Recitals in deed, see post, § 397.

Lands held adversely, see "Champerty and Maintenance," § 7.

Presumption as to bar of debts by limitation, see "Limitation of Actions," § 195.

Rights in respect to patented invention, see "Patents," § 213.

Rights of subsequent mortgagees, see "Mortgages," § 154.

Right to subrogation, see "Subrogation," § 16.

Title to support action to set aside tax deed, see "Taxation," § 796.

(a) On a sale of a decedent's land to pay debts, a purchaser applied for a writ of hab. fa. poss. The parties in possession answered, alleging matters which, if true, would make the delivery a fraud on their rights. *Held*, that if the parties in possession acquired title to the land or to the possession subsequent to the decree, whether from the purchaser or other person capable of giving it, such right could be set up in an answer to the application, though the right was only an equitable one.—*Nutwell v. Nutwell*, 47 Md. 35.

(b) On a creditor's bill to have the real estate of a decedent sold to pay debts, the trustee reported that he had sold a tract supposed to contain 828¼ acres, more or less, but soon after the sale it was discovered that the grantor of the deceased had retained 50 acres of the tract for which he had made an allowance to the purchaser from

the trustee, but that the purchaser had caused the land to be surveyed and had discovered that in the residue there was a deficiency of 9¼ acres, for which he claimed an allowance. *Held*, that, as to the 50 acres, the deficiency was not of quantity, but in title, and the allowance was properly made, but the 9¼ acres was merely a deficiency in quantity, for which the purchaser was not entitled to an allowance.—*Murdock v. Beall*, 1 Bland 109, note.

(c) Where decedent's real estate was sold under an order of the chancery court founded on an allegation of the inadequacy of personal estate to pay debts and legacies, and such order did not direct that the rents and profits of the land should be sold as necessary to pay debts and legacies, the devisees who took title to the land on the death of the testator were absolutely entitled to such rents and profits.—*Guyer v. Maynard*, 6 G. & J. 420.

### § 389. Rights and remedies of purchasers on avoidance of sale.

#### Cross-Reference.

Mortgagee, see post, § 398.

(a) A., a widow and administratrix, to satisfy advances made by her, appropriated to her own use the estate of her deceased husband, consisting mainly of leasehold property; her action being sustained by a decree of the Orphans' Court, which it was held that the court had no power to pass. A. marrying again, her husband made valuable improvements on the leasehold property, and afterwards they mortgaged the same to B., who bought in the property on foreclosure sale. On petition of the children of A.'s first marriage, after her death, her account was opened, and an administrator de bonis non of the leasehold property was appointed. On bill by B. to enjoin him from selling the same, *held*, that, in dealing with the net proceeds of the administrator's sale, there should be an equitable apportionment made between the value of the property as it was left by decedent and the permanent beneficial improvements placed thereon since his death, rating their value and the enhancement of the property as at the time of the sale,—such improvements to bear their proportion of all taxes, insurance, etc., as-



sessed or paid upon the basis of the improved condition of the property,—and that, after all proper deductions from the value of such improvements and A.'s one-third interest, the balance would be the extent of B.'s interest in the premises.—*Gavin v. Carling*, 55 Md. 530.

(b) Where the Orphans' Court vacates a sale by an executor under its order, it has no power to adjust the rights of the purchaser growing out of the vacation, but such jurisdiction belongs exclusively to a court of equity.—*Eichelberger v. Hawthorne*, 33 Md. 588. [Cited and annotated in 69 L. R. A. 45, on relief of purchaser on annulling judicial sale.]

### § 390. Liabilities of purchasers.

#### Cross-References.

Liabilities as to application of proceeds, see post, § 407.

On failure to complete sale, see ante, § 372.

Payment of purchase money, see ante, § 368.

### § 391. Liabilities of executor or administrator.

#### Cross-References.

Evidence on accounting, see post, § 506.

Exceptions to report, see post, § 504.

Form of action, personal or representative character, see post, § 430.

(a) If a trustee appointed by the court to sell the real estate of a deceased person does not collect the proceeds of sale, or account for not doing so, he will be dealt with as if they had come to his hands.—*Dent v. Maddox*, 4 Md. 522.

(b) Where a trustee was appointed to sell certain lands in 1830, and reported in 1831 that he had sold them, and was called on in 1842 by the heirs to account for the proceeds, it was held, that, after such lapse of time, it must be presumed that he had received payment, and that he was responsible, whether he had received it or not.—*Maddox v. Dent*, 4 Md. Ch. 543.

(c) An administrator, in the execution of an order for the sale of his intestate's estate, took a bond with one surety for \$72, which not being paid, he did not sue until one term of court after the day of payment had passed, and, upon obtaining judgment and issuing a fi. fa., did not obtain the money.

Held, that the administrator was not liable for the amount, or chargeable with negligence.—*Gwynn v. Dorsey*, 4 G. & J. 453.

(d) The law does not imply a warranty by an administrator of title of personal property sold by him on administration sale, so as to render him personally liable to the vendee in case of failure of title.—*Mockbee v. Gardner*, 2 H. & G. 176.

### § 392. Liabilities on bonds for sale.

#### Cross-Reference.

Liability on general administration bond, see post, § 528.

### (D) CONVEYANCE.

#### Cross-References.

Effect of failure to record deed on rights of subsequent purchaser from heir or devisee, see "Vendor and Purchaser," § 233.

Estoppel by deed executed in representative capacity, see "Estoppel," § 31.

Mandamus to compel execution of conveyance, see "Mandamus," § 56.

Record as notice to subsequent purchaser from heir or devisee, see "Vendor and Purchaser," § 231.

### §§ 393-396. (See Analysis.)

### § 397. Deed to purchaser.

(a) A deed, which conveys the interests of two intestates, is sufficient, though signed but once by the administrator, where it is acknowledged by him as the administrator of both, and its recitals show that he was the administrator of both, and conveyed "all the right, title, property, claim, and demand of the said" intestates, under authority of the Orphans' Court.—*Connaughton v. Bernard*, 84 Md. 577, 36 Atl. 265.

(b) Where a conveyance of a certain lot by an administrator is correct, the title thereto is not affected because a deed of an adjoining lot, made by him on the same day to a different grantee, by mistake, falsely recites that the lot thereby conveyed was "the same lot conveyed by W. to B., recorded in Liber A. M., No. 331, folio 532," and the lot so conveyed by W. to B. was the one described in the former deed.—*Bay v. Posner*, 78 Md. 42, 26 Atl. 1084, 29 Atl. 11. [Cited and annotated in 50 L. R. A. (N. S.) 613, as to who, aside from person expressly named, may exercise power of sale of realty.]

**§ 398. Mortgage.***Cross-References.*

Application and order, see ante, §§ 332-359.

Liability of mortgagee for disposition of proceeds, see post, § 407.

When authorized, see ante, §§ 323, 324, 329.

**§ 399. Lease.***Cross-References.*

Application and order, see ante, §§ 332-359.

When authorized, see ante, §§ 319-331.

**(E) PROCEEDS.***Cross-References.*

Insolvent estate, see post, § 414.

Payment of widow's allowance, see ante, § 181.

Right of executor or administrator to commissions on proceeds, see post, § 495.

Sale without order of court, see ante, § 147.

Construction of statute adopted from another state, see "Statutes," § 226.

**§ 400. Disposition in general.**

(a) Where real estate in which an infant was interested was sold by a decree of the court, but the purchaser failed to comply with the terms, and a resale was ordered, and the infant died before the sale under the second decree, it was *held*, that, by the sale after the death of the infant, the character of the property was not changed, but that the proceeds descended to the heir, and not to the personal representative of the deceased.—*Dalrymple v. Taneyhill*, 4 Md. Ch. 171.

**§ 401. Costs and expenses.****§ 402. Mortgages and other liens.***Cross-Reference.*

Rights of widow in respect to statutory allowance, see ante, § 182.

**§ 403. Payment of debts.**

(a) In 1830 A. was appointed by the court a trustee to sell the real estate of B., who had died intestate, for the payment of his debts. A sale was made and reported by the trustee, and an order of ratification nisi passed in 1831. In 1842 the heirs at law of B., having become of age, and no further proceedings having been had in the case, except to refer the same to an auditor for account, filed a petition, praying that the proceeds of the sale might be brought into court by the trustee and distributed among

them, upon the ground that the claims against B. had not been proved, and were subject to the plea of the statute of limitations. In 1846 the heirs filed another petition, suggesting the death of the trustee, and praying that his executor might be made a party, and relief had against him. *Held*, that the proceeds of the real estate sold by A.'s executor were by virtue of act 1831, c. 315, applicable to the claim of B.'s heirs at law as personal assets in his hands.—*Dent v. Maddox*, 4 Md. 522. (See Code, art. 93, § 290.)

(b) Where the chancellor had ordered that the money arising from the sale of the estate of a decedent be applied according to the auditor's statement filed, but, before such payments were made, other creditors filed claims which were just, they were entitled to payment, though no blame would have attached had the money been paid under the order before the last creditors applied.—*O'Brian v. Bennet*, 1 Bland 86, note.

**§ 404. Right to surplus.**

(a) Where the real estate is sold by an executor, under act May 1831, c. 315, §§ 10, 11, the widow is entitled to an investment for life of so much of the proceeds as remain after the settlement of the estate.—*Dent v. Maddox*, 4 Md. 522. (See Code, art. 93, § 290.)

(b) After the death of both vendor and vendee, a creditors' bill was filed for a settlement of the vendor's estate, and the land sold thereon to pay the balance of the purchase money remaining due. *Held*, that a judgment creditor of the purchaser was entitled to the satisfaction of his debt out of the surplus after paying the vendor's lien.—*Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236. [Cited and annotated in 23 L. R. A. 259, on crops as personalty for purpose of levy and sale; in 38 L. R. A. 249, on priority of judgment over conveyance made after beginning of term; in 53 L. R. A. 703, on effect, on existing judgment lien, of proceedings to renew, revive, or extend judgment; in 57 L. R. A. 644, on nature of interest in land contract as real or personal.]

(c) The real estate of A., a decedent, was sold to B. under a decree for the payment of debts, and the sale was regularly confirmed.

B. not having paid the whole of the purchase money, the land was resold for the payment of the balance; and certain judgment creditors of B. claimed the payment of their demand out of the fund in the trustee's hands after the payment of the original purchase money, alleging his death, and that his personal estate was insufficient for the payment of his debts. This claim was opposed by the heirs at law of A., who were minors at the time of the first sale, and whose guardian, for whom B. was security, had received and wasted a large amount of the money received from B. on the ground that, being seised of the legal title in the land, it could not be taken from them until the whole balance due from the guardian, or B. as his security, or from B. on any account, was paid to them. *Held*, that the fund should be decreed to the judgment creditors of B.—*Lee v. Stone*, 5 G. & J. 1, 23 Am. Dec. 589.

**§ 405. Surplus proceeds of sale on foreclosure paid into probate court.**

**§ 406. Proceedings for distribution.**

(a) Where an executor, who had been appointed the trustee under decree to sell premises mortgaged to his testatrix, died before effecting a sale, and another person was appointed trustee and made sale, which was reported and ratified, *held*, that letters de bonis non should be taken out on her estate before the auditor could distribute the fund.—*Kirby v. State*, 51 Md. 383. [*Cited and annotated in 40 L. R. A. (N. S.) 1137, on decree directing transfer by executor, administrator, or guardian to himself in another fiduciary capacity, as affecting liabilities of sureties.*]

(b) In 1830 A. was appointed by the court a trustee to sell the real estate of B., who had died intestate, for the payment of his debts. A sale was made and reported by the trustee, and an order of ratification nisi passed in 1831. In 1842 the heirs at law of B., having become of age, and no further proceedings having been had in the case, except to refer the same to an auditor for an account, filed a petition, praying that the proceeds of the sale might be brought into court by the trustee and distributed among them, upon the ground that the claims against B. had not been proved, and were

subject to the plea of the statute of limitations. In 1846 the heirs filed another petition, suggesting the death of the trustee, and praying that his executor might be made a party, and relief had against him. *Held*, that the decree appointing A. trustee for the sale of the real estate of B., though containing no direction to bring the proceeds of the sale into court, conferred on him no authority to disburse them.—*Dent v. Maddox*, 4 Md. 522.

(c) Where the trustee appointed to sell real estate, on a creditors' bill for a settlement of the deceased debtor's estate, died after the sale, and before the purchase money had been paid, the purchaser was directed to pay the same to creditors entitled under the bill.—*Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236. [*Cited and annotated, see supra, § 404.*]

(d) Where a trustee appointed to sell real estate, on a creditors' bill for the settlement of the deceased's debts, dies after the sale, and before the purchase money has all been paid, the administrator of the deceased trustee may be required to come in and account for the money or bonds for the purchase money in his hands.—*Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236. [*Cited and annotated, see supra, § 404.*]

**§ 407. Liabilities of purchaser or mortgagee as to application of proceeds.**

**IX. INSOLVENT ESTATES.**

*Cross-References.*

Allowance for support of minor children, see ante, § 176.

Effect on liability on administration bond, see post, § 537.

Foreign and ancillary administration, see post, §§ 517-526.

Insolvency as defense against action by administrator, see post, § 432.

Right of widow to priority in respect to allowance, see ante, § 182.

Set-off of claim against insolvent estate, see post, § 434.

Comity between courts of different states, see "Courts," § 511.

Concurrent and conflicting jurisdiction of state and federal courts of suits by or against receiver of insolvent estate, see "Courts," § 501.

**§ 408. Administration in general.**

**§ 409. Grounds for declaration of insolvency.**

### § 410. Proceedings on reporting or declaring insolvency.

(a) In a judicial proceeding to determine the validity of a deed manumitting a slave, the person manumitted is entitled to the assistance of the heirs at law of the grantor, or the person holding the real estate of the grantor, for the purpose of taking an account before it can be legally ascertained that deceased died insolvent, so as to render the manumitted slave subject to the payment of the debts.—*Allein v. Sharp*, 7 G. & J. 96.

§§ 411-413. (See Analysis.)

### § 414. Sales and conveyances under order of court.

(a) In case of an application for a sale of real estate, to pay debts of a deceased insolvent, primary proof of the insolvency stands in place of full proof until full proof is demanded; but such demand dispenses with the primary proof prescribed by the testamentary system.—*Kent v. Waters*, 18 Md. 53.

### § 415. Presentation, proof, and allowance of claims.

#### Cross-References.

Evidence of bar by limitation, see "Limitation of Actions," § 195.

Evidence of existence of indebtedness in action to set aside fraudulent conveyance, see "Fraudulent Conveyances," § 287.

(a) A mortgage, unacknowledged and unrecorded, and without the affidavit by the mortgagee as to the consideration, required by act 1846, c. 271, is insufficient to create a lien on the mortgaged premises, but is evidence of an indebtedness which may be proved against the estate of the deceased insolvent mortgagor, and entitles the mortgagee, as a general creditor to the amount advanced, to a pro rata share of the assets.—*Nelson v. Hagerstown Bank*, 27 Md. 51. (See Code, art. 21, § 32.) [Cited and annotated in 29 L. R. A. 639, on liability of executors, trustees, etc., for compound interest.]

### § 416. Payment of claims.

#### Cross-Reference.

Part payment as accord and satisfaction, see "Accord and Satisfaction," § 8.

### § 417. Rights and remedies of creditors.

#### Cross-References.

Objections to claims, see ante, § 415.

In cases of fraudulent conveyances in general, see "Fraudulent Conveyances," §§ 205-328.

Right of fraudulent grantee to reimbursement of expenditures, see "Fraudulent Conveyances," § 183.

Right to jury trial on creditors' bill, see "Jury," § 14.

### § 418. Distribution and settlement.

### § 419. Review of proceedings.

#### Cross-References.

Costs, see "Costs," § 236.

Courts invested with appellate jurisdiction, see "Courts," §§ 227, 246.

## X. ACTIONS.

#### Cross-References.

Against executors de son tort, see post, § 544.

By or against foreign or ancillary executors and administrators, see post, §§ 524, 525.

For accounting or administration, see post, §§ 473, 474.

For recovery of price of land, see ante, § 146.

For recovery of rents of real estate, see ante, § 131.

For specific performance of decedent's contracts, see ante, § 135.

Necessity of administration, see ante, § 3.

On administration bonds, see post, § 537.

Powers of executor before issue of letters, see ante, § 77.

Powers of temporary administrators, see ante, § 122.

Proceedings to enforce payment of debts, see ante, § 283.

Proceedings to enforce payment of legacies and distribution, see ante, §§ 314, 315.

Termination of authority of special administrator, see ante, § 31.

Appeal from order denying probate of will, see "Wills," § 359.

By committee of incompetent to compel payment of distributive share, see "Insane Persons," § 93.

Compelling administrator to deposit money in court, see "Deposits in Court," § 8.

Continuance or revival of action by or against decedents, see "Abatement and Revival," §§ 71-77; "Appeal and Error," § 334.

Creditors' suit against executor to reach property in custodia legis, see "Creditors' Suit," § 8.

Distress for rent as against representative of decedent, see "Landlord and Tenant," § 268.

Distress for rent by administrator, see "Landlord and Tenant," § 267.

Execution as remedy for attacking fraudulent conveyance, see "Fraudulent Conveyances," § 230.

For causing death of decedent, see "Death," § 31.

For illegal sale of liquor resulting in death of intestate, see "Intoxicating Liquors," § 297.

For taxes, see "Taxation," §§ 590, 592.

For taxes assessed on property of decedent, see "Taxation," § 362½.

Interpleader by executor, see "Interpleader," § 13.

Joinder of causes of action, see "Action," §§ 38, 42, 45, 50.

Liability of executor or administrator to attachment, see "Attachment," §§ 18, 63.

Liability of executor or administrator to garnishment, see "Garnishment," §§ 35, 36, 61.

Possession to support trespass, see "Trespass," § 20.

Purchasers pendente lite, see "Lis Pendens."

Reference in action by administrator, see "Reference," §§ 7, 80.

Release of judgment as defense to subsequent action thereon against the judgment debtor's estate, see "Judgment," § 888.

Revival of judgment by administrator, see "Judgment," § 864.

Right of executor to set up statute of frauds in action to enforce decedent's contract, see "Frauds, Statute of," § 143.

Rights of action by devisees and legatees against third persons, see "Wills," §§ 746-748.

Rights of action by heirs and distributees against third persons, see "Descent and Distribution," §§ 89-91.

Right to jury trial, see "Jury," §§ 13, 14.

Supplementary proceedings against executor, see "Execution," § 362.

Survival of actions by or against decedents, see "Abatement and Revival," §§ 48-70.

Testimony as to transactions with deceased, see "Witnesses," §§ 125-183.

To abate tax, see "Taxation," § 461.

To construe will, see "Wills," § 697.

To enforce trust against executor or administrator of deceased trustee, see "Trusts," § 348.

To establish or contest will, see "Wills," §§ 227, 229.

To recover taxes paid, see "Taxation," § 538.

To restrain collection of taxes, see "Taxation," § 611.

Writ of assistance against representative of deceased mortgagor, see "Mortgages," § 544.

## § 420. Capacity to sue and be sued in general.

### Cross-Reference.

Effect of accounting and settlement, see post, § 513.

## § 421. Nature and form.

### Cross-Reference.

Rights of action, see post, §§ 426, 429.

(a) A distributee may sue in equity against an administrator for a share of the intestate estate.—*Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

## § 422. Statutory provisions.

## § 423. Actions by creditors and others interested in estate.

### Cross-References.

Against executor de son tort, see post, § 544.

Against foreign executor or administrator, post, § 525.

Insolvent estate, see ante, § 417.

Actions by devisees and legatees, see "Wills," §§ 746-748.

Actions by heirs, see "Descent and Distribution," §§ 89-91.

Contest of will, see "Wills," § 229.

Pendency of other action as defense to suit to avoid fraudulent conveyance, see "Fraudulent Conveyances," § 243.

Remedies of creditors and purchasers in cases of fraudulent conveyances in general, see "Fraudulent Conveyances," §§ 205-328.

## § 424. Rights of action between coexecutors or coadministrators.

(a) One executor cannot file a suit in equity against his coexecutor, in order to compel the latter to account for and pay over to him certain claims alleged to be due from the defendant to the estate of their testator.—*Beall v. Hilliary*, 1 Md. 186, 54 Am. Rep. 649. [Cited and annotated in 11 L. R. A. (N. S.) 312, 347, on coexecutor's liability for default of one permitted to manage estate.]

## § 425. Rights of action by executors or administrators.

### Cross-References.

Actions in respect to realty, see ante, §§ 129, 130.

Actions on contracts of decedent, see ante, § 156.

Actions relating to personalty, see ante, § 154.

Administrator de bonis non, see ante, § 120.

Foreign executor or administrator, see post, § 524.

Rights of action as assets of estate, see ante, §§ 49-51.

Appeal from decree setting aside will, see "Wills," § 395.

### Annotation.

Executor or administrator as real party in interest by whom action must be brought.—64 L. R. A. 611, note.

### § 426.— In general.

#### Cross-Reference.

Nature and form of action, see ante, § 421.

(a) The administrator de bonis non cum testamento annexo being intrusted only with property remaining in specie cannot sue for devastavit by his predecessor.—*Sydnor v. Graves*, 119 Md. 321, 86 Atl. 341.

(b) Act 1820, c. 174, through which alone the right of an administrator de bonis non to recover money belonging to the estate of the intestate and in the hands of the first administrator at the time of his death is derivable, requires an order of the Orphans' Court as a necessary preliminary step.—*Johnson v. Farmers' Bank*, 11 Md. 412. (See Code, art. 93, §§ 70-75.) [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(c) The administrator cannot recover back money paid to a distributee or his guardian on new debts appearing against the intestate and being recovered by suit. His remedy is in chancery.—*Turner v. Egerton*, 1 G. & J. 430, 19 Am. Dec. 235; *Same v. Same*, 1 G. & J. 434.

### § 427.— Personal or representative capacity.

#### Cross-References.

Personal representative of executor, see ante, § 128.

Pleading, see post, § 444.

(a) Money recovered upon an appeal bond, given to the obligees, as executors, on an appeal from a judgment obtained by them in that character, will be assets in their hands, and hence they properly sue on the bond in their representative capacity.—*Sasscer v. Walker*, 5 G. & J. 102, 25 Am. Dec. 272.

(b) An action may be maintained by a person in his own right on a bond executed to him as administrator of a deceased person.—*Ayres v. Toland*, 7 H. & J. 3.

### § 428. Rights of action against executors or administrators.

#### Cross-References.

Actions in respect to realty, see ante, § 130.

Effect of appeal from order of appointment, see ante, § 20.

Liabilities of representatives of deceased executor or administrator, see ante, § 128.

### § 429.— In general.

#### Cross-Reference.

Nature and form of action, see ante, § 421.

(a) Where deceased executors have lost, wasted, or misapplied funds in their hands, a court of equity will appoint a trustee who may sue for the recovery of such fund.—*Lawson v. Burgee*, 121 Md. 203, 88 Atl. 121.

(b) In a suit in equity against an executor to compel the final distribution of the funds in his hands, it was shown that the sole devisee was dead, that the plaintiff was his next of kin, and that defendant, upon proper demand, had refused to pay to her the proceeds of the estate. The executor, as a defense, relied on the pendency of another suit brought by himself to settle the estate of the testatrix and to determine who was entitled to the funds in his hands. The two actions were begun on the same day, and matters were involved in the latter suit which were calculated to unnecessarily delay the final distribution of the proceeds of the estate. Held, that plaintiff was entitled to the relief asked by him.—*Garrison v. Hill*, 81 Md. 206, 31 Atl. 794.

(c) An action at law will not lie for a legacy against the administrator of an executor, where the latter has wasted or converted to his own use the assets of his testator. The remedy is by a proceeding in equity.—*Coates v. Mackie*, 43 Md. 127.

(d) Act 1798, c. 101, subc. 8, § 5, provides that executors and administrators shall be liable to be sued in any court of law or equity in any action except actions of slander, injuries, or torts done to the person which might have been maintained against the deceased in his lifetime. Held, that such act authorized the maintenance of an action of trover against the administrators of a deceased person for an alleged conversion of bonds by the intestate.—*Brummett v. Golden*, 9 Gill 95. (See Code, art. 93, § 104.)

### § 430.— Personal or representative capacity.

#### Cross-References.

Form of judgment, see post, § 453.

Pleading, see post, § 444.

(a) Where plaintiff sues in replevin to recover property taken by the administrator in his representative capacity, a suit should

be brought against the defendant individually, and not as administrator.—*Smith v. Wood*, 31 Md. 293.

(b) An administrator must be sued as such on his promise to pay a debt of his intestate.—*Forbes v. Perrie*, 1 H. & J. 109.

### § 431. Conditions precedent.

#### Cross-References.

By foreign executor or administrator, see post, § 524.

Presentation as condition precedent to continuation of suit against one dying pending action, see ante, § 222.

Questions for jury, see post, § 451.

Right of set-off, see post, § 434.

(a) In many cases the authentication of claims in the particular mode required by statute is impracticable; the only alternative of the creditor being a resort to a court of justice. A literal construction, therefore, of the act of 1823, would be fraught with inconsistency and injustice, and will not be placed upon it if it be susceptible of any other just and rational interpretation.—*Steuart v. Carr*, 6 Gill 430. (See Code, art. 93, §§ 108, 116.)

(b) Act 1722, c. 10, requiring that in an action on a bond against an administrator probate should be indorsed thereon that no payment had been made, or anything given or delivered towards satisfaction thereof, does not affect creditors who were not in the state at the time of the execution of the bond, and have resided abroad ever since.—*Hyde v. Bradford*, 1 H. & McH. 82. (See Code, art. 93, § 86.)

### § 432. Defenses against executors or administrators.

### § 433. Defenses by executors or administrators.

#### Cross-Reference.

Pleading accord and satisfaction, see "Accord and Satisfaction," § 25.

(a) A legatee, requiring a legislative enactment to enable him to receive the bequest, and applying therefor to the first Legislature convening after the testator's death, can recover its amount from the executor, although he has settled the estate in the meantime; a demand having also been made upon him before he passed his final account.—*England v. Vestry of Prince George's Parish*, 53 Md. 466. [Cited and annotated in 11 L. R. A. (N. S.) 56, 58, 63, 66, 68, 71, 80,

85, on bequest of stocks, bonds, or notes as general or specific.]

(b) Where an executor has given bond for the payment of debts and legacies of his decedent, in an action by a creditor of the estate, such executor could not plead plene administravit or nulla bona, though the action was not founded on the bond.—*State v. Hammond's Ex'rs*, 6 G. & J. 157.

### § 434. Set-off and counterclaim.

#### Cross-References.

Against claim of administrator for services, see post, § 499.

Against claim presented in probate court, see ante, § 245.

In action for failure to comply with bid, see ante, § 373.

In action for price of property sold, see ante, § 368.

Jurisdiction of probate court, see ante, § 250.

Rights of executor de son tort, see post, § 544.

In different rights and capacities, see "Set-Off and Counterclaim," § 46.

Set-off against assigned claim, see "Set-Off and Counterclaim," § 49.

(a) A wife, holding lands in which her mother held a dower interest, sold them, and by agreement with the mother, who was living with her, retained the proceeds of the dower interest in payment for the mother's board. After the death of the wife the husband paid the mother the amount of the dower. Held, that he was entitled to credit for the amount so paid, in a suit brought against him by the mother, as administratrix of the wife's estate, for an accounting for property received from the estate as distributee.—*Sewell v. Slingsluff*, 62 Md. 592.

(b) In an action against an executor to recover rents collected by his testator as agent of the plaintiff, a set-off may be allowed to the extent of one-half of the fees paid by the deceased to counsel employed to defend an action in which he and the plaintiff were joint defendants.—*Percy v. Clary*, 32 Md. 245.

### § 435. Jurisdiction.

#### Cross-References.

Action for sale of decedent's real estate, see ante, § 356.

Action on administration bond, see post, § 537.

Specific performance of contracts of decedent, see ante, § 135.

As dependent on domicile or residence of parties, see "Corporations," § 665; "Courts," § 12.

Concurrent and conflicting jurisdiction, see "Courts," §§ 472, 475, 476, 489, 493, 505.

Jurisdiction of federal courts as affected by citizenship of executor or administrator, see "Courts," §§ 309, 311.

Jurisdiction of justices of the peace, see "Justices of the Peace," § 39.

Jurisdiction of proceedings to enforce judgment affirmed after death of appellant, see "Judgment," § 855.

Waiver of objections to jurisdiction, see "Courts," § 37.

### § 436. Venue.

#### Cross-References.

Actions by or against representative of community estate, see "Husband and Wife," § 276.

Under general statutes relating to suits by persons in representative capacity, see "Venue," § 10.

### § 437. Time to sue, and limitations.

#### Cross-References.

Actions against insolvent estate, see ante, § 417.

Actions and proceedings for accounting, see post, § 470.

Actions by administrator of insolvent estate, see ante, § 413.

Actions for sale of real estate, see ante, § 356.

Actions on administration bond, see post, § 537.

Claims barred before decedent's death, see ante, § 213.

Effect of defense by administrator, see ante, § 433.

Proceedings for payment of legacies or distributive shares, see ante, § 314.

Proceedings for sale of property of estate, see ante, § 334.

Time for presentation of claims, see ante, § 225.

Validity of judgment, see post, § 453.

Accrual of right of action as affecting limitations, see "Limitation of Actions," § 49.

Acknowledgment or new promise by executor or administrator as affecting limitations, see "Limitation of Actions," § 143.

Action by creditor of heir, see "Descent and Distribution," § 157.

Action for death, see "Death," § 38.

Action to construe will, see "Wills," § 699.

Commencement of action or other proceeding as suspending running of statute, see "Limitation of Actions," §§ 115-138.

Computation of time, see "Time," § 9.

Death and administration as suspending running of statute, see "Limitation of Actions," §§ 80-83.

Estoppel to rely on limitation, see "Limitation of Actions," § 13.

Evidence on issue of limitations, see "Limitation of Actions," § 13.

Evidence on issue of limitations, see "Limitation of Actions," §§ 195-197.

Existence of trust as affecting limitations, see "Limitation of Actions," §§ 102, 103.

Instructions as to bar by limitations, see "Limitation of Actions," § 200.

Limitations applicable, see "Limitation of Actions," § 18.

Limitations as question for jury, see "Limitation of Actions," § 199.

Operation and effect of bar by limitation in general, see "Limitation of Actions," §§ 165-175.

Partition suit within time allowed for settlement of estate, see "Partition," § 25.

Pendency of action or legal proceeding as affecting limitations, see "Limitation of Actions," § 105.

Pleading defense of limitations, see "Limitation of Actions," §§ 176-202.

Proceedings to revive judgment, see "Judgment," § 866.

Restraining defense of limitations, see "Injunction," § 29.

Waiver of bar by limitation, see "Limitation of Actions," § 175.

What law governs as to limitation of actions on judgment against decedent, see "Limitation of Actions," § 2.

Who may plead limitations, see "Limitation of Actions," § 172.

(a) Laches will bar suit to enforce a claim against testatrix, the claimants, though knowing all the facts, having waited years till after her death and that of her attorney, who knew the facts, and till after distribution of her personalty to legatees, though having had notice to present any claim they had.—*Constable v. Camp*, 87 Md. 173, 39 Atl. 807.

(b) Declarations of one executor that plaintiff's claim for services rendered his testator ought to be paid, and of another that the claim was too large, but that plaintiff should have something, while inadmissible to establish the debt, are competent to take the case out of the statute of limitations.—*Stoner v. Devilbiss*, 70 Md. 144, 16 Atl. 440.

(c) The decedent having been under a contract to build a wall, and having contracted with plaintiff to furnish the materials, his administrator, after his death, continued the work, and received material from plaintiff. Held, that plaintiff's claim against the administrator was not such a one as would be barred, under Code 1860, art. 93, § 108, by failure to sue within nine months after exhibition of the claim to the administrator and rejection by him; that section referring only to such claims as require authentication by the Orphans' Court before the administrator would be protected in paying them, whereas this claim, from its nature, would



not need to be authenticated by the court.—*Coburn v. Harris*, 58 Md. 87. (See Code 1911, art. 93, § 107.)

(d) Under Code 1860, art. 93, § 108, requiring suits against administrators to be begun within nine months after the rejection of the claims exhibited and disputed, it must appear that a claim, after being authenticated as required by law, was presented to the administrator for payment by the plaintiff, or by some one by him so authorized to present it, and was disputed or rejected by the administrator, and that the plaintiff failed to bring suit to recover on the claim within nine months after such dispute or rejection.—*Coburn v. Harris*, 53 Md. 367. (See Code 1911, art. 93, § 107.)

(e) The statute of limitations does not run in favor of an administrator against an action for distributive shares.—*Ogle v. Tayloe*, 49 Md. 158.

(f) It is essential to the admissibility of the promise or acknowledgment of one of several administrators in a suit against all, to take the case out of the statute of limitations: (1) That the original debt be proven aliunde; (2) that the promise or acknowledgment occur before the debt be barred by the statute; and (3) that the admission be made within three years before the commencement of the suit.—*Pole v. Simmons*, 49 Md. 14.

(g) Code 1860, art. 93, § 108, requiring a plaintiff to sue on a bond, or on claims for breaches thereof, within nine months after their rejection by the administrator, has no reference to a possible or contingent claim that might arise from further breaches of a bond.—*Orendorff v. Utz*, 48 Md. 298. (See Code 1911, art. 93, § 107.)

(h) In an action by a creditor against the executrix of the deceased husband, a letter written by the defendant's attorney to the plaintiff's attorney, asking information relative to the claim, and stating that "the executrix will pay it if just," was not admissible to take the case out of the statute of limitations.—*Goldsmith v. Kilbourn*, 46 Md. 289.

(i) The payment of a dividend to a creditor by an administrator in the Orphans' Court does not estop him or a subsequent admin-

istrator de bonis non from pleading the statute of limitations to the same claim in a court of law.—*Miller v. Dorsey*, 9 Md. 317.

(j) Testator died in 1834, devising land to his son subject to the payment of one-third of all the wheat and corn raised thereon to the widow during her life. The son accepted the devise, but did not pay the rent as prescribed, and on the death of the widow in 1852 became her administrator. *Held*, in an action by the distributees, that he could not, by becoming her administrator, defeat the claim by pleading the statute of limitations, as the probate court would not allow the statute to bar an action where it would be no bar to a bill in equity to enforce such claim.—*Smith v. Smith*, 7 Md. 55. [Cited and annotated in 30 L. R. A. (N. S.) 826, on remedies for enforcement of legacy charged upon devise.]

(k) A testator died in 1828, and devised all his lands to his three sons, "they paying what I shall hereinafter mention and bequeath." He gave to his daughter a certain sum, the interest of which was to be paid to her yearly; and if she should "live more than five years after my death, having lived the last two years preceding her death with one of my children," such child "shall be entitled to the said sum, and shall be paid by my three sons." The daughter died in 1837, having lived with one of her brothers from the death of her father. In 1850 the administrator of the said brother filed a bill against one of the other sons, claiming one-third of this legacy to be a charge on the land devised to such son, and praying for a sale thereof to pay the same. *Held*, that the statute of limitations was not a bar to this claim.—*Greenwood v. Greenwood*, 5 Md. 334.

(l) The act of limitations does not apply to the claim of an executor against his testator, as he could institute no action against himself.—*State v. Reigart*, 1 Gill 1, 39 Am. Dec. 628.

(m) Where a husband's land was sold under execution in 1789, and his widow died in 1823, without having demanded dower or commenced suit to recover her portion of rents and profits, etc., her administrator was barred by laches from recovering such rents and profits in a suit brought in 1827, where

he alleged no reason for the widow's omission to prosecute such suit in her lifetime; the purchaser and his descendants having been in possession of the land from the time of the sale.—*Steiger v. Hillen*, 5 G. & J. 121. [Cited and annotated in 21 L. R. A. 183, on right to mesne profits or damages for detention of dower.]

(n) In assumpsit against an administratrix she pleaded the act of limitations, and the plaintiff proved that immediately preceding the institution of the suit he presented his account to the defendant, who said that she did not wish to see it; that she would pay all just claims against the estate of the deceased as soon as she obtained money; that she would put the money into the hands of the Orphans' Court, to have the same adjusted; and that, if the plaintiff would pass his account with the Orphans' Court, she would pay it. *Held*, that these declarations were of themselves sufficient to prevent the operation of the statute.—*Chapman v. Dixon*, 4 H. & J. 527.

(o) Where an administrator files, as an exhibit in a suit in chancery, an account against his intestate in favor of A., it is sufficient acknowledgment of such account to prevent the operation of the act of limitations.—*Forbes v. Perrie*, 1 H. & J. 109.

### § 438. Parties.

#### Cross-References.

- Action on administration bond, see post, § 537.
- Action to determine claims to property sought to be sold by administrator, see ante, § 344.
- Action to restrain sale of property, see ante, § 357.
- Administration suits, see post, §§ 473, 474.
- Evidence, see post, § 450.
- On application for sale of real estate, see ante, § 335.
- Proceedings to compel accounting, see post, § 472.
- Action to construe will, see "Wills," § 700.
- Change from personal to representative capacity and vice versa, see "Parties," § 59.
- Defects, objections and waiver, see "Parties," §§ 76, 88, 94, 95.
- Marriage of executrix as ground for abatement, see "Abatement and Revival," § 34.
- Proceedings for determination of heirship, see "Descent and Distribution," § 71.
- Proceedings for probate or contest of wills, see "Wills," §§ 262-264.
- Substitution of administrator as plaintiff in action by legatee, see "Parties," § 59.

Substitution of executor of deceased indemnitor in action against sheriff, see "Sheriffs and Constables," § 135.  
 Substitution of heirs as plaintiffs in action by administrator, see "Parties," § 59.  
 Writ of entry by mortgagee, see "Mortgages," § 213.

(a) Where an executrix married pending the settlement of the estate, it was proper to make her husband a party to a bill filed against her under Code 1888, art. 93, § 239, authorizing suit against an executor or administrator to discover assets concealed or omitted from the inventory.—*Linthicum v. Polk*, 93 Md. 84, 48 Atl. 842. (See Code 1911, art. 93, § 244.) [Cited and annotated in 26 L. R. A. (N. S.) 416, on effect on debt of appointment of debtor as executor or administrator.]

(b) The distributees of an estate are not proper parties to a bill in equity by an administrator to compel his coadministrator to pay over money alleged to be due to the estate, and the administrator cannot maintain the suit by joining them as parties.—*Whiting v. Whiting*, 64 Md. 157, 20 Atl. 1030. [Cited and annotated in 11 L. R. A. (N. S.) 347, on coexecutor's liability for default of one permitted to manage estate.]

(c) On a bill to foreclose a mortgage of land it is not necessary to make the personal representative of the mortgagor a party to the bill.—*Worthington v. Lee*, 2 Bland 678.

(d) The heirs and personal representatives of a mortgagee are necessary parties plaintiff to a bill to foreclose, and the administrator alone cannot maintain the action.—*Worthington v. Lee*, 2 Bland 678.

(e) Since all the executors have an equal interest in their testator's estate, a decree in the Orphans' Court affecting the estate, where but one of three executors answers the petition on which the decree is based, will be reversed for want of proper parties.—*Spencer v. Ragan*, 9 Gill 480.

(f) An action may be maintained by a creditor of a testator against the executor of his executor, suggesting a devastavit by the first executor of the goods of his testator.—*Sibley v. Williams*, 3 G. & J. 52. [Cited and annotated in 22 L. R. A. 510, on adoption of common law in United States; in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(g) Upon a proceeding for the sale of land the executor or administrator of the debtor is a necessary party, where the debtor dies without leaving sufficient personalty to pay his debts.—*David v. Grahame*, 2 H. & G. 94.

(h) It is not necessary to make all the distributees parties to a bill for distribution.—*Conway v. Green*, 1 H. & J. 151.

(i) A. bequeathed a legacy to his daughter, payable out of his personal estate, or, if the personal estate should be insufficient, out of the proceeds of certain lands. The personal estate proving insufficient, an act of Assembly was passed for the sale of the testator's lands, and sundry persons, including the executors, were authorized to make such sale. Held, on bill against the executors for the legacy, that it was not necessary to make the other trustees parties.—*Scott v. Dorsey*, 1 H. & J. 227.

#### § 439. Joinder or intervention in actions by others.

##### Cross-References.

See ante, § 438.

Action for discovery of assets, see ante, § 85.

Failure to join interested executor ground for new trial at his instance, see "New Trial," § 15.

Necessary parties on appeal, see "Appeal and Error," § 327.

Necessary party to motion to quash levy of execution, see "Execution," § 144.

Revival of action by or against decedent, see "Abatement and Revival," §§ 72, 73; "Appeal and Error," § 334.

#### § 440. Removal or death pending action.

##### Cross-Reference.

Foreign administrator, see post, § 524.

(a) Where suit is brought against an executor, who dies after narr. filed, and the administrator de bonis non with will annexed is made a party, it is not necessary to file a new narr.—*Mitchell v. Williamson*, 9 Gill 71.

(b) Where an action was brought by an executor, as such, for property which had never been in his possession, and which, when recovered, with the damages awarded for its caption and detention, would be assets in his hands, upon his death, the administrator de bonis non of his testator is the proper person to make plaintiff for the further prosecution of the suit, according to the provision of the act of Assembly to pre-

vent the abatement of suits.—*Cole v. Hebb*, 7 G. & J. 20.

#### § 441. Process and appearance.

##### Cross-References.

Action on administration bond, see post, § 537.

Appearance as evidence of capacity to sue, see post, § 450.

Foreign executors, see post, § 525.

#### § 442. Pleading.

##### Cross-References.

Action on administration bond, see post, § 537.

Actions for accounting, see post, §§ 473, 474.

Presentation in lower court of grounds for review, see post, § 455.

Amendment or correction of judgment in general, see "Judgment," § 310.

Departure in replications, see "Pleading," § 180.

In actions before justices of the peace, see "Justices of the Peace," §§ 90-101.

Multifariousness of bill, see "Equity," § 150.

Possession in trespass, see "Trespass," § 40.

Right to bill of particulars, see "Pleading," § 318.

Sufficiency of complaint for money received, see "Money Received," § 17.

Surplusage in pleading, see "Pleading," § 35.

#### § 443.— In general.

(a) In a suit against an administrator on a written instrument for the payment of money, a declaration is defective which alleges that deceased did not pay the same, but does not allege that the administrator did not pay the same.—*Junkins v. Sullivan*, 110 Md. 539, 73 Atl. 264.

(b) In an action against an administrator on a nonnegotiable written instrument under seal, payment of which was to be made by the administrator after the maker's death, a plea alleging that the instrument was executed by the maker for fraudulent purposes, and the payee and administrator knew of the fraudulent intention when the writing was executed is a good plea.—*Junkins v. Sullivan*, 110 Md. 539, 73 Atl. 264.

(c) In an action against an executrix, a count in the declaration "for money found due from said deceased in his lifetime" is defective, in that it fails to state that the money was due to the plaintiff.—*Merryman v. Rider*, 34 Md. 98.

(d) A plea that the defendant's intestate was indebted to an amount greatly exceed-

ing the assets which came to the hands of the defendant, his administrator, regard being had to the debts due and still owing by the intestate, is in substance a plea of no assets, and casts the burden of proving assets on the plaintiff.—*Seighman v. Marshall*, 17 Md. 550.

(e) Where, in an action against an executrix, she answers that she has received the assets of the testator, as shown by her return to the Orphans' Court, the inventory of which she is prepared, when required, to produce, such allegation is not an admission of the sufficiency of assets for the payment of debts, so as to relieve plaintiffs from the necessity of proof of such fact.—*Dugan v. Gittings*, 3 Gill 138, 43 Am. Dec. 306.

(f) Where a testator charges both his real and personal estate with the payment of debts and legacies, and a purchaser of the real estate applies to a court of equity to have his bonds for the purchase money applied to release his purchase from the charge in the will, it should regularly appear upon the face of the pleadings that the whole of the personalty has been devoted to the payment of debts and legacies before the land can be decreed liable for that purpose. This fact ought to be expressly averred; and where it was not averred, but admitted by the defendant, and a decree was passed accordingly by the court below, it was reversed, though without prejudice, by the appellate court.—*Hoye v. Brewer*, 3 G. & J. 153.

(g) In an action against an administrator, the declaration set forth a debt due from the intestate in his lifetime and his promise to pay it, a reference of the demand by the plaintiff and defendant as administrator, an award in favor of the plaintiff, and a promise by the administrator to pay the specific sum awarded, and charged a breach in the nonpayment of such sum. *Held*, that it was sufficient, without averring sufficient assets in the hands of the administrator.—*Giles v. Perryman*, 1 H. & G. 164.

(h) A testator bequeathed certain legacies, to be satisfied from his personal estate after payment of his debts, or, if the personal estate should prove insufficient, from real estate devised to one of his executors. A bill against this devisee and the executrix of the other executor for a legacy did not charge

that the personal, but that the real and personal, estate of the testator was sufficient to pay his debts and legacies. It charged that the deceased executor possessed himself of a considerable amount of the testator's personal estate, but not that enough came to his hands to pay the debts and legacies. It did not state that he wasted or misapplied the personal assets, so as to create a liability on his executrix to the amount of such waste, and to make his own personal estate the fund from which it should be paid; and it did not state that any part of the personal estate of the testator came to the hands of the executrix. *Held*, that the facts charged in the bill were not sufficient to fix any liability for the legacy upon the executrix.—*West v. Hall*, 3 H. & J. 221.

(i) If the laws of a state give a preference to its citizens in the payment of the debts of the deceased, the executor, if sued by a foreign creditor, should plead such preference.—*De Sobry v. De Laistre*, 2 H. & J. 191, 3 Am. Dec. 535. [Cited and annotated in 25 L. R. A. 450, 451, 460, on oral proof of foreign laws.]

#### § 444.—Allegation and denial of representative capacity.

##### Cross-References.

Action by foreign representative, see post, § 524.

Allegations in actions for causing death, see "Death," §§ 50, 57.

(a) Under Code 1860, art. 75, § 22, subsec. 96, providing that causes of action may be stated against executors as if they were original parties, except that words must be used to show that the claim was against the deceased, a declaration than plaintiff sues "for money payable by the defendants' testator to the plaintiff, for goods sold by the plaintiff to the defendants' testator," is sufficient.—*Stoner v. Devilbiss*, 70 Md. 144, 16 Atl. 440. (See Code 1911, art. 75, § 24, subs. 96.)

(b) The executor of A. obtained a judgment against B., from which he appealed, and gave a bond, with C. as his surety. The judgment being affirmed, a suit was afterwards brought upon the appeal bond against B. and C. The writ in the latter case was in the detinet only, and the plaintiffs therein were styled "executors," etc. In the declaration which recited the writ, the plaintiffs,

without being named, were styled throughout "the said plaintiffs." In the replication assigning the breaches, the plaintiffs styled themselves "executors," etc. To the replication there was a rejoinder, and to that a general demurrer by the plaintiffs. *Held*, that the words, "the said plaintiffs," in the declaration, must be understood as having reference to the plaintiffs as described in the writ, and that, the contract sued on being one on which the plaintiffs could maintain an action in their representative capacity, there was no error in the pleadings.—*Sasscer v. Walker*, 5 G. & J. 102, 25 Am. Dec. 272.

(c) A declaration which avers that defendant administered on a decedent's estate sufficiently sets out that defendant is administrator, no particular form of words being required.—*Giles v. Perryman*, 1 H. & G. 164.

**§ 445.—Profert and oyer of letters.**

(a) The profert of letters of administration places them in the hands of the court of whom oyer is craved, and not of the party; and, being in possession, the court must be assured, by an inspection of the letters, of the right of the party to sue, and of the jurisdiction of the court granting them.—*Brown v. Jones*, 10 G. & J. 334.

(b) In an action by an administrator, an allegation making profert of plaintiff's letters, which does not set out by what court the letters were granted, so that the court in which the action is brought may see that they were granted by a court of competent jurisdiction, is insufficient.—*Brown v. Jones*, 10 G. & J. 334.

**§ 446.—Plea of plene administravit.**

*Cross-References.*

See post, § 454.

By executor de son tort, see post, § 543.

(a) Under act 1886, c. 184, § 170 (Practice Act applicable to Baltimore City), requiring a defendant to make an affidavit that his pleas are true, and to state the amount of plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed, in an action against executors on a note of their decedent, the pleas of plene administravit, and that the claim has been paid, supported by affidavit, are sufficient; the statement in regard to the amount admitted and

disputed being unnecessary.—*May v. Wolvington*, 69 Md. 117, 14 Atl. 706. (See Balto. City Rev. Charter, § 312; Code [vol. 3], art. 75, § 84, subs. 107.)

**§ 447.—Demurrer.**

*Cross-Reference.*

Demurrer raising defense of bar by limitations, see "Limitation of Actions," § 180.

**§ 448.—Amendment.**

**§ 449.—Issues, proof, and variance.**

(a) Where, in an action against an estate for services rendered, plaintiff's bill of particulars did not define just what the services were, or the time during which they were performed, but the proof showed a verbal contract, and that it had been executed, except as to the payment of the compensation due, evidence in regard to the value of the services was admissible.—*Gill v. Donovan*, 96 Md. 518, 54 Atl. 117. [Cited and annotated in 11 L. R. A. (N. S.) 878, 884, on implied agreement to pay for services of relative or member of household.]

(b) Previous to act 1856, c. 112, an administrator or executor, relying upon a new promise to avoid limitations, must have inserted a special count on the promise to himself, but this act renders sufficient the statement of a substantial cause of action, without regard to form; and a declaration for money payable to the administrator, for money loaned, or due on account stated, substantially alleges an assumpsit to the administrator in consideration of the antecedent debt to the intestate, and evidence of a new promise to the administrator is admissible thereunder.—*Felty v. Young*, 18 Md. 163. (See Code, art. 75, § 3.) [Cited and annotated in 25 L. R. A. (N. S.) 809, on person to whom acknowledgment or new promise must be made to toll statute or remove bar of limitations.]

(c) The record of the debts allowed, required to be kept by act 1854, c. 86, is competent to support a plea of no assets by the administrator.—*Seighman v. Marshall*, 17 Md. 550. (See Code, art. 93, § 113.)

(d) Upon a plea of no assets, the plaintiff, a creditor, may plead and show waste by the administrator.—*Seighman v. Marshall*, 17 Md. 550.

(e) To a plea of no assets, a replication that assets have, and ought to have, come to the administrator's hands, enables the plaintiff to prove a devastavit.—*Seighman v. Marshall*, 17 Md. 550.

(f) Where an executor or administrator is sued at law in his representative character, assets are presumed unless one question,—whether they are in his hands or not,—is put in issue by the pleadings; but, in equity, assets in his hands must be alleged, and, if denied or not admitted, be proved.—*Contee v. Dawson*, 2 Bland 264. [Cited and annotated in 44 L. R. A. (N. S.) 886, 919, 937, 981, on personal liability of trustee for losses; in 45 L. R. A. (N. S.) 419, on investments by trustees in foreign jurisdictions.] *Evans v. Iglehart*, 6 G. & J. 171.

(g) On a bill for the payment of a legacy, it must appear, either by proof or the admissions of the executors, that there are sufficient assets to pay the legacy after payment of debts, funeral charges, etc. In chancery, it is not necessary for executors to deny such an allegation.—*Stevens v. Gordy*, 9 Gill 405.

(h) A plaintiff who declares as executrix in assumpsit may, under a plea of the general issue, offer in evidence her letters testamentary.—*Chapman v. Davis*, 4 Gill 166.

(i) In an action by an executor to recover money alleged in his declaration to have been paid by his testatrix in her lifetime, he cannot give evidence of a payment made by himself after her death.—*Turner v. Maddox*, 3 Gill 190.

(j) In an action against the executor of one of several makers of a promissory note, the defendant may give in evidence the survivorship of the other makers, without pleading it.—*Osgood v. Spencer*, 2 H. & G. 133.

(k) Where a declaration in assumpsit against an administratrix alleged promises made by the intestate, and stated that the administratrix, after the death of the intestate, accounted with the plaintiff, on which accounting the intestate was found indebted to the plaintiff, and that defendant, in consideration thereof, promised to pay plaintiff, but did not state that the defendant promised "as administratrix," her declaration to pay the claim could not disprove the plea of

limitations.—*Chapman v. Dixon*, 4 H. & J. 527.

(l) In action by a legatee against an executor, the executor cannot give in evidence proof that he had equally or proportionately distributed the residue of the personal estate after payment of debts, etc., among his several legatees, under a plea of plene administravit and no assets.—*Morgan v. Slade*, 2 H. & J. 38.

(m) In assumpsit by one executor against another on a promise to plaintiff's testator, evidence of a promise by defendant to plaintiff will not support the action, where plaintiff had not declared on a promise made by defendant to himself as executor.—*Beard v. Cowman*, 3 H. & McH. 152.

## § 450. Evidence.

### Cross-References.

Action on administration bond, see post, § 537.

Actions for accounting, see post, §§ 473, 474.

Appointment of administrator, see ante, § 28.

Existence and validity of claims against estate, see ante, § 221.

Indebtedness to decedent's estate, see ante, § 52.

On accounting, see post, § 506.

On trial of disputed claim against estate, see ante, § 252.

Ownership of property claimed as assets of estate, see ante, § 59.

Presentation of claims, see ante, § 228.

Proceedings to open or vacate accounting, see post, § 509.

Review of rulings, see post, § 455.

Admissibility of checks as evidence of payment of debt to decedent, see "Payment," § 70.

Admissions by coadministrator, see "Evidence," § 226.

Competency of executor or administrator as witness in behalf of estate or in his own interest, see "Witnesses," § 145.

Competency of parties or persons interested to testify against executor or administrator as to transactions with decedent, see "Witnesses," § 149.

Evidence of compromise of claim by intestate, see "Compromise and Settlement," § 23.

Evidence of decedent's reputation in suit to foreclose mortgage, see "Evidence," § 106.

(a) Where, in an action to establish a claim against a decedent's estate for services rendered, the evidence showed that in proceedings for the removal of claimant as executor of decedent, his mother, he testified that he had no claim against his mother's estate,

evidence that he had presented to decedent's mother a paper constituting a claim against decedent's estate, and that in a conversation with the register of wills he had been told that it was the custom of the Orphans' Court, where an executor presented a bill, to ask him to get the indorsement of the heirs, was admissible as bearing on the good faith of the claim as against the objection that the evidence showed a compromise.—*Huff v. Simmers*, 114 Md. 548, 79 Atl. 1003.

(b) Where, in an action to establish a claim against a decedent's estate, the declaration alleged a contract of employment to manage a bakery of decedent, and there was evidence of an express promise by decedent to pay for such services, a charge that there was no legally sufficient evidence to authorize claimant to recover was properly refused.—*Huff v. Simmers*, 114 Md. 548, 79 Atl. 1003.

(c) Letters of administrator cannot be presumed where there is not pretense that the proper record has been lost or mutilated.—*Smith v. Wilson*, 17 Md. 460, 79 Am. Dec. 665. [Cited and annotated in 15 L. R. A. 496, on necessity of administration in devolution of decedent's personalty.]

(d) The inventory of testator's estate, and the accounts thereof, as filed in court by his executor, are admissible in assumpsit by a child of the deceased against the executrix of such executor; the latter having been guardian of the child, and the object of the suit being to recover property of the ward which he, as guardian, was charged with having converted to his own use, and assumed to pay, upon the liability resulting from such conversion.—*Green v. Johnson*, 3 G. & J. 389. [Cited and annotated in 47 L. R. A. (N. S.) 451, on limitation of suits to compel accounting by, or to recover on bond of guardian; in 28 L. R. A. 838, 842, 851, on accounting by co-tenants for use and occupation and rents and profits; in 26 L. R. A. (N. S.) 789, on right to maintain action at law against guardian for guardianship funds before settlement of account.]

(e) An inventory made and returned by an administrator to the Orphans' Court, after he has commenced an action for the recovery of the property included therein, is not competent evidence for him at the trial of the

cause, since he might become personally liable for the costs of suit.—*Allender v. Ris-ton*, 2 G. & J. 86. [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non.]

### § 451. Trial.

#### Cross-References.

Construction of findings in general, see "Trial," § 404.

Failure of court to find on particular questions, see "Trial," § 397.

Right to jury trial, see "Jury," §§ 13, 14. Specification in verdict of amount of recovery, see "Trial," §§ 333, 334.

(a) An instruction, in an action against an executor for services rendered to decedent, to find for plaintiff for what the services were reasonably worth, upon finding certain facts without requiring a finding upon the alleged agreement to pay a stipulated sum therefor, was erroneous.—*Giering v. Sauer*, 120 Md. 295, 87 Atl. 774.

(b) In an action against an estate, evidence held proper to go to the jury that the contract was made with the claimant.—*Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161.

(c) In an action against an estate, a prayer held properly refused for lack of supporting evidence.—*Herman v. Oehrl*, 116 Md. 512, 82 Atl. 161.

(d) Where, in proceedings to establish a claim against a decedent's estate for services rendered in managing a bakery of decedent, the evidence showed that claimant, a son of decedent, had been appointed executor, and had not included in the inventory the chattels in the bakery at the time of decedent's death, and there was evidence that the chattels did not belong to decedent, but to a third person, a charge that claimant was estopped from claiming that decedent was the owner of the business if the jury found that he did not include in the inventory the chattels in the bakery was properly refused.—*Huff v. Simmers*, 114 Md. 548, 79 Atl. 1003.

(e) Where, in an action against decedent's estate, there was evidence of an express promise by decedent to pay claimant for services rendered, a charge that there was no sufficient evidence to prove a design on the part of the claimant at the time of the rendition of the services to charge therefor and

an expectation on the part of decedent to pay was properly refused.—*Huff v. Simmons*, 114 Md. 548, 79 Atl. 1003.

(f) When an administrator pleads insufficiency of assets as a partial defense to an action against the estate, and the assets are shown to be insufficient, but the record shows that the parties agreed that the judgment was only to bind the assets, the failure to submit the issue as to the effect of insufficiency of assets, as required by Code 1888, art. 26, § 26, is not erroneous.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650. (See Code 1911, art. 26, § 27.) [Cited and annotated in 2 L. R. A. (N. S.) 403, on account books as evidence in case of loans or payments by owner; in 11 L. R. A. (N. S.) 882, 884, on implied agreement to pay for services of relative or member of household.]

(g) An instruction in an action by a nephew of the husband of defendant's intestate, for wages, that such relationship did not make plaintiff a member of intestate's family, and that the acceptance of the services raised an obligation to pay therefor, is not inconsistent with an instruction requiring the jury to find a design on the part of plaintiff to charge therefor, and an expectation of pay.—*Gill v. Staylor*, 93 Md. 453, 49 Atl. 650. [Cited and annotated, see supra.]

(h) A creditors' bill was filed against the administrators and heirs of an estate to charge the estate for debts claimed to be due the complainant. After answer denying the indebtedness, and replication, the complainant petitioned, under Code 1860, art. 16, §§ 20, 21, alleging that the deceased had been his agent, and as such had kept books containing accounts of moneys received as such agent; that these books were in the possession of the defendants,—and praying a discovery and production of the books. Held, that the averment in the petition, if true, of the existence of the relation of principal and agent between the deceased and the complainant, showed such an interest in the accounts kept by the former as such agent as to entitle the latter to the books, or certified copies from them, of the agency affairs in dispute.—*Eschbach v. Lightner*, 31 Md. 528. (See Code 1911, art. 16, §§ 25, 26.)

(i) An instruction to a jury is erroneous when it leaves them to determine the character of letters of administration, this being a question of law for the court.—*Fells Point Sav. Inst. v. Weedon*, 18 Md. 320.

(j) The sufficiency of evidence of the notice required by act 1798, c. 101, subc. 8, § 13, to be given by an administrator to creditors of the estate, is, in the first instance, for the court.—*Rawlings v. Adams*, 7 Md. 26. (See Code, art. 93, § 109; Id. [vol. 3], art. 93, § 109.)

(k) In a suit by a creditor of an estate, where the administrator pleads that he has fully administered the estate, and that he has paid over the assets to the legatees, and the court is in doubt as to the sufficiency of the six-months' notice required by act 1798, c. 101, subc. 8, § 13, to be given to the creditors, it may submit the matter to the jury.—*Rawlings v. Adams*, 7 Md. 26. (See Code, art. 93, § 109; Id. [vol. 3], art. 93, § 109.)

(l) In an action by an agent who had collected a claim for an estate, evidence examined, and held, that the question whether the administrator had made a new contract with the agent which would render the administrator liable in his individual capacity was for the jury.—*Stiles v. Causten*, 2 G. & J. 49.

## § 452. New trial

## § 453. Judgment.

### Cross-References.

Action on administration bond, see post, § 537.

Actions for accounting, see post, §§ 473, 474.

Administration suits, see post, §§ 473, 474. Effect of death or removal pending action, see ante, § 440.

Sale by executor as divesting lien, see ante, § 138.

Collusion as ground for equitable relief, see "Judgment," § 442.

Conclusiveness, as against executor's or administrator's successor, devisees, legatees, heirs or distributees, of judgment against executor or administrator, see "Judgment," § 688.

Discretion of court as to setting aside default judgment, see "Judgment," § 139.

Excuses for default, see "Judgment," § 143.

In suit to enforce payment of municipal taxes, see "Municipal Corporations," § 978.

Interest on judgment, see "Interest," § 22. Judgment as evidence of debt, see "Judgment," § 711.



Persons concluded by judgment, see "Judgment," § 707.

Right to equitable relief against, see "Judgment," §§ 405, 452.

(a) Under Code 1860, art. 29, § 21, directing the court, in suits against administrators, "to enter up judgment against the defendant for the penalty of the bond or damages laid in the declaration, \* \* \* to be released upon payment of the sum ascertained to be paid by the verdict," the court should not enter the judgment for the penalty of the bond, when the bond is not in suit.—*Neale v. Hermanns*, 65 Md. 474, 5 Atl. 424. (See Code 1911, art. 26, § 27.)

(b) Where executors sued are not liable as such, but are liable in their individual capacities, for the wrong complained of, judgment may be rendered against them as individuals, although the declaration be against them as executors.—*Baughner v. Wilkins*, 16 Md. 35, 77 Am. Dec. 279. [Cited and annotated in 42 L. R. A. (N. S.) 775, on liability of landlord for damages to tenant in consequence of acts of third persons.]

(c) A judgment against an executor in an action on a demand against his testator is conclusive that there are assets of the estate in the hands of the executor, and he cannot plead a want of such assets in a subsequent action on the judgment.—*Dorsey v. Hammond*, 1 Bland 463; *Ellicott v. Welch*, 2 Bland 242; *Post v. Mackall*, 3 Bland 486.

(d) Upon a bill by a distributee against the administrator for her distributive share of an estate, a decree directing the share of the complainant to be paid to her, and taking no notice of the shares of other distributees, is erroneous.—*Buckley v. Buckley*, 9 Gill 497.

(e) Absolute judgments at law obtained by a creditor of a deceased debtor against his executor or administrator amount to an admission of a sufficiency of personal assets in the hands of the latter, and he cannot resist them on the ground of a deficiency.—*Gaither v. Welch*, 3 G. & J. 259.

(f) Where a promissory note was drawn by A. in favor of B., and indorsed by B. to C. and D., executors of T., and by C. (one of the executors) indorsed to the plaintiff, and C. died, in assumpsit against D., styled

"executor" in the writ and declaration, and D. confesses judgment as executor, it was held that the judgment was, notwithstanding, de bonis propriis of D.—*Curtis v. Bank of Somerset*, 7 H. & J. 25.

(g) Where an administrator gives judgment by confession, which judgment is afterwards reversed, he is not precluded from showing afterwards a want of assets at that time.—*Green v. Stone*, 1 H. & J. 405.

(h) A. bequeathed a legacy to his daughter, payable out of his personal estate, or, if the personal estate should be insufficient, out of the proceeds of certain lands. The personal estate proving insufficient, an act of Assembly was passed for the sale of the testator's lands, and sundry persons, including the executors, were authorized to make such sale. Held, on bill against the executors for the legacy, they being chargeable therewith, and with interest from the time it was payable, as well as with the amount of the sale of the lands by them made, with interest thereon, that, if the assets in hand were insufficient to satisfy the decree, it was to bind future assets.—*Scott v. Dorsey*, 1 H. & J. 227.

(i) Plene administravit is a good plea to a scire facias upon a judgment against an intestate.—*Tanner v. Freeland*, 1 H. & McH. 34.

#### § 454. Execution and enforcement of judgment.

##### Cross-References.

Action for accounting, see post, §§ 473, 474.

Effect of insolvency, see ante, § 417.

Judgment for costs, see post, § 456.

Set-off of judgment against decedent against judgment for administrator, see "Judgment," § 883.

(a) An administrator de bonis non made no defense to a writ of scire facias issued against him for the purpose of reviving a judgment against a former administrator, but voluntarily confessed an absolute judgment, and four years afterwards, upon execution being issued, applied to a court of equity for relief by injunction on the ground that he was mistaken as to the amount of assets in his hands. Held, that, such mistake being attributable to his own negligence, he was not entitled to relief.—*Kear-*

*ney v. Sascor*, 37 Md. 264. [Cited and annotated in 30 L. R. A. 241, on injunction against judgments by confession; in 30 L. R. A. 797, on injunction against judgments obtained by fraud, accident, mistake, surprise and duress; in 40 L. R. A. 44, on assets passing to administrator de bonis non; in 40 L. R. A. (N. S.) 726, 748, on effect upon surety of judgment against principal.]

(b) Where judgment has been recovered by a creditor against the executor of the debtor's surety, the creditor may enforce his claim by execution against the property of the executor, although an injunction be pending restraining the creditors generally of the principal debtor from proceeding against him at law.—*Beall v. Osbourn*, 30 Md. 8.

(c) An execution on a judgment against an administrator or executor can be issued and levied upon his lands, as well as upon his goods and chattels.—*Beall v. Osbourn*, 30 Md. 8.

(d) Judgments obtained against an executor or an administrator by a creditor of the decedent are not alone such evidence of debt against the heir at law as to entitle the creditor to payment from the proceeds of the real estate; but when such proceeds are in the court, and a creditor wishes to subject them to his claim on the ground of a deficiency of personal assets, he need not exhibit full proof of his claim in the first instance. That may be done under an order nisi upon the heirs at law.—*Gaither v. Welch*, 3 G. & J. 259.

(e) A judgment against an executor, etc., "to bind assets which are or have been in hand," etc., is a judgment of assets in futuro, and a fieri facias cannot issue until after a scire facias suggesting assets.—*State v. Goldsmith*, 1 H. & J. 101.

### § 455. Appeal and error.

#### Cross-References.

See "Wills," § 368.

Actions for accounting, see post, §§ 473, 474.

Effect of revocation of letters pending suit, see ante, § 440.

Proceedings to compel accounting, see post, § 472.

Appeal to jury in justice's court, see "Justices of the Peace," § 117.

Executor and administrator as party aggrieved giving right of review, see "Appeal and Error," § 151.

Necessary parties on appeal, see "Appeal and Error," § 327.

Personal representatives as parties required to give bond on appeal from justice's court, see "Justices of the Peace," § 159.

Right of executor to appeal from decision of intermediate court, see "Appeal and Error," § 152.

#### Annotation.

Right to accept favorable part of decree of distribution and appeal from the rest.—29 L. R. A. (N. S.) 13, note.

Right of executor or administrator to appeal as party aggrieved.—13 L. R. A. 745, note.

(a) Where a judgment was entered up against an administrator de bonis propriis, which should have been de bonis testatoris si non, etc., the Court of Appeals allowed an amendment of the judgment, and permitted it to stand thus amended.—*Kent v. Lyles*, 7 G. & J. 73.

(b) A suit was brought by executors, who recovered judgment, and then revived the judgment by sci. fa. as executors. An appeal was prayed from the last judgment, and a bond executed to them as executors, upon which judgment was obtained by one of them as surviving executor. Held, that it was too late for the surety on the bond, 16 years after the first judgment, and 6 years after the appeal, to ask for relief in equity, on the ground that the plaintiffs were never executors, or sued upon letters granted by a foreign jurisdiction.—*Sascor v. Young*, 6 G. & J. 243.

(c) Although proceedings in chancery are informal and irregular as to the admission of parties, yet, where the decree of the court below would be final and conclusive on representatives of a lunatic who have become parties, an appeal by those representatives will be sustained.—*Moore v. White*, 4 H. & J. 548.

### § 456. Costs.

#### Cross-References.

Actions for accounting, see post, §§ 473, 474.

Allowance of expenditures, see ante, § 111. Conclusiveness as against sureties on administration bond, see post, § 535.

Insolvent estate, see ante, § 417.

Of accounting, see post, § 511.

Order of payment, see ante, § 260.

Proceedings in probate court for allowance of claim, see ante, §§ 240, 257.

Action to construe will, see "Wills," § 707.

Action to set aside election under will, see

"Wills," § 797.

Allowance in proceedings and actions relating to probate or contest of wills, see "Wills," §§ 402-416.

Exemption from requirement of security on appeal, see "Appeal and Error," § 374; "Arbitration and Award," § 73.

In action to recover insurance, see "Insurance," § 675.

Recovery of costs of prior proceeding as damages, see "Damages," § 72.

Security, see "Costs," §§ 105-145.

(a) Where a bill is filed, by the maker of a note belonging to the estate of the testator, for cancellation of the note, on the ground that testator did not intend to exact payment, but intended it as a gift, and a decree is rendered against the executor, such decree, being against the executor, who is acting simply in the proper discharge of his office, will be without costs.—*Linthicum v. Linthicum*, 2 Md. Ch. 21.

(b) Where an executor interposes no improper obstacles to the determination of the right to property found in possession of his testator, the costs will be chargeable on the fund; but, where he offers vexatious grounds of defense, equity may award costs against him personally.—*Lee v. Pindle*, 12 G. & J. 288.

#### § 457. Liabilities for conduct of action or defense.

##### Cross-Reference.

Liability for costs, see ante, § 456.

(a) An administrator recovered a judgment, and, after appeal was barred, waived his advantage, and allowed the same to be taken. The appellate court reversed the judgment, and refused a new trial, on the ground that the proof showed no cause of action. *Held*, that he was not obliged to insist on the technicality, and was not personally liable to the estate for the amount of the judgment.—*McGuire v. Rogers*, 74 Md. 192, 21 Atl. 723.

(b) Where a recovery is had against an administrator in a court of competent jurisdiction, and he has acted bona fide in resisting the claim against him, he is not answerable over to another, though not a party to a suit for the same sum.—*State v. Greenwell*, 4 G. & J. 407. [Cited and annotated in

62 L. R. A. 622, on liability where litigation is controlled or carried on in name of another.]

## XI. ACCOUNTING AND SETTLEMENT.

### Cross-References.

Accounting and default necessary to liability of sureties on bond, see post, § 533.

Account of administration in proceedings to sell property, see ante, § 342.

As condition precedent to distribution, see ante, § 314.

By foreign or ancillary executor or administrator, see post, § 526.

Delay in accounting as ground for charging personal representative with interest, see ante, § 104.

Settlement of insolvent estates, see ante, § 418.

What law governs, see ante, § 2.

Effect of stipulation, see "Stipulations," § 14.

Proceedings for discharge of defaulter from imprisonment under insolvent laws, see "Insolvency," § 151.

Process, exemption of executor from service while attending court in proceedings for settlement of accounts, see "Process," § 118.

Restraining accounting, see "Injunction," § 28.

Stay of proceedings, see "Action," § 69.

### (A) DUTY TO ACCOUNT.

#### § 458. Nature and grounds.

#### § 459. Time for accounting.

##### Cross-Reference.

Administration suit, see post, §§ 473, 474.

(a) Where a testator bequeathed to his wife an annuity during his life, "to be paid out of my estate in equal monthly payments," it was *held* that the executor was not bound to render a final account until after her death.—*Rieman v. Peters*, 2 Md. 104.

#### § 460. Who entitled to require accounting.

#### § 461. Who liable in general.

#### § 462. Acting in different capacities.

(a) Where executors hold the twofold relation of executors and trustees, they, by operation of law, hold the property in the latter capacity after their executorship ceases, and are liable to account for it.—*Sparks v. Weedon*, 21 Md. 156.

#### § 463. Coexecutors or coadministrators.

(a) Where an executor rests inactive for

15 years and until his coexecutor had died, before making any move to expedite the administration of the estate, he is not in a position to commend himself to a court as an injured party.—*Crothers v. Crothers*, 121 Md. 114, 88 Atl. 114. (For second appeal see *Same v. Same*, 123 Md. 603, 91 Atl. 691.)

(b) On a petition by an executor to compel his coexecutor to join in stating an account, where it appears that defendant has repeatedly declared his willingness to unite in an account disposing of the assets in accordance with the proper practice, and in such manner as to allow petitioner full opportunity to establish certain disputed claims held by him against the estate in the proper court, but that petitioner has persistently refused to do so, the petition should be dismissed.—*Strasbaugh v. Dallam*, 93 Md. 712, 50 Atl. 417.

#### § 464. Successors and representatives.

##### Cross-References.

Conclusiveness of settlement, see post, § 513.

Jurisdiction, see post, § 469.

##### Annotation.

Right of administrator de bonis non to require predecessor to account.—40 L. R. A. 73, note.

(a) Under Code, art. 93, §§ 70, 72, a sole surviving legatee held not entitled to sue an executor of a deceased executor who had failed to fully account for property in his hands.—*Lawson v. Burgee*, 121 Md. 203, 88 Atl. 121.

(b) Where an executor dies without making a full distribution and delivery of the assets of the estate, his executor is not competent to render an account for him.—*Lawson v. Burgee*, 121 Md. 203, 88 Atl. 121.

(c) An administrator de bonis non is responsible only for such unadministered assets as he has received. He can in no way be called on to account for the maladministration of his predecessor.—*Smithers v. Hooper*, 23 Md. 273. [Cited and annotated in 40 L. R. A. 46, on assets passing to administrator de bonis non; in 31 L. R. A. (N. S.) 352, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(d) Under Code 1860, art. 93, § 11, providing that the administrator of a deceased ad-

ministrator, who shall die before an account of his administrator has been rendered, shall render an account showing the amount of assets received and the payments made by his decedent, the court may compel such administrator to pass the account required.—*Muncaster v. Muncaster*, 23 Md. 286. (See Code 1911, art. 93, § 11.)

#### § 465. Property to be included.

##### Annotation.

Duty to account for gold or silver.—29 L. R. A. 523, note.

(a) A bill sought to set aside a deed of trust of certain securities given by an executrix and life tenant on the ground that she had no such authority over the securities under the will; to compel her to conduct the administration of the personal estate under the supervision of the Circuit Court, and that she be required to charge herself with all personal property of the testator; and the decree rendered required her to account, which was also required by a subsequent decree after an appeal. Held, that the auditor had authority to include in the account any personal property shown to have belonged to testator at his death, and to have come into possession of the executrix, notwithstanding the property had not been specifically mentioned in the first decree of the trial court, or dealt with on appeal.—*Bauernschmidt v. Bauernschmidt*, 101 Md. 148, 60 Atl. 437.

(b) An executor pro forma is accountable only for the surplus remaining after payment of debts.—*De Sobry v. De Laistre*, 2 H. & J. 191, 3 Am. Dec. 535.

#### § 466. Release from liability.

##### Cross-References.

Affecting right of person executing release to require accounting, see ante, § 460.

Private settlements, see post, § 515.

(a) Where, on payment to them of their respective shares, distributees executed and acknowledged releases, attested and under seal, discharging the executor from all claim on account of the settlement of his account, such releases operated as estoppels in pais.—*Shafer v. Shafer*, 85 Md. 554, 37 Atl. 167.

(b) A release of an executor from liability for money due the parties executing the release as residuary legatees will not discharge

the executor from liability as trustee for a specific legacy bequeathed to him in trust for such parties.—*Hanson v. Worthington*, 12 Md. 418. [Cited and annotated in 21 L. R. A. 153, on validity of acts under letters probate afterwards revoked or held invalid.]

#### § 467. Failure to account.

##### Cross-References.

- Deprivation of compensation, see post, § 500.
- Ground for charging interest, see ante, § 104.
- Ground for removal, see ante, § 35.
- Withdrawal of estate from administration in general, see ante, § 7.

(a) The pending of an appeal taken by an administratrix from an order of the Orphans' Court as to the distribution of her intestate's estate, and the fact that proceedings had been instituted by her in a court of equity for the purpose of having the estate distributed under the sanction and indemnity of a decree of that court, furnish no excuse, in the absence of an order of the court to restrain her in the administration, for her neglect to render accounts of her administration as required by law, or to deposit the funds of the estate in bank as directed by an order of the Orphans' Court.—*Jones v. Jones*, 41 Md. 354.

(b) It seems that an answer setting forth a pending suit in chancery, in which the respondent is cited for a settlement of his account, is good in bar of a suit for a final accounting as administrator in the Orphans' Court.—*Barroll v. Peters*, 20 Md. 172.

#### (B) PROCEEDINGS FOR ACCOUNTING.

##### Cross-References.

- On application for leave to issue execution, see ante, § 454.
- Proceedings for distribution, see ante, §§ 314, 315.
- Abatement on death of administrator, see "Abatement and Revival," § 65.
- Computation of time of notice, see "Time," § 9.
- Right to jury trial in contest, see "Jury," § 19.
- Submission of special issues to jury, see "Trial," § 370.
- Time for reference in action by residuary legatees and devisees for final settlement, see "Reference," § 18.

#### § 468. Nature and form of remedy.

#### § 469. Jurisdiction of courts.

##### Cross-References.

- Allowance of compensation, see post, § 493.
- Effect of final settlement, see post, § 513.
- Foreign and ancillary administration, see post, § 526.
- On accounting, see post, § 507.
- On administration bond, see post, § 537.
- Vacation of accounting, see post, § 509.
- As dependent on domicile or residence of parties, see "Courts," § 12.
- Concurrent and conflicting jurisdiction, see "Courts," §§ 472, 475, 489, 506.
- Conferring jurisdiction by consent, see "Courts," § 25.
- Jurisdiction of other courts to enjoin proceedings in probate court, see "Courts," § 480.

(a) When a coexecutor filed in the Orphans' Court a petition to compel the representatives of his deceased coexecutor to file an inventory and render an accounting, and to pay over to petitioner any sum remaining in the hands of the deceased coexecutor, any question of jurisdiction was waived by act of the representatives of the deceased executor in filing the inventory, and it was too late to make the question after petitioner had excepted to the inventory as filed.—*Crothers v. Crothers*, 121 Md. 114, 88 Atl. 114. (For second appeal see *Same v. Same*, 123 Md. 603, 91 Atl. 691.)

(b) Under Code, art. 93, § 235, the Orphans' Court has jurisdiction to entertain a petition by a surviving executor against the executors of his deceased coexecutor to compel the filing of an inventory and the rendition of an account.—*Crothers v. Crothers*, 121 Md. 114, 88 Atl. 114. (For second appeal see *Same v. Same*, 123 Md. 603, 91 Atl. 691.)

(c) Where an executrix and sole legatee for life under a will died in another state, the administrator d. b. n. c. t. a. of the testator's estate could not be compelled to account, unless there were assets unadministered within the state to which he was entitled.—*Sydnor v. Graves*, 119 Md. 321, 86 Atl. 341.

(d) Infant legatees entitled to enjoyment of a vested legacy on reaching their majority filed a bill against the executors praying that the legacies might be treated as trust funds in the hands of the executors, and that the court would assume jurisdiction of the

trust and supervise the administration for complainants' support and education. The executors, by answer, expressed their willingness to become trustees, and a decree was entered describing them as such, and directing them to pay a certain sum to the infants' guardian monthly until further order of the court; and thereafter the legatees filed a petition asking for an accounting under the court's direction. *Held*, that the court was not without jurisdiction to entertain the petition on the ground that the matters had been adjudicated between the parties, and that no estate was being administered in the court.—*Webb v. Webb*, 92 Md. 101, 48 Atl. 95, 84 Am. St. Rep. 499.

(e) Insolvent courts are courts of limited jurisdiction, and cannot proceed against the executors or administrators of the trustees of insolvents for the purpose of compelling them to account in those courts for the trust estate.—*Purviance v. Glenn*, 8 Md. 202.

#### § 470. Limitations and laches.

##### Cross-References.

Opening or vacating account, see post, § 509.

Time during which accounting cannot be required, see ante, § 459.

Accrual of right of action as affecting limitations, see "Limitation of Actions," §§ 57, 60, 61, 95.

Application of general statute of limitations, see "Limitation of Actions," §§ 34, 39.

Disability affecting limitations, see "Limitation of Actions," § 72.

Existence of trust affecting limitations, see "Limitation of Actions," §§ 102, 103.

Payment affecting limitations, see "Limitation of Actions," § 155.

Pleading defense of limitations, see "Limitation of Actions," § 182.

Who may rely on limitations, see "Limitation of Actions," § 12.

(a) The statute of limitations will not begin to run on a claim against a surviving partner, who is also for a time administrator of the estate of the deceased partner, for an accounting, until after the termination of his administration.—*Whiting v. Leakin*, 66 Md. 255, 7 Atl. 688. [Cited and annotated in 18 L. R. A. (N. S.) 990, 1026, 1032, 1037, 1087, on effect of agreement to share profits to create partnership; in 26 L. R. A. (N. S.) 414, on effect on debt of appointment of debtor as executor or administrator.]

(b) Where a petitioner to have the accounts of a surviving executor inquired into was a married woman when the accounts were passed and distribution made, laches will not be imputed to her for delaying to file her petition for 15 months after becoming a widow.—*Wilson v. McCarty*, 55 Md. 277. [Cited and annotated in 37 L. R. A. (N. S.) 369, on notice of distribution in probate proceedings as jurisdictional.]

#### § 471. Proceedings by executor or administrator.

#### § 472. Special proceedings to compel accounting.

##### Cross-Reference.

Evidence of appearance by administrator, see post, § 537.

(a) On petition to the Orphans' Court for an order to compel the personal representatives of an administrator to pay over a balance due to the estate administered by him, the order was granted, and the petitioner then sought to compel the representatives to render an account under Code 1860, art. 93, § 11. *Held*, that the representatives were not precluded by the former order from showing that the balance found to be due had been paid by their testator in the course of administration to the persons entitled thereto.—*Donaldson v. Raborg*, 28 Md. 34. (See Code 1911, art. 93, § 11.)

#### §§ 473, 474. Actions for accounting and administration suits.

##### Cross-References.

Limitations, see ante, § 470.

Amendment of pleading setting up new or different cause of action, see "Pleading," § 248.

Enforcement of municipal assessment, see "Municipal Corporations," § 587.

Joinder of causes of action, see "Action," § 50.

Lien as against heirs pending suit, see "Descent and Distribution," § 130.

Pleading limitations, see "Limitation of Actions," §§ 182, 183.

Premature commencement of action, see "Action," § 62.

Rulings on weight and sufficiency of evidence on trial by court, see "Trial," § 384.

(a) In a suit to compel a life tenant and executrix to charge herself with all personal property of testator, evidence considered, and *held* sufficient to warrant a finding by the auditor that certain gold coin

buried by the testator had come into the possession of the executrix.—*Bauernschmidt v. Bauernschmidt*, 101 Md. 148, 60 Atl. 437.

(b) Under Code 1860, art. 93, § 239, providing for an examination under oath on allegations that "the administrator has concealed, or has in his hands, and has omitted to return in the inventory, \* \* \* any part of his decedent's assets," a petition alleging that the administrator in his inventory has failed to charge himself with \$2,000, of which deceased died possessed, and which is retained or concealed by the widow, is bad, as not showing any collusion on the part of the administrator.—*Hignutt v. Cranor*, 62 Md. 216. (See Code 1911, art. 93, § 244.)

(c) Where a husband and wife by a deed conveyed in trust for their infant daughter certain leasehold property, the trustee, not being charged with any active duty relative to the trust, was not a necessary party to a suit for accounting brought by the daughter at her majority against the executors of the grantors.—*Owens v. Crow*, 62 Md. 491.

(d) Legatees and next of kin should not be joined as parties in a bill against an executor for an account of the personal estate, no matter what the extent of their interest.—*Gordon v. Small*, 53 Md. 550.

(e) Where a petition was filed in the Orphans' Court requiring the administrator de bonis non to appear and answer, and he appeared and answered, it is within the class of cases described as plenary proceedings in the testamentary law, and, the Orphans' Court having ordered a replication, it was improper for the court to give judgment or decree on the bill, answer, and exhibits, no depositions having been filed or finding of a jury taken, and the parties not having consented to a submission to the court in that form.—*Barroll v. Peters*, 20 Md. 172.

(f) Where an administrator is called on to account in a court of equity, he may exhibit with his answer, and explain, not only the accounts passed on in the Orphans' Court, but the vouchers for the credits therein allowed him; but he cannot be compelled to do so.—*Mitchell v. Mitchell*, 3 Md. Ch. 71. [Cited and annotated in 30 L. R. A. (N. S.)

815, 826, on remedies for enforcement of legacy charged upon devise.]

(g) Where a bill against an administrator alleges that he has failed to charge himself with the hire of certain negroes, and with the rents and profits of certain leasehold estates, and calls on him, to discover the full value and true amounts which he has or ought to have received on account thereof, and calls for the number and value of the slaves, and the answer omits to give the information, an exception to it for that reason will be sustained. His accounts, passed on in the Orphans' Court, together with his vouchers, when produced, will not be sufficient to give the information called for.—*Mitchell v. Mitchell*, 3 Md. Ch. 71. [Cited and annotated, see supra.]

(h) A decree for an account in a suit by one or more creditors against the executor, either for themselves or on behalf of themselves and all other creditors, is for the benefit of all, and in the nature of a judgment for all, and from the date of such decree an injunction will be granted on motion of either party and on a due disclosure of assets to stay all proceedings of any creditor at law.—*Boyd v. Harris*, 1 Md. Ch. 466. [Cited and annotated in 30 L. R. A. 140, on injunction against execution sales or other proceedings under final process; in 61 L. R. A. 385, on effect of death after judgment on remedy by execution.]

(i) In such case, in order to prevent abuse by connivance between an executor or administrator and a friendly creditor, the practice is to grant an injunction only when the answer or affidavit of the executor or administrator states the amount of the assets, and on the terms of bringing the assets into court, or obeying such other order of the court as the circumstances of the case may require.—*Boyd v. Harris*, 1 Md. Ch. 466. [Cited and annotated, see supra.]

### (C) CHARGES AND CREDITS.

#### Cross-References.

Allowance and payment of claims, see ante, §§ 202-287.

Effect of invalidity of appointment, see post, § 539.

Liabilities on sale of property of decedent, see ante, § 391.

### § 475. Charges in general.

#### Cross-Reference.

See ante, § 50.

(a) In settling an estate of which decedent's wife was administratrix, the Orphans' Court had no jurisdiction to enforce payment of claims of a creditor of the estate held against the wife personally; it being necessary for the creditor to resort to another tribunal to enforce such claim.—*Beachley v. Bollinger's Estate*, 119 Md. 151, 86 Atl. 135.

(b) In stating an account against an executor in chancery, he cannot be charged at one time for the value of specific articles in money, and thereafter with interest until a certain time, and then for the articles specifically again.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

§ 476. (Omitted from the classification used herein.)

§ 476½. Increase of assets.

§ 477. Rents, profits, and income.

#### Cross-Reference.

Right and liabilities as to rents and profits, see ante, § 131.

#### Annotation.

Accounting by administrator for rents of intestate's property.—40 L. R. A. 344, note.

§ 478. Interest.

#### Cross-Reference.

Liability for interest on funds of estate, see ante, § 104.

(a) Where issues were sent from an Orphans' Court to a court of law to determine simply whether assets had come to the hands of the executor, and, if so, to what amount, it was held that it was not competent for the jury, if they found assets, to allow interest.—*Cooke v. Cooke*, 29 Md. 538.

§§ 479-483. (See Analysis.)

§ 484. Disbursements for benefit of legatees or distributees.

#### Cross-Reference.

Power to make expenditures, see ante, § 109.

(a) Where a will gave testator's wife the

income from a trust fund for life, the executor, in settling his account, should not include payments to the wife's trustee after her death.—*In re Hagerstown Trust Co.*, 119 Md. 224, 86 Atl. 982.

(b) Executors are allowed on an account for the widow's thirds, whether they have paid them or not. They are entitled to a credit for the full amount of specific legacies paid by them, of which the appraisal is conclusive evidence.—*Scott v. Dorsey*, 1 H. & J. 227.

§§ 485-487. (See Analysis.)

### (D) COMPENSATION.

#### Cross-References.

Effect of invalidity of appointment, see post, § 539.

Foreign and ancillary administration, see post, § 526.

Affecting adjustment on abatement of legacies, see "Wills," § 818.

Collateral inheritance tax on commissions or other compensation, see "Taxation," § 886.

Compensation as trustees, see "Trusts," § 314.

Contracts relating to compensation as inducing breach of trust, see "Contracts," § 113.

Services as consideration for promise by decedent's widow to pay for them, see "Contracts," § 75.

§ 488. Right to compensation in general.

#### Cross-Reference.

See post, §§ 501, 539.

(a) A special administrator, appointed by the Orphans' Court for the sole purpose of defending a will, and protecting contingent interests thereunder, and rendering such services as attorney, held entitled to a fair and reasonable compensation.—*Friedenwald v. Burke*, 122 Md. 156, 89 Atl. 424. (For second appeal see *Same v. Same*, 123 Md. 511, 91 Atl. 461.)

(b) In the trial of issues on a caveat to a will, a verdict rendered setting aside the will, and imputing fraud to the executors in its procurement, the executors on settlement of their account were nevertheless entitled to their commissions.—*Glass v. Ramsay*, 9 Gill 456. [Cited and annotated in 26 L. R. A. (N. S.) 759, on right of executor to allowance for attorney's fees in attempt to establish or defend will.]



### § 489. Statutory provisions.

(a) Where two accounts were stated by an executor on which the court allowed the commissions at that time authorized by law, and before his third account was passed there was an enactment reducing commissions, *held*, that the first and second accounts were settled by the then existing law, and that the third account must be regarded as the initial account under the new law.—*Gaines v. Reutch*, 64 Md. 517, 2 Atl. 913.

### § 490. Effect of testamentary provisions.

#### Cross-References.

See post, § 495.

Effect of election of widow, see "Wills," § 801.

Failure to act as executor, see "Wills," § 716.

(a) A testator bequeathed certain goods to the person named as his executor, who had also been a warm personal friend of the testator, and requested the legatee to comply with instructions given in a private letter, and in a codicil bequeathed to him an additional sum in money, stating, "And I thank him in advance for his services in closing up my estate as testamentary executor." *Held*, that the bequest of money was not intended as compensation for services as executor, and therefore the legatee did not forfeit it by renouncing the trust.—*Chas-saing v. Durand*, 85 Md. 420, 37 Atl. 362.

(b) A will gave W., as executor, a legacy of \$5,000, in lieu of all commissions as such executor. By a codicil the legacy was revoked, and also his appointment as executor. After the testator's death, a caveat was filed against the will, and W. was appointed administrator pendente lite. The contest being adjusted, W. gave bond, and qualified as executor, and was afterwards allowed the legacy of \$5,000. His right to administer pendente lite was founded under the statute solely on his having been named executor in the will, and the accounts settled by him as administrator and executor amounted to \$127,250.34. *Held*, under Code 1888, art. 93, § 5, which fixes the maximum rates of commissions allowed in the settlement of such accounts, and § 6, which provides that when a testator makes a bequest to his executor by way of compensation in lieu of commis-

sions, and the sum bequeathed is less than the maximum commission allowed by § 5, the Orphans' Court may allow such a percentage as, reckoning the legacy therein, will not exceed the maximum commission; that, the legacy being greater than the maximum commission, the executor was not entitled to commissions during the time he was acting as administrator, and doing the same work he was bound to do as executor.—*Renshaw v. Williams*, 75 Md. 498, 23 Atl. 905. (See Code 1911, art. 93, §§ 5, 6.)

(c) A testator cannot, by anything put in his will, in any wise affect the commissions which the law allows his executor, and, where there has been a full administration, even the court has no power to deprive him of the minimum amount which the law gives him.—*Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725.

(d) Under act 1798, c. 101, which declares that the commissions of an executor shall be not under 5 nor exceeding 10 per centum, etc., an executor is entitled to his commissions, notwithstanding the testator declares in his will that his executors shall not be entitled to any commissions.—*McKim v. Duncan*, 4 Gill 72. (See Code, art. 93, § 5.)

### § 491. Effect of agreements.

(a) Where one agrees with the widow and children of a decedent to act as administrator without compensation, and they become sureties on his bond, as well as waive the right of administering given them by Code 1888, art. 93, § 18, the agreement is supported by sufficient consideration.—*Mott v. Fowler*, 85 Md. 676, 37 Atl. 717. (See Code 1911, art. 93, § 18.)

(b) An agreement on sufficient consideration, to act as administrator without compensation, is valid.—*Mott v. Fowler*, 85 Md. 676, 37 Atl. 717.

### § 492. Waiver of right.

### § 493. Jurisdiction of courts.

#### Cross-Reference.

See post, § 501.

(a) Code 1904, art. 93, § 5, provides that commissions of executors shall be at the discretion of the court, not under 2 per cent., nor exceeding 10 per cent. on the first \$20,000 of the estate, and not more than 2

per cent. on the balance. Article 81, § 112, imposes a tax on commissions allowed executors and administrators by Orphans' Courts, and § 113 provides that those courts shall fix such commissions in all cases where letters of administration have been or may be granted, whether commissions are claimed or not, and that the commissions so fixed shall be subject to the tax. *Held*, that it is the duty of the court to fix the commissions, not only where the executor fails to claim them, but in all cases, except where compensation has been bequeathed to the executor, in which, under the express provisions of art. 93, § 6, no commissions shall be allowed, unless the compensation appear inadequate, especially in view of previous legislation on the subject. Act 1860, c. 163, Code 1860, art. 81, § 107, repealed by act 1862, p. 19, c. 18.—*In re Watts' Estate*, 108 Md. 696, 71 Atl. 316. (See Code 1911, art. 81, §§ 115, 116; art. 93, §§ 5, 6; act 1916, c. 559, p. 1153.)

(b) An Orphans' Court has jurisdiction after final accounting over contested executor's commissions which it has allowed, as such contest involves no question concerning the trusts created by the will.—*Hardt v. Birely*, 72 Md. 134, 19 Atl. 606.

(c) The discretion of the court as to the allowance of commissions to an administrator is a limited one.—*Gwynn v. Dorsey*, 4 G. & J. 453.

#### § 494. For what services allowed.

(a) An executor may be allowed compensation for services rendered the estate of the deceased in finishing the growing crops, if his services are of advantage to the estate.—*Lee v. Lee*, 6 G. & J. 316. [Cited and annotated in 40 L. R. A. (N. S.) 230, on personal representative, testamentary trustee, or guardian carrying on business.]

#### § 495. Commissions.

##### Cross-References.

Amount and computation, see post, § 496.  
Testamentary provisions, see ante, § 490.  
Dependent on general character of bequest, see "Wills," § 754.

(a) Under Code 1888, art. 93, § 5, which declares that executors' commissions shall be discretionary with the court, not under 2 per cent. nor exceeding 10 per cent. on the

first \$20,000, and on the balance of the estate not more than 2 per cent., an executor who is chargeable with the investment of all the moneys of the estate, and who, on finding a portion profitably invested in notes, charges himself therewith, is entitled to his commissions thereon, though he has not collected them, as their real value may be ascertained by appraisement.—*Hardt v. Birely*, 72 Md. 134, 19 Atl. 606. (See Code 1911, art. 93, § 5.)

(b) An executrix is not entitled to commissions on a debt due her testator, and by him specifically bequeathed to her.—*Handy v. Collins*, 60 Md. 229, 45 Am. Rep. 725.

(c) Where bonds returned in an inventory are not appraised, they cannot be considered a part of the inventory, so that the administrator is entitled to commissions thereon, under Code 1860, art. 93, § 5.—*In re Stratton's Estate*, 46 Md. 551. (See Code 1911, art. 93, § 5.)

(d) Where an executrix with power under the will to sell any or all of the testator's estate to effectuate the provisions of the will, and who is also given authority by codicil as testamentary trustee to sell a certain named farm owned by testator, without making any provision for compensation for her services as trustee, sells the farm and reports the sale, representing herself both as executrix and trustee, to the Orphans' Court, by which she is allowed a commission of 7½ per cent. upon the proceeds, and afterwards applies to the Circuit Court as a court of equity, under act 1870, c. 370, for a confirmation of the sale and a distribution of the fund, and claiming a further commission as trustee, such sale of the farm is to be deemed to have been made by her as trustee; and a confirmation thereof by both courts does not entitle her to commissions out of the proceeds both as executrix and trustee.—*Sanderson v. Pearson*, 45 Md. 483. (See Code, art. 16, § 234.)

(e) Testator devised his real and personal property to a trustee in trust to apply the income arising therefrom for the benefit of certain persons, and further provided that the trustee, whom he also appointed his executor, should have 10 per cent. of the whole amount of property which might come into

his hands as trustee. *Held*, that the trustee was entitled to this percentage on the whole amount of the property, and not on the income only, irrespective of the sum which might have been allowed him by the Orphans' Court as executor.—*Mitchell v. Holmes*, 1 Md. Ch. 287.

(f) Where a testator bequeathed to his three sons the whole of the capital used in his copper business remaining after settlement of the debts of that business, and also bequeathed to a certain son certain shares of stock previously transferred to him by his said son, who was also one of his executors, it was *held* that the executors were entitled to commissions upon the amount of both of these items.—*McKim v. Duncan*, 4 Gill 72.

(g) Where an administratrix was liable for interest for delaying payment of the principal of the estate pending suit to determine the title thereto, she was not entitled to commissions on the interest with which she was charged.—*Thomas v. Visitors of Frederick County School*, 9 G. & J. 115. [Cited and annotated in 31 L. R. A. (N. S.) 358, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(h) An executor is not entitled to a commission on the excess of sales over the appraisement.—*Evans v. Iglehart*, 6 G. & J. 171. [Cited and annotated in 16 L. R. A. (N. S.) 486, on effect of bequest for life of chattels consumable in use; in 41 L. R. A. (N. S.) 406, on right of tenant at will to crops.]

(i) Under act 1798, c. 101, subc. 10, § 2, providing that an administrator shall receive not less than 5 per cent. on the amount of the inventory, it is the duty of the court to allow such rate on all the assets mentioned in the inventory, except such as have not been accounted for.—*McPherson v. Israel*, 5 G. & J. 60. (See Code, art. 93, § 5.)

(j) An executrix was allowed 5 per cent. commission on the amount of the inventories returned by her as executrix, excluding what may have been lost or may have perished.—*Eversfield v. Eversfield*, 4 H. & J. 12.

#### § 496. Amount and computation of compensation.

(a) The inventories, list of debts, and reports required by law to be filed in proceedings to settle an estate, and the executor's account of the amount and character of the estate, and, except perhaps in rare cases, the nature and extent of the executor's services, are sufficient to enable the court to determine proper commissions to the executor; and the hearing of testimony as to the value of his services is not required.—*In re Watts' Estate*, 108 Md. 696, 71 Atl. 316.

(b) The fixing of executor's commissions within the limits prescribed by the statute resting in the discretion of the court, it will consider the nature and extent of his labor, with the aim of allowing a fair compensation for the services rendered.—*In re Watts' Estate*, 108 Md. 696, 71 Atl. 316.

(c) The executor need not accept the commissions allowed, but may waive all except the amount of tax imposed thereon.—*In re Watts' Estate*, 108 Md. 696, 71 Atl. 316.

(d) Where the administration of an estate has been complete, it is the duty of the Orphans' Court to allow the administrator 5 per cent. on the whole property; but, if the administration has only been partial, the court may, in its discretion, allow less.—*Parker v. Gwynn*, 4 Md. 423.

#### § 497. Extra allowances.

##### Cross-References.

Rights for sureties on administration bond, see post, § 537.

Review of discretion of court, see "Appeal and Error," § 984.

(a) An administrator, in finishing the growing crops of the deceased, is not bound to act as, and discharge the duties of, an overseer; and if, with more advantage to the estate, he does act in that capacity himself, the Orphans' Court may properly allow him a reasonable compensation therefor, in addition to his compensation as administrator.—*Lee v. Lee*, 6 G. & J. 316. [Cited and annotated in 40 L. R. A. (N. S.) 230, on personal representative, testamentary trustee, or guardian carrying on business.]

(b) Where executors had been allowed a commission on money arising from a sale of their intestate's lands by them, made pur-

suant to an act of the Legislature, the court refused to allow them a commission for the sale itself.—*Scott v. Dorsey*, 1 H. & J. 227.

#### § 498. Coexecutors and coadministrators.

##### *Cross-Reference.*

Scope of inquiry on accounting, see post, § 507.

(a) An agreement between two administrators stipulating that one would be satisfied with such proportionate part of the commissions as his associate would allow him is valid and binding, where the principal labor and responsibility was to be borne by one of them, though in the absence of agreement they are equally entitled to the commissions, even though one has the entire management of the estate.—*Brown v. Stewart*, 4 Md. Ch. 368.

(b) Where one of two executors is not entitled to his commission because he is a legatee, the other executor should receive only one-half of the commission.—*Lee v. Lee*, 6 G. & J. 316. [*Cited and annotated*, see supra, § 497.]

(c) One of two executors, who alone had the whole management of the estate, will not be allowed to deprive the other of his commissions.—*Richardson v. Stansbury*, 4 H. & J. 275. (See *Brown v. Stewart*, 4 Md. Ch. 368.)

#### § 499. Successive administrations.

##### *Cross-Reference.*

See ante, § 122.

(a) The allowance of the maximum commission to the first administrator in the case of a partial administration will not deprive the administrator de bonis non of his right to the balance remaining in the hands of the first administrator as such, or his right to commissions on the same.—*Lemmon v. Hall*, 20 Md. 168. [*Cited and annotated* in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(b) Under act 1820, c. 174, taken in connection with act 1798, c. 101, subc. 10, § 2, which provides that an administrator shall be entitled to not less than 5 per cent. commission on the amount of the inventory, the representative of a deceased administrator may be allowed such amount as the court in

its discretion may deem proper, though it be less than 1 per cent.; the balance of the compensation or commission to go to the administrator de bonis non on final settlement.—*McPherson v. Israel*, 5 G. & J. 60. (See Code, art. 93, § 5.)

(c) The allowance for commissions made to a collector in Maryland, under letters ad colligendum granted upon a deceased person's estate, can have no effect upon the commissions of the executor or administrator of the same estate. They are distinct and independent allowances for different services.—*Wilson v. Wilson*, 3 G. & J. 20. [*Cited and annotated* in 31 L. R. A. (N. S.) 358, 360, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

#### § 500. Forfeiture or deprivation of compensation.

##### *Cross-Reference.*

Effect of final settlement, see post, § 513.

(a) Though an administrator who, notwithstanding an order directing a sale of sufficient personal estate to pay an intestate's debts, retains certain personal estate, including slaves, paying debts to the amount of their appraised value, will be accountable for the increase of the slaves, and for their use, and for the value of such as run away, he should be allowed commissions on the sums paid by him to the creditors.—*Hall v. Griffith*, 2 H. & J. 483.

#### § 501. Proceedings and order for allowance.

##### *Cross-References.*

See ante, §§ 488, 493.

Opinion evidence, see "Evidence," § 487.

(a) On appeal by special administrator in a proceeding for allowance of compensation for services, *held*, that a memorandum of record that petitioner was appointed to act only as attorney, though immaterial, could not be stricken out or ignored where the answer of adverse parties showing petitioner's acquiescence therein was not denied.—*Friedenwald v. Burke*, 122 Md. 156, 89 Atl. 424. (For second appeal see *Same v. Same*, 123 Md. 511, 91 Atl. 461.)

(b) On appeal from an ex parte order of the Orphans' Court allowing compensation to a special administrator, and from its re-

fusal to suspend the effect of such order, *held*, on determining that parties objecting to the compensation as excessive were entitled to be heard thereon, that the appeal from the refusal to suspend would be dismissed, and the cause remanded, without affirming or reversing the order for compensation.—*Friedenwald v. Burke*, 122 Md. 156, 89 Atl. 424. (For second appeal see *Same v. Same*, 123 Md. 511, 91 Atl. 461.)

(c) Administrators c. t. a. and others interested in an estate, objecting to an ex parte order allowing compensation for services to a special administrator, *held* entitled to a hearing in the Orphans' Court, where they might examine the attorneys certifying to reasonable compensation.—*Friedenwald v. Burke*, 122 Md. 156, 89 Atl. 424. (For second appeal see *Same v. Same*, 123 Md. 511, 91 Atl. 461.)

(d) The right of an executor to commissions on an indebtedness due from him to the estate of testatrix *held* proper for determination in an action by the legatees for their shares of the indebtedness.—*Sloan v. Sloan*, 117 Md. 141, 83 Atl. 38.

(e) It is not too late to object to the executor's commissions within a reasonable time after the final account by which they were allowed.—*Hardt v. Birely*, 72 Md. 134, 19 Atl. 606.

(f) It is in the discretion of the probate court to fix the amount of the commissions allowed administrators and executors, within the limits fixed by law; and the Court of Appeals will not interfere with an allowance by that court, unless there has been a manifest abuse, or the amount is clearly excessive.—*Dalrymple v. Gamble*, 68 Md. 156, 11 Atl. 718. [Cited and annotated in 14 L. R. A. 103, on liability of executor or trustee for loss of funds by failure of bank.]

(g) Commissions should not be allowed the administrator until the final settlement of his accounts.—*McPherson v. Israel*, 5 G. & J. 60; *In re Baxley's Estate*, 47 Md. 555.

(h) It is not necessary to ascertain the whole amount of an estate that will be subject to commissions before any are allowed.—*In re Stratton's Estate*, 46 Md. 551.

(i) Appellants from a decree of the Or-

phans' Court allowing a percentage to the executor of a will must show an interest in the estate by allegation or proof, or an exhibition of the will under which they claim as heirs or devisees.—*Hoffar v. Stonestreet*, 6 Md. 303.

(j) The order of the Orphans' Court allowing commissions to an administratrix and fixing the amount thereof, which is unappealed from, is conclusive, and cannot be collaterally attacked.—*Thomas v. Visitors of Frederick County School*, 9 G. & J. 115. [Cited and annotated in 31 L. R. A. (N. S.) 358, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

(k) It is the province of the Orphans' Court to determine whether or not an extra commission should be allowed to an executor for extraordinary troubles, and their decision is conclusive.—*Scott v. Dorsey*, 1 H. & J. 227.

#### (E) STATING, SETTLING, OPENING, AND REVIEW.

##### Cross-References.

Appointment of temporary administrator, see ante, § 122.

Discharge of executor or administrator, see ante, § 33.

Collateral attack on probate of will, see "Wills," § 421.

Right to jury trial on appeal, see "Jury," § 17.

#### § 502. Form and requisites of account.

(a) Where a will provided that the income from the estate should be paid to a trustee for the widow during her life, an item in the account of the executor claiming credit for a specified amount paid to the trustee for the wife, but which failed to show that the widow had died prior to the accounting, was not in proper form.—*In re Hagerstown Trust Co.*, 119 Md. 224, 86 Atl. 982.

#### § 503. Vouchers and proof of payment.

##### Cross-Reference.

Grounds for setting aside settlement, see post, § 509.

(a) Where an executor denied payments made by a deceased coexecutor, the representatives of the estate of the deceased coexecutor were entitled to retain the vouchers for the payments as a matter of protection to the estate.—*Crothers v. Crothers*, 121 Md.

114, 88 Atl. 114. (For second appeal see *Same v. Same*, 123 Md. 603, 91 Atl. 691.)

(b) Register's fees accruing upon the administration of an estate by a deceased husband are well proved by the records of an order of the 'Orphans' Court where the administration was conducted allowing them, and, if so allowed, may be charged by an administratrix who has paid them, upon her husband's estate, administered in the same court.—*Edelen v. Edelen*, 11 Md. 415. [Cited and annotated in 56 L. R. A. 822, on burden of proof of husband's debt to wife for property received from her.]

#### § 504. Objections and exceptions.

##### Cross-References.

Allowance of costs to or against contestants, see post, § 511.

Objections to validity of sale, see ante, § 149.

On appeal, see post, § 510.

Persons entitled to maintain proceedings to open account see post, § 509.

##### Annotation.

Manner of raising question, to charge executor or administrator personally, of collusion in establishing claim against estate.—L. R. A. 1915C, 737, note.

Right of executor or administrator or his representatives to object to account of coexecutor or coadministrator.—22 L. R. A. (N. S.) 1119, note.

(a) Where two coexecutors gave a joint bond, and were sureties on the bond of a third, one of such executors was entitled to object to an accounting and to a distribution of the estate before the expiration of the time within which claims might be filed against the estate.—*Yakel v. Yakel*, 96 Md. 240, 53 Atl. 914. [Cited and annotated in 22 L. R. A. (N. S.) 1119, on right to object to account of coexecutor or coadministrator.]

(b) That trustees of an insolvent legatee did not object to an order allowing executors to restate their account does not affect their right to object to the account as restated.—*Hoffman v. Armstrong*, 90 Md. 123, 44 Atl. 1012. [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

(c) A husband who can derive no pecuniary benefit from a decree to account must, nevertheless, be permitted to attend and to except

for the protection of his own rights.—*Helms v. Franciscus*, 2 Bland 544, 20 Am. Dec. 402.

#### § 505. Examination of executor or administrator.

(a) Where an executor has been ordered to account, he may be called before the auditor and examined on oath on interrogatories in relation to the account; and, if necessary, he may be compelled to attend and answer.—*Hammond v. Hammond*, 2 Bland 306.

#### § 506. Evidence.

##### Cross-References.

Vouchers and proof of payment, see ante, § 503.

Competency of witnesses of persons interested as to transactions with person since deceased, see "Witnesses," § 134.

(a) Where less than a year has elapsed since administration, it cannot be presumed that an executor has transferred the property to a trustee appointed by the will.—*In re Hagerstown Trust Co.*, 119 Md. 224, 86 Atl. 982.

(b) A deceased woman had held a life estate in the lands both of her mother and of her husband, with remainder in each to her three sons, one of whom was deceased, leaving three children. Decedent's administrators, in distributing her estate, produced two papers, signed by two of the latter, purporting to be receipts to her for \$222.22 on account of their great-grandmother's estate. It appeared that two of decedent's sons, doing business as partners, had borrowed of their father \$10,000. After his death the firm paid interest thereon to their mother, and at length paid \$8,000 in discharge of a mortgage against their father's estate. Of the balance of \$2,000 she allowed \$666.66 to each of her two surviving sons, and paid \$222.22 to two of the children of the deceased son,—their pro rata share. The other child of such son testified that this money was his father's share of the \$2,000 which was "to be distributed among us three grandchildren," but that, as his grandmother had long supported him, he did not claim his share. It further appeared that at the time the receipts were made the great-grandmother's estate had not been sold. Held, that the evidence was sufficient to establish a mistake in the receipts, and to show that the money came from the estate of decedent's

husband, and not from that of her mother.—*Horwitz v. Forbes*, 74 Md. xiv, memorandum case, 22 Atl. 267, full report.

(c) An executor or administrator will not be charged with interest upon the presumption that he made it merely because the money was in his hands, when it appears that, with the approbation of the Orphans' Court, he held the money for the purpose of paying a claim actually due, and which might, at any time, be demanded.—*Mickle v. Cross*, 10 Md. 352. [Cited and annotated in 31 L. R. A. (N. S.) 360, on liability of executor or administrator to distributees for interest where settlement of estate delayed.]

### § 507. Hearing or reference.

#### Cross-References.

Jurisdiction of proceedings for accounting, see ante, § 469.

Proceedings to compel accounting, see ante, § 472.

(a) Under Code 1904, art. 93, § 234, providing that the probate court shall have full power to settle the accounts of executors and administrators, superintend the distribution of estates, and secure the rights of orphans and legatees, such court has power to hear and determine the question of the ademption of a legacy because of the alleged payment thereof by the testatrix in her lifetime.—*Gallagher v. Martin*, 102 Md. 115, 62 Atl. 247. (See Code 1911, art. 93, § 235.) [Cited and annotated in 38 L. R. A. (N. S.) 589, on gift by testator as ademption of general legacy to donee.]

(b) Under Code 1888, art. 93, § 5, providing for funeral expenses to be allowed at the discretion of the Orphans' Court, the question of such an allowance is not a proper subject for issues for a jury.—*Maynadier v. Armstrong*, 98 Md. 175, 56 Atl. 357; *Armstrong v. Maynadier*, Id. (See Code 1911, art. 93, § 5.)

(c) Where the Orphans' Court is, on plenary proceedings, actually engaged in hearing the question whether administrators are entitled to be allowed for certain items, parties may not require issues for determination thereof to be sent to a court of law.—*Maynadier v. Armstrong*, 98 Md. 175, 56 Atl. 357; *Armstrong v. Maynadier*, Id.

(d) An auditor, in stating an account against executors, is not concluded by any allowance made to them by the Orphans' Court, but must determine from the vouchers whether the allowance was just. He need not require evidence to establish the articles allowed, if they were of a nature proper to be allowed; but, if improper, he should not credit them.—*Scott v. Dorsey*, 1 H. & J. 227.

### § 508. Order or decree.

#### Cross-References.

Operation and effect of settlement, see post, §§ 513, 514.

Order or decree for distribution, see ante, § 315.

### § 509. Opening or vacating.

#### Cross-References.

Action to open or set aside, see post, § 516.

Persons entitled to object or except, see ante, § 504.

Accrual of right as affecting limitations, see "Limitation of Actions," § 65.

Inadequacy of remedy at law as affecting right to equitable relief, see "Judgment," § 408.

Judgments against which equitable relief may be had, see "Judgment," § 410.

(a) Where, notwithstanding the ademption of a legacy by payment to the legatee during the testatrix's lifetime, the register stated and passed an account ex parte for the executor in the Orphans' Court in such form as to show that the legacy was distributable to the legatee, it was the duty of such court, on the executor's application, to set aside the account after proof of such facts; and an order dismissing the petition, after answer in denial by the legatee, without hearing or submission on the pleadings was error.—*Gallagher v. Martin*, 102 Md. 115, 62 Atl. 247. [Cited and annotated in 38 L. R. A. (N. S.) 589, on gift by testator as ademption of general legacy to donee.]

(b) A proceeding in the Orphans' Court to rescind an order approving an administrator's account, and to require the administrator to restate his account, in pursuance of which the court ordered the administrator to show cause, as authorized by Code 1888, art. 93, § 231, is not a summary proceeding.—*Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139. (See Code 1911, art. 93, § 236.) [Cited and annotated in 47 L. R. A. (N. S.) 283, on liability for necessities furnished wife living with husband.]

(c) The Orphans' Court may rescind an order passing the account of administrators, presented without notice to creditors, allowing credits, as preferred claims, without the vouchers required by Code 1888, art. 93, § 90.—*Maynadier v. Armstrong*, 98 Md. 175, 156 Atl. 357; *Armstrong v. Maynadier*, Id. (See Code 1911, art. 93, § 90.)

(d) Where an administrator has paid an attorney for his services in behalf of the estate, and the amount so paid has been included in an account allowed by the court, and both the administrator and the attorney have acted in good faith, the account should not be reopened to reduce the attorney's fees, unless it clearly appears that they were unreasonable.—*Geesey v. Geesey*, 96 Md. 630, 54 Atl. 616.

(e) Code 1888, art. 93, § 241, authorizes a joint executor to institute proceedings when he shall apprehend that he is likely to suffer by the negligence or misconduct in the administration of any executor, and provides that, if such apprehension is well founded, the court may revoke the authority of the executor complained of. Article 90, §§ 1, 2, authorize the requirement of counter security under such circumstances. *Held*, that such provisions did not preclude a coexecutor from petitioning the court to vacate a settlement of the estate by his coexecutors entered without notice to the petitioner.—*Yakel v. Yakel*, 96 Md. 240, 53 Atl. 914. (See Code 1911, art. 90, §§ 1, 2; art. 93, § 246.) [Cited and annotated in 22 L. R. A. (N. S.) 1119, on right to object to account of coexecutor or coadministrator.]

(f) Where two coexecutors obtained an order for the settlement of the estate and allowance of their accounts without notice to a third executor, who was liable on the bonds of the others, such third executor was not required to appeal from such order, but was entitled to proceed by petition in the Orphans' Court within 30 days after knowledge of the order to set the same aside, and appeal from an order denying such relief.—*Yakel v. Yakel*, 96 Md. 240, 53 Atl. 914. [Cited and annotated, see *supra*.]

(g) When an administrator, upon his filing a petition alleging that there had been no assets of decedent received by him, was dis-

charged by an Orphans' Court under Code 1888, art. 93, § 38, which provides that an administrator may be discharged by filing his petition, "accompanied by a full and particular account, under oath, of his \* \* \* receipts and disbursements, if any, as such \* \* \* administrator," and it subsequently appeared that the court had been deceived, and that the administrator had received assets, a part of which he had used to settle his own private claims against the estate, the court, under the general powers in matters relating to the accounts of administrators conferred by §§ 230 and 231, should rescind the previous order discharging the administrator, and require of him a complete accounting as to such assets of his decedent as came into his hands.—*Cummings v. Robinson*, 95 Md. 83, 51 Atl. 1105. (See Code 1911, art. 93, §§ 37, 235, 236.)

(h) An arrangement with his coadministrator as to the disposition of such assets would not prevent the court from rescinding its previous order, and requiring of him a complete accounting as to such assets.—*Cummings v. Robinson*, 95 Md. 83, 51 Atl. 1105.

(i) An administrator, in settling his second account, presented a voucher for it, which, after stating the title of a suit against the estate, had the following items: "1901, May 15th. Judgment for plaintiff for \$200 paid. Defendant's cost, \$6.00,"—followed by a receipt of the same date from an attorney for \$75 for counsel fee in the case. As stated in the said second account, the allowance was, "For judgment and cost, \$281." In the first account, which was allowed before the suit was brought, was an allowance for \$100 for counsel fees, which the court understood was for all services rendered or to be rendered for the estate. *Held*, that it was error to set aside the allowance of the second account, as having been fraudulently procured, without allowing the administrator to prove the value of the services rendered in the suit; nothing appearing to show that the administrator had not paid the attorney in good faith, and the attorney having filed the vouchers with the deputy register of wills, who stated the account, and whose testimony did not show that he was imposed on by the



attorney.—*Geesey v. Geesey*, 94 Md. 371, 51 Atl. 36.

(j) Where an administrator rendered an account to the Orphans' Court, which was accepted as correct by the distributees of the estate through their counsel, who participated in its preparation, and they have accepted payment from the administrator of the sums thereby awarded to them, in the absence of fraud they could not thereafter question its accuracy.—*Appler v. Merryman*, 91 Md. 706, 47 Atl. 1026.

(k) That trustees of an insolvent legatee could have appealed from an order of the Orphans' Court allowing an executors' account does not prevent the court from setting such order aside within the time allowed for appeal, on the trustees' application.—*Hoffman v. Armstrong*, 90 Md. 123, 44 Atl. 1012. [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

(l) Where the accounts of executors contain errors in omitting proper charges against themselves and others, and also proper credits, and in including improper charges and credits, the Orphans' Court has power to open and correct the same.—*Hoffman v. Hoffman*, 88 Md. 60, 40 Atl. 712.

(m) A petition to reopen an administratrix's accounts, filed over 17 months after their allowance without protest, will be dismissed, where the ground relied on is an alleged error of the court in not allowing a share of the commissions to the estate of a coadministratrix, who, after giving bonds, died at the threshold of her duty, and performed little or no services.—*Martin v. Jones*, 87 Md. 43, 39 Atl. 102.

(n) Accounts of an administratrix will not be reopened, where the error alleged is one of the court's, and not the administratrix's, after the time limited for appeals has expired.—*Martin v. Jones*, 87 Md. 43, 39 Atl. 102.

(o) Where the distributees under a will filed a petition in the Orphans' Court, alleging errors in the executor's account in respect to a personal claim of the executor after it had been duly passed and approved, and the balance appearing therein had been

distributed, the burden was on them to establish such errors.—*Shafer v. Shafer*, 85 Md. 554, 37 Atl. 167.

(p) Testator died in 1861. The estate was largely in debt, and about portions of it there was protracted litigation. The executor filed four accounts, in March, 1863, July, 1863, May, 1875, and May, 1879, which were duly confirmed. Held, that a petition filed in 1887 by the administrators of two of the legatees, who had died intestate, to open the executor's accounts for misconduct and fraud, was barred by laches; it appearing that plaintiffs' intestates were of full age at the passing of the accounts, and lived after that, the one until 1882, and the other until 1887, without having ever made any complaint, and the executor having denied all the allegations of fraud and misconduct and want of notice on the part of plaintiffs' intestates.—*Richardson v. Billingslea*, 69 Md. 407, 16 Atl. 65.

(q) An acquiescence of 18 years in the settlement of an administrator's account of which they had full notice, and to which they consented, will estop the next of kin and their descendants from disputing it.—*Yearley v. Cockey*, 68 Md. 174, 11 Atl. 586.

(r) Where an executor's account has been passed by the Orphans' Court, and its accuracy is not impeached in a subsequent action against the executor for failure to collect and apply assets belonging to the estate, which it was alleged was due to an erroneous construction of the testator's will, the complainants were not entitled to surcharge such account, nor show that it had not been properly audited.—*Bennett v. Rhodes*, 58 Md. 78. [Cited and annotated in 40 L. R. A. (N. S.) 211, 213, on personal representative, testamentary trustee, or guardian carrying on business.]

(s) An executor, in his first administration account, included a claim for services rendered his testatrix during her lifetime. The account was dated December 15, 1874, and was passed and approved by the Orphans' Court. The inclusion of this claim in his account gave the appearance of an overpayment of the estate. This overpayment was brought forward successively in each of the two following accounts as a matter for

allowance. The third account was passed on April 27, 1878, and, within 10 days thereafter, an application by parties in interest was made to strike out this claim. *Held*, that the application was seasonably made.—*Bantz v. Bantz*, 52 Md. 686. [Cited and annotated in 33 L. R. A. 668, on liability of decedent's estate for funeral expenses; in 11 L. R. A. (N. S.) 880, 889, 904, on implied agreement to pay for services of relative or member of household; in 40 L. R. A. (N. S.) 215, 225, 232, on personal representative, testamentary trustee, or guardian carrying on business.]

(t) An erroneous admission of unappraised bonds in an administration account may be corrected by the Orphans' Court before the estate is finally closed, although the account has been passed.—*In re Stratton's Estate*, 46 Md. 551.

(u) In an investigation of an administrator's accounts, the fact that 17 years have elapsed without any claim being made by parties to whom the estate is alleged to have been indebted raises a strong presumption that such debts were discharged.—*Donaldson v. Raborg*, 28 Md. 34.

(v) It is a principle, settled beyond all doubt, that administration accounts are only prima facie correct. Errors in them have been repeatedly corrected, when made to appear either in courts of law or equity.—*Scott v. Fox*, 14 Md. 388. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.] *In re Stratton's Estate*, 46 Md. 551.

(w) Failure to appeal from the passage of an administrator's account for more than 30 days will not prevent an administrator de bonis non, 7 years thereafter, from obtaining a correction of any errors in it.—*Scott v. Fox*, 14 Md. 388. [Cited and annotated, see supra.]

(x) On an appeal from an order of distribution of a testator's estate, by one of the executors, the record showed that the Orphans' Court met on the 1st of March, 1854, having summoned the executors to make a final settlement of said estate. An order was passed adjudging the distribution of the balance due the estate in the second account of the executors, settled on the 15th

of June, 1849, to be null and void, and directing them to settle a fourth account, charging themselves with the balance of \$2,064.50 due the estate, and distributed by said second account, with interest from the 15th of June, 1844. *Held*, that as the second account of the executors was not in the record, and as it was vacated after several years' standing, without any evidence of incorrectness, and after the balance had been distributed, as far as the record shows, the balance was improperly brought into the estate a second time, and that the charge of interest was manifestly erroneous.—*Watkins v. Bevans*, 6 Md. 489.

(y) After a lapse of 16 years and a distribution of an intestate's estate, portions of which have since been disposed of by the distributees, the court will not set aside the settlement of the accounts on petition of the distributees, where no fraud is alleged, especially if the distributees do not restore the amounts which they have received.—*Ridenour v. Keller*, 2 Gill 134.

(z) After a period of nearly 15 years, in the absence of all proof to the contrary, the Orphans' Court, in reviewing the proceedings of an executor, should presume that all debts and legacies have been paid.—*Gardner v. Simmes*, 1 Gill 425. [Cited and annotated in 40 L. R. A. 45, on assets passing to administrator de bonis non.]

(aa) Accounts settled in the Orphans' Courts by executors, administrators, and guardians are prima facie evidence in all suits touching the matters therein contained to which such executors, etc., are parties, and the onus probandi rests on him who seeks to impeach their correctness.—*Owens v. Collinson*, 3 G. & J. 25.

(bb) A., as administrator of B., claimed an allowance for the payment of a note signed by A. and B., and was allowed a credit by the Orphans' Court for the whole amount. It was admitted that the signature of A. and B. was in B.'s handwriting, and it did not appear that B. had any authority to sign the name of A. *Held*, in the Court of Chancery, that there was no ground for impeaching the account.—*Owens v. Collinson*, 3 G. & J. 25.

## § 510. Review.

### Cross-References.

Allowance of compensation, see ante, § 501.

Proceedings to compel accounting, see ante, § 472.

Appellate jurisdiction dependent on amount or value in controversy, see "Courts," §§ 224, 231.

Courts invested with appellate jurisdiction, see "Courts," §§ 219, 227, 237.

Dependent on finality of decision, see "Appeal and Error," §§ 69, 77.

Executor or administrator as party aggrieved giving right of review, see "Appeal and Error," § 151.

Right to certiorari as dependent on absence of remedy by appeal, see "Certiorari," § 5.

(a) Under Code 1911, art. 93, § 5, providing that the commissions to an administrator shall be at the discretion of the court, "not under two per cent., nor exceeding ten per cent." on the amount stated, an allowance within that percentage cannot be reviewed though a judgment absolute was rendered against the administratrix in an action on a claim; Code 1904, art. 81, § 113, requiring the Orphans' Court to fix commissions "in all cases" whether claimed or not.—*Beachley v. Bollinger's Estate*, 119 Md. 151, 86 Atl. 135. (See Code 1911, art. 81, § 116.)

(b) Where a coexecutor filed a petition to set aside an order of the Orphans' Court on a final accounting of his coexecutors, entered without notice to petitioner within 30 days after such order, the fact that the court's order dismissing the petition was "without prejudice" did not preclude petitioner from appealing therefrom; the time within which a second petition could be filed having expired.—*Yakel v. Yakel*, 96 Md. 240, 53 Atl. 914. [Cited and annotated in 22 L. R. A. (N. S.) 1119, on right to object to account of coexecutor or coadministrator.]

(c) An appeal from an order of the Orphans' Court commanding the appellant to pay certain money into court stays all further proceedings; and where that court, after such an appeal, attempted to enforce its order by imprisonment for contempt, the appellate court granted a supersedeas suspending all proceedings after the appeal.—*Bruscup v. Taylor*, 26 Md. 410.

(d) A party who is coexecutor and legatee is in either capacity entitled to appeal

from an order of the Orphans' Court passing a separate account of the other executor, in which the latter is allowed a large claim against the estate.—*Hesson v. Hesson*, 14 Md. 8.

(e) The appellate court will not pronounce upon items in an administrator's account, paid over under the will to a residuary legatee for life, with a bequest over to others, where the record does not contain the will under which the legatee claims.—*Bowling v. Lamar*, 1 Gill 358.

## § 511. Costs and expenses.

### Cross-References.

See ante, § 500.

Expenses incurred as credit in account, see ante, § 487.

Mode of giving credit for payments by executor or administrator, see ante, § 485.

## §§ 512-14. Operation and effect.

### Cross-References.

As terminating authority of administrator, see ante, § 31.

Conclusiveness of adjudication as against sureties on bond, see post, § 535.

Correction of errors in general, see ante, § 509.

Construction and operation of decree, see ante, § 508.

Effect of omission of property from inventory, see ante, § 69.

Effect on liability of sureties on bond, see post, § 530.

Grounds for requiring supplemental account, see ante, § 458.

Insolvent estates, see ante, § 418.

Jurisdiction of probate court, see ante, § 469.

Persons entitled to apply for vacation of settlement, see ante, § 509.

Persons entitled to present objections at accounting, see ante, § 504.

Power to appoint administrator de bonis non, see ante, § 37.

Contest of will, see "Wills," § 225.

Right of action of executor against devisees for balance due in excess of assets, see "Wills," § 827.

### Annotation.

Remedy of distributees as to accounting of which he had no notice and on which he did not appear.—63 L. R. A. 95, note.

(a) Under a will entitling a life tenant to possession of securities and cash left by the testator, an account by the life tenant and another as executors distributing such securities and cash to her held to show full administration, and she thereafter held the property as life tenant.—*Foley v. Syer*, 121 Md. 79, 88 Atl. 38.

(b) An administrator may recover as an individual from the realty of an estate an amount overpaid by him in his accounting as administrator, if the payments were properly chargeable against the estate, being subrogated to the rights of the creditors whose claims he has paid.—*State v. Graham*, 115 Md. 520, 81 Atl. 31.

(c) An order of the Orphans' Court dismissing a petition to open the accounts of an executrix and to allow a claim of the petitioner against decedent's estate does not affect the right of the petitioner to enforce his claim at law or in equity.—*Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

(d) B. bequeathed to S. a certain sum for life, and after S.'s death "to be equally divided among her children then living, and the descendants of any who may have died." Held, that, where the executors invested the money in certain stock in the name of the life legatee, subject to the provisions of the will, in compliance with an order of court, and secured an allowance of the amount so invested in their "first and final account," the administration terminated.—*Siechrist v. Bose*, 87 Md. 284, 39 Atl. 745.

(e) Where an executor, having received the proceeds of a sale under a power in a will, stated his account in the proper court, by which he was charged with the whole of the proceeds, and credited with the amount of debts and expenses paid and commissions allowed, the correctness of that account cannot be called in question by a suit in another court against him in his individual capacity.—*Roberts v. Roberts*, 71 Md. 1, 17 Atl. 568.

(f) So long as assets can be found which properly belong to the estate of a decedent which have not been brought in and accounted for, the estate is not fully closed, and the Orphans' Court, on proper application, has jurisdiction to compel a surviving executor to return such assets, or recover them when they can be recovered, even where an account, called "final," had been passed, and some 14 years have elapsed since such account.—*Wilson v. McCarty*, 55 Md. 277. [Cited and annotated in 37 L. R. A. (N. S.) 369, on notice of distribution in probate proceedings as jurisdictional.]

(g) An administrator, who passes an ac-

count showing a balance due the estate of his intestate, is not thereby precluded from claiming an allowance in a subsequent action for the entire amount paid the distributee before the passage of the first account.—*Donaldson v. Raborg*, 28 Md. 34.

(h) On the trial of a plea of plene administravit to an action on the original debt, the accounts passed before the ordinary by the administrator are not conclusive in favor of the latter, but may be falsified by common-law evidence.—*Seighman v. Marshall*, 17 Md. 550.

(i) When an executrix has settled her accounts fully in the Orphans' Court, the jurisdiction of that court ceases, and a court of equity alone can enforce the trusts created by the will, if any such be raised by it.—*Binnerman v. Weaver*, 8 Md. 517.

(j) Accounts settled in the Orphans' Court are prima facie evidence in suits relating to matters contained in them. The vouchers for credits allowed by that court are evidence, and need not be filed as part of the pleadings in a suit respecting those credits. If they are produced before the auditor when he is about to state the account in the case, it is sufficient.—*Mitchell v. Mitchell*, 3 Md. Ch. 71. [Cited and annotated in 30 L. R. A. (N. S.) 815, 826, on remedies for enforcement of legacy charged upon devise.]

(k) Accounts passed by an executor before the Orphans' Court, pending a controversy in chancery between the executor and a claimant, are admissible as prima facie evidence before the auditor of the Court of Chancery.—*Evans v. Iglehart*, 6 G. & J. 171.

(l) The settlement of an administration account by the County Court is prima facie correct.—*Owens v. Collinson*, 3 G. & J. 25.

(m) Accounts of an executor settled in court are not evidence of overpayments by executors, nor that the claims stated in them were debts justly due by the deceased and chargeable on his real estate.—*Gist v. Cockey*, 7 H. & J. 134.

(n) Accounts settled in court are prima facie evidence of the situation of the personal property of the deceased, in all controversies between executors, etc., and the representatives of the deceased, and in ac-

tions by creditors against his heirs or devisees, and to warrant a sale of the real estate by a decree of chancery.—*Gist v. Cockey*, 7 H. & J. 134.

(o) An executor having settled an account of his administration in the Orphans' Court, and being charged there with the appraised value of the estate, according to the inventory, is not conclusive evidence that he had fully administered, and that the effects of the deceased thereby became his.—*Haslett v. Glenn*, 7 H. & J. 17. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non.]

(p) The proceedings of the Orphans' Court, and the account and distribution of the estate of the intestate by the administrator, are competent and sufficient evidence against the administrator.—*Scott v. Burch*, 6 H. & J. 67.

(q) An additional account, returned to the prerogative of Maryland in 1775 by one A., who had intermarried with the executrix of B., charging themselves with a certain balance due, certified, under seal, by the register of wills, was admitted in evidence in an action of trover for slaves, brought by the administrator of C., the daughter and representative of B., against a person claiming the slaves under A.—*Fishwick's Adm'r v. Sewell*, 4 H. & J. 393.

#### § 515. Private accounting and settlement.

##### Cross-References.

Affecting duty to account, see ante, § 466.  
Affecting necessity for administration, see ante, § 3.

Conveyances and transactions between devisees and legatees in general, see "Wills," § 740.

Conveyances and transactions between heirs and distributees in general, see "Descent and Distribution," § 82.

Ground for denial of probate of will, see "Wills," § 212.

(a) An account by R., one of two administrators, the other being C., the sole distributee of the estate, there being no creditors, charging himself and C. with the entire assets, and crediting himself with \$600, which was turned over to C. on the agreement that R. should resign, in consideration of \$400, which C. should pay him for his claims against the estate and for his commissions,

which resignation and payment were made, may properly be confirmed, there being nothing objectionable in the agreement.—*Cummings v. Robinson*, 95 Md. 759, 53 Atl. 795.

#### § 516. Actions to open or set aside settlement.

##### Cross-References.

Opening or vacating, see ante, § 509.

Bringing in new parties, see "Parties," § 51.

Right to trial by jury, see "Equity," § 377.

(a) When an administrator's accounts are under examination in the court of chancery, if it should appear, on the face of a voucher passed by the Orphans' Court, that the claim paid was not a just one against the deceased, it is as much the duty of the court to reject it as if the illegality of its allowance were established by proof dehors.—*Owens v. Col-linson*, 3 G. & J. 25.

### XII. FOREIGN AND ANCILLARY ADMINISTRATION.

##### Cross-References.

Foreign assets, see ante, § 60.

Liability on administration bonds, see post, §§ 527-537.

What law governs, see ante, § 2.

Determination in probate proceedings as to validity and construction of will, see "Wills," § 215.

Judgment against domiciliary administrator as conclusive against ancillary administrator, see "Judgment," § 689.

Liability of property of estates under ancillary administration to taxation, see "Taxation," § 99.

Party in proceedings for probate or contest of will, see "Wills," § 524.

Persons entitled to sue for wrongful death, see "Death," § 31.

Probate or record of foreign wills, see "Wills," §§ 238-246.

Restraining foreign appointment, see "Injunction," § 33.

Revival of action against decedent by service on foreign executor, see "Appeal and Error," § 334.

Right of assignee of foreign executor of mortgagee to execute power of sale contained in mortgage, see "Mortgages," § 340.

Right to oppose probate of will, see "Wills," § 220.

#### § 517. Foreign appointment.

#### § 518. Ancillary appointment.

##### Annotation.

Right of domiciliary executors and administrators, or their nominees, to ancillary letters.—48 L. R. A. (N. S.) 858, note.

Effect of ancillary appointment after commencement of action by foreign executor or administrator.—4 L. R. A. (N. S.) 657, note.

(a) After the appointment in Maryland of an administrator upon the estate of a resident of California, a will, which named no executor, was established and probated in California, and a copy of it was filed in the Orphans' Court in Maryland, which had granted administration. *Held*, that that court had the power, in its discretion, to revoke the former letters of administration, and issue letters of administration cum testamento annexo, although the statute (Code 1860, art. 93, § 36) provides only for revocation of letters of administration by the issue of letters testamentary; and that such power was properly exercised without awaiting the result of a suit in equity brought by the heirs and next of kin, who claimed that the devise made by the will was void, and did not operate upon the Maryland property, to determine the effect of the will.—*Dalrymple v. Gamble*, 66 Md. 298, 7 Atl. 683. (See Code 1911, art. 93, § 35.) [Cited and annotated in 48 L. R. A. (N. S.) 861, on right of domiciliary executors and administrators, or their nominees, to ancillary letters; in 49 L. R. A. (N. S.) 896, on revocation of letters of administration upon discovery of will.]

(b) Where a testator in Ireland appointed executors there, and declared that a certain person should be trustee of his property in America, such trustee having taken out letters testamentary, and his duties imposed by the will as trustee being the same which he was bound by law to perform as administrator, he cannot discharge himself as administrator by a payment to himself as trustee.—*Hunter v. Bryson*, 5 G. & J. 483, 25 Am. Dec. 313.

### § 519. Collection and disposition of assets.

#### Annotation.

Distribution of assets to next of kin or beneficiary under will in jurisdiction of ancillary administration.—L. R. A. 1915A, 431, note.

(a) A voluntary payment by a debtor in Maryland to the executor or administrator of his creditor, appointed in the state of the creditor's domicile, is valid, and a good discharge of the debt. Such payment, having

been made before administration granted in Maryland, is a bar to the claim of the domestic administrator afterwards appointed; nor does the validity of such payment depend in any manner upon the fact of the nonexistence of debts against the deceased in Maryland.—*Citizens Nat. Bank v. Sharp*, 53 Md. 521.

(b) Where the decedent resided in another state, and died intestate there, an administration in Maryland is merely ancillary to the original administration in the place of the domicile of the testator, and any assets collected by the administrator in Maryland would be payable to the executors in the other state, and applicable to the payment of the expenses of administration there, and to the payment of debts and legacies; there being no proof that the testator owed any debts in Maryland.—*Wright v. Gilbert*, 51 Md. 146. [Cited and annotated in 4 L. R. A. (N. S.) 658, on effect of ancillary appointment after commencement of action by foreign executor or administrator.]

(c) What may be the necessary expenses attendant upon the administration in the state of the domicile will be left to the decision of the courts of that state, and will not be determined in the state of the ancillary administrator.—*Williams v. Williams*, 5 Md. 467.

(d) Where one of two executors applies for a transfer of such portion of the assets in the hands of an ancillary administrator as will be sufficient to pay the legatees residing in the state of the domicile, and the necessary costs attendant upon the administration in that state, and there is nothing to show that any of the legatees assent or object, the transfer should be allowed.—*Williams v. Williams*, 5 Md. 467.

(e) If there are two administrations upon one estate, that which is foreign to the state of the domicile is ancillary, and as a general rule the assets within such jurisdiction will be transferred to the place of the domicile; but this rule is not absolute. On the contrary, the transfer will or will not be made, as the court may deem proper, in the exercise of a sound judicial discretion, according to the circumstances of the case.—*Williams v. Williams*, 5 Md. 467.

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

(f) A citizen of Ohio executed his will there, and died, leaving real and personal estate in Maryland, and five children, residents of Ohio, two of whom were his executors. The other three filed a petition in the Orphans' Court of the city of Baltimore, where ancillary administration had been granted against the executors, alleging payment of debts, legacies, etc., and praying for an account and distribution of the assets in Maryland. *Held*, that the courts of Maryland were not bound to transfer the assets to Ohio for distribution.—*Cassilly v. Meyer*, 4 Md. 1.

### § 520. Sales and conveyances under order of court.

#### *Cross-Reference.*

Sales in general, see ante, § 519.

(a) A resident debtor died seized of land in Ohio, which was claimed by one of her children under a mortgage from the debtor. The other children disputed this claim, and a compromise was effected, whereby the land was sold on foreclosure, purchased by trustees, and subsequently conveyed to the parties in the proportion of seven-twelfths to the mortgagee and five-twelfths to the other heirs. *Held*, that as Code 1888, art. 16, § 188, authorizing the sale of a decedent's realty to pay his debts, can have no extra-territorial effect, and as the common law, which must be presumed to be in force in Ohio, does not make a decedent's land liable for his debts, a local court was without jurisdiction to decree a sale of the five-twelfths interest of the heirs to satisfy decedent's debts.—*Seldner v. Katz*, 96 Md. 212, 53 Atl. 931. (See Code 1911, art. 16, § 218.)

(b) Code 1888, art. 21, § 78, provides that all deeds duly acknowledged and recorded, made by executors of wills of nonresident testators, proved according to law, and conveying land in this state, shall be as effectual "as if made by executors under last will and testament, duly executed, proved, and recorded in the office of the register of wills in this state for lands lying therein, and whose sales of real estate under the authority of said will were duly made and reported to and ratified by an Orphans' Court in this state: provided," etc. *Held*, that executors under the wills of nonresident testators are

not required to report their sales of land for ratification to an Orphans' Court.—*Smith v. Montgomery*, 75 Md. 138, 23 Atl. 145. (See Code 1911, art. 21, § 81.)

(c) The Orphans' Court has no jurisdiction over sales of realty made by executors of a nonresident testator, where an authenticated copy of the will has not been filed in the office of the register of wills of the county where the realty lies, since act 1872, c. 451, conferring jurisdiction on the Orphans' Court over sales of realty by executors of the will of a nonresident testator, requires that it shall be so filed.—*Norment v. Brydon*, 44 Md. 112. (See Code, art. 21, § 81; art. 93, §§ 262, 354.)

### § 521. Presentation and allowance of claims.

#### *Cross-Reference.*

Allowance of claim as judgment on which creditors' suit may be based, see "Creditors' Suit," § 11.

#### *Annotation.*

Effect of failure to present claim within time allowed by administration statute of domicile as bar to its allowance in state of ancillary administration or vice versa.—19 L. R. A. (N. S.) 553, note.

### § 522. Payment of claims.

### § 523. Distribution of estate.

#### *Cross-Reference.*

Actions, see post, § 525.

(a) A citizen of Ohio executed his will there, and died, leaving real and personal estate in Maryland, and five children, residents of Ohio, two of whom were his executors. The other three filed a petition in the Orphans' Court of the city of Baltimore, where ancillary administration had been granted against the executors, alleging payment of debts, legacies, etc., and praying for an account and distribution of the assets in Maryland. All the parties interested in the assets being before the court in Maryland, and no circumstances showing any particular propriety or necessity for transferring the property to Ohio being presented, but, by so doing, further delay and expense would be incurred, distribution should be made in Maryland.—*Cassilly v. Meyer*, 4 Md. 1.

### § 524. Actions by foreign executors or administrators.

#### Cross-Reference.

Security for costs, see "Costs," §§ 105-145.

#### Annotation.

Right of foreign representative to maintain action for death of decedent under statute of another state which provides that the action shall be brought by the personal representative.—18 L. R. A. (N. S.) 1252, note.

(a) Foreign executors and administrators cannot begin or prosecute a suit in this state until they have filed their letters testamentary, or an attested copy.—*Wright v. Gilbert*, 51 Md. 146. (See Code 1911, art. 21, § 81; art. 93, §§ 76, 262, 354.) [Cited and annotated in 4 L. R. A. (N. S.) 658, on effect of ancillary appointment after commencement of action by foreign executor or administrator.]

(b) In Maryland a foreign executor cannot collect and administer assets due the testator, but a foreign executor may enforce in this state the payment of a judgment already recovered by him in the state where his letters testamentary were granted.—*Barton v. Higgins*, 41 Md. 539. [Cited and annotated in 39 L. R. A. (N. S.) 431, on right of domiciliary administrator to sue on judgment in another state.]

(c) In a suit by a foreign executor to enforce in Maryland the payment of a judgment already recovered by him in the state where his letters testamentary were granted, he should sue in his own name.—*Barton v. Higgins*, 41 Md. 539. [Cited and annotated, see supra.]

(d) Where a foreign executor sues in his representative capacity within the state to enforce payment of a judgment previously recovered by him in the state where his letters testamentary were granted, he need not make proof of his letters of administration.—*Barton v. Higgins*, 41 Md. 539. [Cited and annotated, see supra.]

(e) Act 1813, c. 165, authorizing suit to be maintained by persons granted letters testamentary or of administration in the District of Columbia, places such executors and administrators in respect to proof of their authority in the same position as Maryland

executors.—*Mangun v. Webster*, 7 Gill 78. (See Code, art. 93, § 76.)

(f) Copies of their letters testamentary, or of administration under the seal of the authority granting the same, are sufficient evidence to prove a grant thereof.—*Mangun v. Webster*, 7 Gill 78.

(g) An executor or administrator cannot, as such, maintain a suit in Maryland by virtue of letters granted in another state.—*Glenn v. Smith*, 2 G. & J. 493, 20 Am. Dec. 452.

### § 525. Actions against foreign executors or administrators.

#### Cross-References.

Federal judicial district in which action may be brought, see "Courts," § 269.

Injunction from federal court against proceedings in state probate court, see "Courts," § 508.

Judgment of Orphans' Court as bar to action in court of Common Pleas, see "Judgment," § 545.

Jurisdiction of justices of the peace, see "Justices of the Peace," § 40.

#### Annotation.

Right to revive suit and continue same against foreign representatives of deceased defendant over whom jurisdiction was obtained in his lifetime.—15 L. R. A. (N. S.) 632.

(a) Any creditor may sue an executor pro forma, as he is called, provided he shows himself to be a creditor under the laws of the country where the contract was made; and, as long as assets remain in the hands of such executor, he is answerable to the creditors, and, if there is any surplus, it is to go into the mass of the succession, to be distributed according to the laws of the country where the testator was domiciled.—*De Sobry v. De Laistre*, 2 H. & J. 191, 3 Am. Dec. 535. [Cited and annotated in 25 L. R. A. 450, 451, 460, on oral proof of foreign laws.]

### § 526. Accounting and settlement.

#### Cross-Reference.

Presumptions in action on administration bond, see post, § 537.

## XIII. LIABILITIES ON ADMINISTRATION BONDS.

#### Cross-References.

Essentials of decree on accounting, see ante, § 508.

Liabilities on special bonds for sale of property, see ante, § 392; on sale of



real estate under power in will, see ante, § 138.  
 Necessity and sufficiency of bond, see ante, § 26.  
 Presentation of claim against estate of deceased surety, see ante, § 225.  
 Repayment to administrator of money paid by him to reimburse his sureties, see ante, § 219.  
 Right of sureties to object to payment of claims, see ante, § 258.  
 Right of sureties to purchase claims against estate, see ante, § 220.  
 Right of sureties to require accounting, see ante, § 460.  
 Rights of surety as to deposit of funds of estate, see ante, § 105.  
 Right to object to account, see ante, § 504.  
 Scope of inquiry on accounting, see ante, § 507.  
 Sureties as parties to proceeding to compel accounting, see ante, § 472.  
 Conclusiveness of judgment as to executor who had notice of action, see "Judgment," § 675.  
 Decree fixing surety's liability on bond as claim against bankrupt's estate, see "Bankruptcy," § 315.  
 Right of sureties to subrogation, see "Subrogation," § 7.

### § 527. Nature and extent in general.

#### Annotation.

Penalty as limit of liability on bond.—55 L. R. A. 392, note.

(a) Act 1890, c. 263, § 4, authorized a certain corporation to become surety on any bond, and declared that it might provide for indemnity from the parties for whom it might become responsible. Code 1888, art. 90, § 1, provides that any surety of an executor or administrator who shall deem himself in danger from the suretyship may ask the Orphans' Court to require the administrator to give counter security. *Held*, that the corporation in question had the same rights as other sureties to apply for such counter security.—*March v. Fidelity & Deposit Co.*, 79 Md. 309, 29 Atl. 521. (See Code 1911, art. 90, § 1.) [Cited and annotated in 48 L. R. A. 591, on powers and privileges of surety and trust companies.]

(b) Under Code 1860, art. 91, § 1, providing that any security of an executor or administrator conceiving himself in danger from such securityship may apply to the Orphans' Court, and the said court "may require the party to give counter security," *held*, that the "may" was imperative.—*Siford v. Morrison*, 63 Md. 14. (See Code 1911, art. 90, § 1.) [Cited and annotated in 5 L. R. A. (N. S.) 343, on "may" in con-

stitutional or statutory provisions as mandatory.]

(c) The obligation of the sureties on an executor's bond is solely one of contract, and does not partake of the trust relation of the executor.—*Edes v. Garey*, 46 Md. 24.

(d) A counter security bond was signed by the defendants on the 21st of March, 1851, and left with the executor and principal obligor, who had been required by the Orphans' Court to give such for the security of his sureties. It was next seen in December, 1851, among the official papers of the court, and was approved by the court on the 9th of March, 1852. *Held*, upon the evidence that the bond was duly delivered and approved.—*Brown v. Murdock*, 16 Md. 521.

(e) A counter security bond, given to sureties upon an executor's bond, conditioned that "he should well and truly perform his duties as such," and that the sureties and their property should always be kept harmless and indemnified "from all actions, suits, payments, costs, charges," etc., "by reason of their suretyship," will bind the obligors for a judgment which the sureties have been compelled to pay, although the devastavit by the executor, upon which the judgment was founded, was committed before the execution of the bond.—*Brown v. Murdock*, 16 Md. 521.

(f) In an action on a bond given by an executor, under act 1798, c. 101, subc. 14, §§ 6, 7, conditioned to pay all the debts and claims against decedent, and all damages which shall be recovered against him as executor, and all legacies included in the will, a surety is bound with the principal to plaintiff, who claims under a debt due by the testator of the principal, regardless of whether or not there are assets sufficient to pay the claim.—*Duvall v. Snowden*, 7 G. & J. 430; *State v. Snowden*, *Id*; *State v. Nichols*, 10 G. & J. 27. (See Code, art. 93, §§ 38, 41, 49, 105, 290.)

(g) Where joint administrators unite in giving the same bond, they are jointly and severally liable, not only each for his own acts, but also each for the acts of his co-administrator.—*Clarke v. State*, 6 G. & J. 288. [Cited and annotated in 11 L. R. A. (N. S.) 307, on coexecutor's liability for default of one permitted to manage estate.]

(h) Act 1798, c. 101, subc. 15, § 20, declares that the Orphans' Court shall not exercise any jurisdiction not expressly conferred. Subc. 14, § 11, provides that, if the surety of an administrator believes that he is in danger of suffering from his suretyship, the court granting the administration can require counter security, and that, on failure to furnish such security, the court can order the property remaining in the administrator's hands to be delivered to the surety. *Held*, that the Orphans' Court has no jurisdiction to require a surety to whom the property belonging to a decedent has been delivered, on the administrator's failure to comply with an order for counter security, to afterwards redeliver the goods to the administrator; such jurisdiction not having been expressly conferred.—*Scott v. Burch*, 6 H. & J. 67. (See Code, art. 90, § 1; art. 93, § 262.)

(i) Act 1798, c. 101, subc. 14, § 11, provides that, where the surety of an administrator believes that he is in danger of suffering from his suretyship, the court may order counter security, and that, if such security is not furnished, it may order the property to be delivered to the surety for administration. *Held*, that, if the administrator afterwards suffers by the misconduct of the surety in diminishing any part of the property, his remedy is by a special action on the case to recover damages.—*Scott v. Burch*, 6 H. & J. 67. (See Code, art. 90, § 1.)

(j) Act 1798, c. 101, subc. 14, § 11, declares that, where the surety of an administrator believes that he is danger of suffering from his suretyship, the court may order counter security, and that, if such security is not furnished, it may order the property in the administrator's hands to be delivered to the surety. *Held*, that, where goods had been delivered to the surety on an administrator's failure to furnish counter security, the right of possession did not supervene to the administrator on the surety's death, since the order requiring the delivery to the surety operated to divest the administrator's title.—*Scott v. Burch*, 6 H. & J. 67. (See Code, art. 90, § 1.)

(k) Where the statute under which an administrator's bond was taken did not require

that bonds should be joint and several, but was silent on that subject, the fact that the bond given under order of the Orphans' Court was executed as a joint bond does not render it defective.—*Waters v. Riley*, 2 H. & G. 305, 18 Am. Dec. 302. (See Code, art. 93, §§ 38, 41, 49, 105, 290.)

### § 528. Property covered.

#### Annotation.

Decree directing transfer of fund by executor or administrator to himself in another fiduciary capacity as affecting liability of his sureties.—40 L. R. A. (N. S.) 1136, note.

Liability of administrator and his sureties for debt owing by the former to the estate of his intestate where administrator is hopelessly insolvent.—61 L. R. A. 313, note.

(a) Where testator bequeaths half of his estate to his wife, and half to K., in trust for P., half thereof passes, by operation of law, to P., in trust, at the expiration of the time appointed by law for settlement of the estate; so that bondsmen of the executors are not liable for devastavit thereafter committed.—*Woolley v. Price*, 86 Md. 176, 37 Atl. 644.

(b) Where a principal in a bond becomes executor of his surety's estate, and payment of such bond is enforced out of such estate, the amount so paid should be listed as a debt due his testatrix, and the executor charged therewith, and, on failure to do so, after his removal, an administrator d. b. n. may proceed against such executor and his sureties to establish such debt, under Code 1888, art. 93, § 224, requiring executors to include debts due from them in the list of debts due their testator.—*Kealhofer v. Emmert*, 79 Md. 248, 29 Atl. 68. (See Code 1911, art. 93, § 228.) [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

(c) An intestate's son conveyed to the administratrix all his interest in the estate, and administration was had and distribution made. After the son's death, intestate, his deed was annulled at the suit of his widow, and an account was taken of the amount due from the administratrix, and she was ordered to pay the same over to her son's administrators, but the order was not complied with. The distribution by the ad-

ministratrix was made before the deed was annulled, and the bill to set the deed aside proceeded on the theory that it was valid in its execution, but that it was merely an assignment of the son's share to the administratrix individually, to be held by her in trust for his wife and children. *Held*, that, in an action against the sureties on the bond of the administratrix, they should have been allowed to show that the deed was set aside for causes arising after its execution, and after the distribution by the administratrix, and that the son's share was held by the administratrix, under the deed, as a trustee, and not as administratrix, in which case the sureties would not be liable for her breach of trust.—*Jenkins v. State*, 76 Md. 255, 23 Atl. 608, 790. [Cited and annotated in 52 L. R. A. 1888, on effect against surety of judgment against officer; in 40 L. R. A. (N. S.) 712, 713, 716, on effect upon surety of judgment against principal.]

(d) S. bequeathed a sum of money to H., and L. became executor, giving a testamentary bond. The assets consisted principally of a debt due from L. to S., which debt L. gave in as a claim against himself, as required by the Code. *Held*, that the surety upon his testamentary bond was liable for H.'s legacy, without regard to the question of whether L. was or was not able to pay it.—*Lambrecht v. State*, 57 Md. 240. (See Code 1911, art. 93, § 228.) [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, on effect on debt of appointment of debtor as executor or administrator.]

(e) In 1873, W., as trustee, under a decree of a Circuit Court sold certain mortgaged premises, which sale was ratified in 1874. In May, 1876, W. was appointed administrator d. b. n. c. t. a. of the mortgagee, and in June, 1876, under order of the Circuit Court, the fund in the hands of W., trustee, was distributed by the auditor to W., administrator. In November, 1876, W. prepared his first and final administration account in the Orphans' Court, in which he charged himself with the money distributed to him as administrator. In January, 1877, W. died without having made affidavit to the account, which was sworn to by his executrix and filed in the office of the register of wills.

In a suit brought against the sureties on W.'s administration bond to recover the money received by him as administrator, *held*, that the fund which W. held as trustee should be considered as having been transferred by operation of law to him as administrator.—*Kirby v. State*, 51 Md. 383. [Cited and annotated in 40 L. R. A. (N. S.) 1137, on decree directing transfer by executor, administrator, or guardian to himself in another fiduciary capacity, as affecting liability of sureties.]

(f) A testator bequeathed the remainder of his estate to one H. in fee, and named him as executor, on condition that he pay to one J. a certain sum on his arrival at the age of 25 years; such sum to be charged on the estate so given. The executor filed a bond and passed his final account, showing a balance in his hands after payment of all debts and charges which was more than sufficient to pay the sum charged, and which was passed over to him as residuary legatee. *Held*, that, on his failure to pay such legacy, the bond given by him as executor was not liable.—*State v. Hewlett*, 48 Md. 138.

(g) Prior to act 1831, c. 315, § 10, money coming into the hands of an executor or administrator from his sale of real estate for the payment of debts was not covered by the testamentary or administration bond. By that act, the law was changed.—*Cornish v. Willson*, 6 Gill 299. (See Code, art. 93, § 290.) [Cited and annotated in 30 L. R. A. (N. S.) 824, on remedies for enforcement of legacy charged upon devise.]

(h) Where an administratrix marries, and the personal estate of decedent comes into the joint possession of the administratrix and her husband, and the husband is appointed guardian of minor heirs, the administratrix and her sureties are released from all responsibility on the administration bond, and her husband and his sureties become answerable on his bond as guardian.—*Seegar v. State*, 6 H. & J. 162, 14 Am. Dec. 265.

(i) An administrator de bonis non is not liable on his bond for property received from the executrix which she held in her capacity as guardian of the heirs.—*Downes v. State*, 3 H. & J. 239. [Cited and annotated in 16 L. R. A. (N. S.) 209, on transfer of funds

or securities from one estate to another by common trustee.]

(j) The nonpayment of a legacy to a grandchild, where the executor was named by the will as guardian of the child, is not a breach of his bond which will render his sureties liable.—*State v. Jordan*, 3 H. & McH. 179.

### § 529. Functions and acts covered.

#### Annotation.

Liability of surety on bond of executor or administrator for debt contracted in interest of estate.—22 L. R. A. (N. S.) 1094, note.

Liability on bond for default of coexecutor permitted to manage estate.—11 L. R. A. (N. S.) 306, note.

(a) A testator having desired, by a codicil to his will, that two individuals therein named (one being his executor) should continue his business for three years, the act of such individuals in so continuing the business charged them with the duty of returning the money invested in it, at the end of the three years, to the estate, as if it had been a loan to them; and for a failure on the part of the executor to collect such money at maturity the sureties of such executor are liable on their bond.—*State v. Wilmer*, 65 Md. 178, 3 Atl. 252.

(b) Detinue does not come within the condition of an administration bond.—*Hecking v. Howard*, 3 H. & McH. 203.

### § 530. Settlement and discharge of principal.

### § 531. Discharge of sureties.

#### Cross-Reference.

Effect of taking judgment against principal, see "Principal and Surety," § 110.

#### Annotation.

Decree directing transfer of fund by executor or administrator to himself in another fiduciary capacity as affecting liability of his sureties.—40 L. R. A. (N. S.) 1136, note.

(a) The fact that parties entitled in remainder procure the appointment of a receiver to collect funds belonging to the estate, and constituting the remainder, does not relieve from liability the sureties of the executor who should have collected such fund.—*State v. Wilmer*, 65 Md. 178, 3 Atl. 252.

(b) Where an executor sustains the two-fold character of executor and trustee under

a will, a transfer of property by operation of law from such person in his character as executor to himself as trustee will be adjudged after the time limited for the settlement of the estate, so as to exonerate the sureties on the executor's bond.—*State v. Cheston*, 51 Md. 352. [Cited and annotated in 16 L. R. A. (N. S.) 209, on transfer of funds or securities from one estate to another by common trustee.]

(c) Where a testator devised his estate to his children, share and share alike, but declared that, if his son should elect to carry on the business in which his father was then engaged, he should have the whole estate, and should in that event pay his brothers and sisters at a valuation, the election of the son accordingly, and his taking the estate, the debts being all paid, discharges the testamentary bond of the executor.—*Ellicott v. Ellicott*, 3 Gill 439.

(d) In an action on an executor's bond, a plea that, since the last continuance of the cause, the court which granted the letters testamentary had revoked them, is no bar to the plaintiff's right of recovery.—*State v. Blackistone*, 2 H. & G. 139.

(e) When a contest on a will is terminated by admitting the will to probate, authority under letters of administration granted pendente lite is at an end, though letters testamentary are not taken out; and suits upon the special administration bond, whether against the principal or his sureties, may be abated by them.—*State v. Craddock*, 7 H. & J. 40.

(f) After the lapse of a year, property of a decedent held by an executrix, who is also guardian of the legatees, will be presumed to have been transferred to herself as guardian, and to be held by her in the latter capacity.—*Downes v. State*, 3 H. & J. 239. [Cited and annotated in 16 L. R. A. (N. S.) 209, on transfer of funds or securities from one estate to another by common trustee.]

### § 532. Breach or fulfillment of condition.

#### Cross-Reference.

See post, § 537.

(a) An intestate's son conveyed to the administratrix all his interest in the estate,

and administration was had and distribution made. After the son's death, intestate, his deed was annulled, on the ground of fraud and undue influence, at a suit on behalf of his widow and children, and an account was taken of the amount due from the administratrix, and she was ordered to pay the same over to the son's administrators, which order was not complied with. *Held*, that, the deed being declared null, the distribution by the administratrix became null also, and the sureties on her bond were liable for her failure to distribute as directed by the order of the court after the deed was annulled.—*Jenkins v. State*, 76 Md. 255, 23 Atl. 608, 790. [Cited and annotated in 52 L. R. A. 188, on effect against surety of judgment against officer; in 40 L. R. A. (N. S.) 712, 713, 716, on effect upon surety of judgment against principal.]

(b) Where executors or administrators fail to follow the statute provisions in regard to the distribution of estates, their bonds are responsible to an absent heir for his portion of the estate, although his whereabouts were unknown at the time, if he appear within 12 years or before limitations run.—*Shriver v. Reister*, 65 Md. 278, 4 Atl. 679; *Shriver v. State*, Id. [Cited and annotated in 2 L. R. A. (N. S.) 809, on necessity for inquiry to raise presumption of death from seven years absence; in 37 L. R. A. (N. S.) 369, on notice of distribution in probate proceedings as jurisdictional.]

(c) Under Code 1860, art. 93, § 243, which provides that a removed executor or administrator shall deliver over to his successor all property remaining in his hands unadministered, including choses in action and funds, and that he shall also pay over to such successor "all the money due to him as executor or administrator," the successor of a removed executor may recover from the latter not only all the property of decedent which the removed executor had in his possession, but also the value of decedent's property wasted or converted to his own use by the removed executor.—*State v. Smith*, 64 Md. 101, 20 Atl. 1037. (See Code 1911, art. 93, § 248.)

(d) Code 1860, art. 93, § 320, provides that letters testamentary shall be revoked if the

court subsequently decides against the probate of the will. Section 243 provides that whenever the Orphans' Court shall revoke letters testamentary or of administration, and the party whose letters shall be revoked shall not, within a reasonable time, deliver over to the new administrator all the unadministered assets in his hands, the court may direct a suit on his bond. *Held*, that after the setting aside of a will, and the revocation of the letters of an administrator with the will annexed, the sureties on his bond, conditioned that he should perform the duties of his office "according to law," were liable for his refusal to turn over the assets in his hands to the administrator appointed to succeed him.—*State v. Smith*, 64 Md. 101, 20 Atl. 1037. (See Code 1911, art. 93, §§ 248, 348.)

(e) After an executor's sale duly ratified and a conveyance to the purchaser, the executrix failed to produce the proceeds on the ground that her coexecutor, who managed the business, was dead, and she could not respond; and an administrator de bonis non was appointed, who brought suit on the executor's bond. *Held*, that defendant could not show by the purchaser that no money was paid for the property.—*Campbell v. State*, 62 Md. 1.

(f) When an executrix who has given bond fails, for 13 months, to pay a specific legacy, payable in money out of the general assets, the bond becomes forfeited, and the legatee has, under the laws, a clear and undoubted right to maintain an action thereon for the breach.—*State v. Wilson*, 38 Md. 388.

### § 533. Necessity of accounting and default by principal.

#### Cross-Reference.

Proceedings to establish claim, see post, § 534.

(a) Under Code 1904, art. 93, § 290, and in view of art. 81, § 129, the Orphans' Court of the City of Baltimore *held* to have jurisdiction to order the sale of land lying in the county which belonged to an intestate who resided in the city; this power not being impaired by art. 16, § 83.—*Cain v. Miller*, 117 Md. 45, 82 Atl. 1055. (See Code 1911, art. 16, § 87; art. 81, § 132; art. 93, § 293.)

(b) A proceeding by an administrator for

the sale of his testator's land to pay unsecured debts held not a proceeding to enforce a "charge," and hence not within the provisions of Code 1904, art. 16, § 83.—*Cain v. Miller*, 117 Md. 45, 82 Atl. 1055. (See Code 1911, art. 16, § 87.)

(c) An action cannot be maintained on an administration bond by a creditor of the deceased before a non est inventus is returned on a *capias ad respondendum* against the administrator, or a *fi. fa.* returned *nulla bona*.—*Seegar's Ex'rs v. State*, 5 H. & J. 488.

#### § 534. Necessity and sufficiency of proceedings for recovery against principal.

##### Cross-References.

See post, § 537.

Proceedings to establish devastavit or default in payment, see ante, § 533.

(a) Code 1904, art. 93, § 100, requiring an administrator to pay each claimant his just proportion of the money in his hands, etc., and § 104, providing that no creditor shall sue on an administration bond for any "debt or damages" due from decedent before a non est in a summons is returned against the administrator of a *feri facias* returned *nulla bona* or the insolvency of the estate of the administrator otherwise appears, must be read together, and a creditor whose debt has been established cannot sue on the administration bond without complying with § 104.—*State v. Moore*, 108 Md. 636, 71 Atl. 461. (See Code 1911, art. 93, §§ 101, 105.)

#### § 535. Conclusiveness of adjudication against principal.

##### Cross-References.

Settlement without approval of court, see ante, § 530.

Surety as party aggrieved by judgment against principal giving right of review, see "Appeal and Error," § 151.

##### Annotation.

Effect on surety of judgment against principal.—52 L. R. A. 187; 40 L. R. A. (N. S.) 708, notes.

(a) A judgment by confession by an administrator *d. b. n.* is only *prima facie* evidence of sufficiency of assets, as against the sureties on his bond.—*Kearney v. Sascor*, 37 Md. 264. [Cited and annotated in 40 L. R. A. 44, an assets passing to administrator *de bonis non*; in 40 L. R. A. (N. S.) 726, 748,

on effect upon surety of judgment against principal.]

(b) The confession of a judgment by an administrator is conclusive on him, as well as to the debt confessed as to the sufficiency of the assets to pay it.—*Iglehart v. State*, 2 G. & J. 235. [Cited and annotated in 52 L. R. A. 187, on effect against surety of judgment against officer; in 40 L. R. A. (N. S.) 748, on effect upon surety of judgment against principal.]

(c) Though the confession of a judgment by an administrator is conclusive on him as to the debt confessed and the sufficiency of assets to pay, it is only *prima facie* evidence of such facts against the security, as, not being a party to the judgment, he cannot be concluded by it.—*Iglehart v. State*, 2 G. & J. 235. [Cited and annotated, see supra.]

(d) In an action on an administration bond in the County Court, the account of the administrator as the same stood stated in the Orphans' Court is not conclusive evidence of the account.—*State v. Massey*, 3 H. & J. 276, note.

#### § 536. Summary remedies.

#### § 537. Actions.

##### Cross-References.

See ante, § 532.

Dismissal as to surety as discharge from liability, see ante, § 531.

Action by legatee on bond as extinguishment of charges on real estate, see "Wills," § 825.

Bringing suit in name of real party in interest, see "Parties," § 6.

Joinder of causes of action, see "Action," § 50.

Jurisdiction of federal courts of action by assignee of a share in estate as affected by the citizenship of the assignor, see "Courts," § 312.

Verdict on several counts, or issues, see "Trial," § 330.

##### Judgment and review.

Appellate jurisdiction of suits on bonds, see "Courts," § 226.

Executor or administrator as party aggrieved giving right of review, see "Appeal and Error," § 151.

Merger and bar of causes of action, see "Judgment," § 560.

##### Limitation of actions.

Accrual of right of action as affecting limitations, see "Limitation of Actions," § 47.

Application of general statute of limitations, see "Limitation of Actions," §§ 34, 39.

Conditions precedent affecting accrual of right of action, see "Limitation of Actions," §§ 65, 69.

Death affecting computation of period of limitation, see "Limitation of Actions," § 83.

Disabilities affecting limitations, see "Limitation of Actions," § 102.

Necessity of leave to sue as affecting running of statute of limitations, see "Limitation of Actions," § 69.

#### *Pleading.*

Amendment setting up new cause of action, see "Pleading," § 248.

Demurrer to pleading good in part, see "Pleading," § 204.

Duplicity, see "Pleading," § 64.

Pleading bond, see "Pleading," § 32.

#### *Annotation.*

Right to sue executor or administrator, on his bond, in a state other than that of his appointment.—35 L. R. A. (N. S.) 334, note.

(a) Under Code 1888, art. 93, § 70, authorizing an administrator de bonis non to administer all assets not converted into money and not distributed and delivered, or retained by the executor; and § 72, providing that the court shall, on application of an administrator de bonis non, order the administrator of a deceased administrator to deliver all bonds, notes, accounts, and evidences of debt which the deceased administrator may have taken or had as administrator at the time of his death, and also to pay over to him the money in his hands as such—an administrator de bonis non has no capacity to sue the surety on the bond of a deceased executor, his predecessor, for an alleged devastavit committed by him.—*State v. Fidelity & Deposit Co.*, 100 Md. 256, 59 Atl. 735, 108 Am. St. Rep. 410. (See Code 1911, art. 93, §§ 70, 72.)

(b) Where defendant, as surety, executed an executor's bond, the Orphans' Court, on a showing after the executor's death that he had committed a devastavit, had power to appoint a trustee at the instance of the beneficiaries under the will, to maintain a suit against defendant on the bond.—*State v. Fidelity & Deposit Co.*, 100 Md. 256, 59 Atl. 735, 108 Am. St. Rep. 410.

(c) In an action by an administrator d. b. n. against an executor, who has been removed, and his sureties, to enforce a debt due from him to the estate, but not listed as required by Code 1888, art. 93, § 224, per-

sonal jurisdiction of the executor is necessary.—*Kealhofer v. Emmert*, 79 Md. 248, 29 Atl. 68. (See Code 1911, art. 93, § 228.) [Cited and annotated in 26 L. R. A. (N. S.) 414, 415, 416, on effect on debt of appointment of debtor as executor or administrator.]

(d) An heir suing on an executor's bond for his portion of an estate, which was not set aside in the distribution thereof, must show what that portion would have been, and cannot presume the death of another who has been for years unheard of.—*Shriver v. State*, 65 Md. 278, 4 Atl. 679; *Shriver v. Roister*, Id. [Cited and annotated in 2 L. R. A. (N. S.) 809, on necessity for inquiry to raise presumption of death from seven years absence; in 37 L. R. A. (N. S.) 369, on notice of distribution in probate proceedings as jurisdictional.]

(e) A receiver appointed to collect assets of the estate in danger of being lost by reason of the refusal of the executor to collect them may maintain a suit against the sureties of the executor, in the name of the state, for his failure to make such collection.—*State v. Wilmer*, 65 Md. 178, 3 Atl. 252.

(f) Where an administratrix absconded with funds in her hands subject to distribution, one of the next of kin entitled to part of such funds was entitled to sue the distributee of the estate of a deceased surety on such bond; 12 years not having elapsed from the time of the default, allowing 13 months for the settlement of the estate.—*Hagerty v. Mann*, 56 Md. 522.

(g) Where an administratrix having funds in her hands for distribution absconded, and one of her sureties died, and his estate was settled and distributed among the persons entitled thereto, and one of the next of kin of the administratrix sued the remaining surety on the bond and recovered judgment, on which a fi. fa. was issued and returned unsatisfied, the distributee of the deceased surety was not entitled to combine the defenses of settlement and laches in defense of an action against them on such judgment in order that the one defense might supply the deficiencies in the other.—*Hagerty v. Mann*, 56 Md. 522.

(h) In suit upon an executor's bond, to recover the amount of a legacy alleged to be

unpaid, a record of proceedings in the Orphans' Court, showing the indebtedness of the executor to plaintiff, and containing the order of that court directing its payment, is admissible.—*Ruby v. State*, 55 Md. 484.

(i) The presumption of a transfer by operation of law is not made conclusive, as against sureties on an administration bond, from the fact that a person who had property in his possession as trustee has, at his will, charged himself with it in a new capacity of administrator. If the property has been actually wasted and squandered, neither the presumption of law nor the admission of the party will always operate a transfer, when in reality nothing existed to transfer.—*Kirby v. State*, 51 Md. 383. [Cited and annotated in 40 L. R. A. (N. S.) 1137, on decree directing transfer by executor, administrator, or guardian to himself in another fiduciary capacity, as affecting liability of sureties.]

(j) A bill in equity will not lie against an administrator and the sureties on his bond for a devastavit or misappropriation of assets, but the creditor's sole remedy is by action on the bond at law.—*Edes v. Garey*, 46 Md. 24.

(k) The death of an executor does not affect the liability of his sureties as surviving obligors in an action at law, so as to give a court of equity jurisdiction of an action on the bond.—*Edes v. Garey*, 46 Md. 24.

(l) A confession of judgment of fiat by an administrator d. b. n. is only prima facie evidence of sufficiency of assets in his hands as against the sureties on his bond.—*Kearney v. Sascor*, 37 Md. 264. [Cited and annotated in 40 L. R. A. 44, on assets passing to administrator de bonis non; in 40 L. R. A. (N. S.) 726, 748, on effect upon surety of judgment against principal.]

(m) A capias being issued and returned against an executor on a bond of the testator, he may voluntarily appear at any time during the term, even after a return of non est, and by so doing prevent a suit on his bond, but a subsequent appearance will not prevent such suit.—*Sprigg v. Jones*, 8 Md. 88; *State v. Jones*, Id.

(n) In an action on an administration bond by an assignee of the obligee of the intes-

tate, an objection to the admissibility of the bond in evidence does not raise any question as to the assignment.—*Burgess v. State*, 12 G. & J. 64.

(o) A widow sued her husband's executor upon his bond, claiming her third of the estate. The replication, assigning the breach, alleged the nonpayment of her third of a debt due from the executor himself, without averring that she was entitled to such third after the payment of debts. Held, that it was bad on general demurrer.—*State v. Gaither*, 11 G. & J. 160.

(p) In an action on a bond given by an executor under act 1798, c. 101, subc. 14, §§ 6, 7, conditioned to pay all the debts and claims against decedent, and all damages which shall be recovered against him as executor, and all legacies included in the will, plaintiff need not show assets.—*State v. Snowden*, 7 G. & J. 430. (See Code, art. 93, §§ 38, 41, 49, 105, 290.)

(q) In an action upon an administration bond, where the breach assigned was an inventory returned by the administrator, and that, after sundry disbursements made, there remained a balance of said inventory in the hands of the administrator to be distributed, of which the plaintiff claimed a portion as distributee, and the issue was made up upon the truth of such breach, the plaintiff cannot insist upon charging the defendant with anything not in the inventory; and the hire of negroes, which accrued after the date of the inventory, could not be recovered, in such a state of the pleadings.—*Edelen v. State*, 4 G. & J. 277.

(r) Where the personal estate of an intestate consisted of slaves, it was held, in an action upon the administration bond by a distributee, that the plaintiff could not recover both the appraised value of the slaves and the increase and hire of such slaves from the time of granting the letters or the appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to, and real value at, the time of bringing his action, and the pleadings must disclose which course he elects to take.—*Burch v. State*, 4 G. & J. 444.

(s) In an action upon an administration bond by a distributee, the defendant filed an



account for expenses furnished by him to the plaintiff since the intestate's death, in bar, to which non assumpsit and the act of limitations were pleaded. *Held*, that the plaintiff could not, at the trial, for the purpose of showing that the defendant was entitled to no credit for the items charged in the account, prove that the defendant entered upon and received the rents and profits of real property which descended to the plaintiff.—*Burch v. State*, 4 G. & J. 444.

(t) Under act 1720, c. 24, § 2, providing that an administrator's bond shall not be sued on until proceedings have been had to recover the money from the administrator, or out of the effects of the deceased, unless the estate or the administrator is insolvent, and requiring that a *capias ad respondendum* should have issued in the county where the administrator resides, it is necessary to aver the fact of his residence; and an allegation that the writ was sued out against the administrator, and returned in the county where it appeared from the proof that the intestate lived, and where letters were granted, and where in fact the administrator was sued on his bond, without alleging that he lived in such county, was insufficient.—*Dorsey v. Pannell*, 4 G. & J. 471; *Dorsey v. State*, *Id.* (See Code, art. 93, § 105.)

(u) A creditor obtained judgment against an executor by confession, who thereupon stayed execution by a writ of error and bond. While the case was pending in the appellate court, the executor died, and the writ of error was abated. The executors, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *de bonis non* of the first deceased did not find sufficient assets to discharge the debt. In an action on the executor's testamentary bond, against his surety, a replication disclosing the above facts was *held* sufficient on general demurrer, and a compliance with act 1720, c. 24.—*Iglehart v. Mackubin*, 2 G. & J. 235; *Iglehart v. State*, *Id.* (See Code, art. 93, § 105.) [Cited and annotated in 52 L. R. A. 187, on effect against surety of judgment against officer; in 40 L. R. A. (N. S.) 748, on effect upon surety of judgment against principal.]

(v) A creditor obtained judgment against his executor by a confession, who thereupon

stayed execution by a writ of error and bond. While the case was pending the executor died, and the writ of error was abated. The executors, who had received assets sufficient to pay the judgment, died insolvent, and the administrator *d. b. n.* did not find sufficient assets to discharge the debt. In an action against a surety on the executor's bond, the defendant rejoined that the "executors had no goods or chattels which were of the deceased testator at the time of his death in his hands to be administered, nor had at any time thereafter." *Held*, on demurrer, that this rejoinder could not be received as a general plea extending over the entire time from the death of the testator to the death of the executor, but that it could only be considered as a plea of *plene administravit*, or a substitute for such plea, and, as such, was materially defective.—*Iglehart v. Mackubin*, 2 G. & J. 235; *Iglehart v. State*, *Id.* [Cited and annotated, see *supra*.]

(w) The bond required from executors by act 1798, c. 101, subc. 14, § 6, is a testamentary bond, within the meaning of the act of limitations (act 1729, c. 24, § 21); and an action upon such bond, not commenced within 12 years after the passing of the same, will be barred by said act.—*State v. Boyd*, 2 G. & J. 365. (See Code, art. 57, § 3; art. 93, §§ 38, 41, 49, 105, 290.)

(x) In an action on a testamentary bond, after the plaintiff had filed his declaration, the defendant confessed a judgment for the penalty of the bond and costs, with an agreement that the judgment should be void on payment of 3,900 pounds of net crop tobacco, with interest until paid, and costs. *Held*, that this confession superseded the necessity of assigning breaches of the condition of the bond, and authorized a judgment for the plaintiff.—*Laidler v. State*, 2 H. & G. 281.

(y) In an action on an administration bond, a replication which showed the existence of a debt due from the intestate, and that the administrator was in insolvent circumstances, would render the surety liable, unless he could prove that the estate of the deceased had been duly administered.—*State v. Cox*, 2 H. & G. 379.

(z) Upon the death of an executor, B. was appointed administrator *de bonis non*. In

an action on the executor's bond against his administratrix, to recover the distributive shares due to certain legatees under the will, the replication, in assigning the breach, stated, among other things, that B. had duly administered all the goods, etc., which came to his hands, but that the executor did not duly and properly administer the goods of the testator, but misapplied and wasted them; that, by the inventory of the testator's estate, among other property was one negro boy, of the value of, etc., which property was misapplied, wasted, and consumed by the executor, etc. *Held*, that the action could not be maintained.—*State v. Hanson*, 2 H. & G. 437.

(aa) A testator willed that the proceeds of the sale of certain property should be equally divided between his brother J. and his brother G.'s six children, naming them. *Held*, in an action on the executor's bond, that the jury should be instructed that, if they should not find that G. had left six children, then they should find for the defendant.—*Maddox v. State*, 4 H. & J. 539.

(bb) In an action on an administration bond given to the state by the executor of L., brought in the name of the state, at the instance of the administrator of J., and the six children, by name of G., legatees under the will of L., it was objected that, under the pleadings and issues in the case, the state could not recover unless proof was produced that all the persons for whose use the suit was brought were alive at the trial. *Held*, that, on the issues, the jury could not find that any of those persons were dead unless some proof of their death was produced to them, and that, in the absence of such proof, the legal inference was that they were alive.—*Maddox v. State*, 4 H. & J. 539.

(cc) In an action on an administration bond executed by an administrator de bonis non, brought to recover a legacy, the defendant rejoined that the writ issued before the expiration of 12 months from the date of her letters of administration. A demurrer thereto was ruled good.—*Mann v. State*, 3 H. & J. 237.

(dd) A. bequeathed a legacy to B. by her will in 1775, to be paid to her on the day of her marriage, and made C. her executor and

residuary legatee. C. returned an inventory in 1776, and settled an account, leaving a balance due the estate. After his death, administration de bonis non was granted to D., who neither returned any inventory nor settled any account, though it was proved that sundry negro slaves included in the inventory returned by C. after his death came to the hands of D. In an action against D., on her bond, to recover the legacy bequeathed to B., it was *held* that the above facts were sufficient to support an issue joined by the plaintiff to the rejoinder of no assets.—*Mann v. State*, 3 H. & J. 237.

(ee) In an action on a bond of A. as administrator de bonis non of B., the plaintiff replied to the defendant's plea that there remained in the hands of A. property to a certain amount, clear personal estate, after payment of debts due and payable to C., the daughter of B. The defendant rejoined that D., the former executor, did, as the guardian of C., receive, and, as executor of B., did pay and satisfy to himself, as guardian of C., the said sum. A demurrer thereto was ruled bad.—*Downes v. State*, 3 H. & J. 239. [Cited and annotated in 16 L. R. A. (N. S.) 209, on transfer of funds or securities from one estate to another by common trustee.]

(ff) In an action on an administration bond, the condition of which was not in the words of the form prescribed by act 1798, c. 101, subc. 3, § 11, or subc. 14, § 6, the defendant pleaded general performance; and to the replication, which assigned for breach the nonpayment of an account which the person for whose use the action was brought had against the deceased, the defendant demurred generally. The demurrer was overruled.—*Hamilton v. State*, 3 H. & J. 503. (See Code, art. 93, §§ 38, 41, 49, 105, 290.)

(gg) On a plea of no assets in an action on an executor's bond, the onus probandi is on the plaintiff.—*Morgan v. Slade*, 2 H. & J. 38; *Wilson v. Same*, Id. 281.

(hh) In an action upon an executor's bond, he cannot give in evidence that he has equally and proportionately, or nearly so, distributed the residue of the personal estate, after payment of debts, among the several legatees.—*Morgan v. Slade*, 2 H. & J. 38.

(ii) A copy of a paper purporting to be an additional inventory of decedent's estate, certified under the hand and seal of the register of wills to be a true copy taken from the original additional inventory, offered, but not proved, by the administrator, and lodged in the office of the register, is not competent evidence, in an action against the surety on the administration bond, to charge the administrator with the amount of goods and chattels as therein mentioned.—*Emory v. Thompson*, 2 H. & J. 244.

(jj) In debt on an administration bond, the defendant pleaded conditions performed. The plaintiff replied a judgment recovered against the executor, who had assets, and his refusal to pay. The defendant rejoined assets, with an encore prist. *Held*, a departure.—*Lord Proprietary v. Cockshut*, 1 H. & McH. 40.

(kk) In an action on an administrator's bond, where defendant pleaded special performance, and the replication alleged that the action ought not to be barred, because the defendant did not exhibit any inventory of goods and chattels, and this he prays may be inquired of by the country, the replication is not demurrable for that it concludes to the country, and because it ought to have averred that the defendant might have set forth the goods and chattels, that the parties might have traversed the plenitude thereof.—*Lord Proprietary v. Gibbs*, 1 H. & McH. 58.

#### XIV. EXECUTORS DE SON TORT.

##### *Cross-Reference.*

Executor de son tort as trustee for heirs, see "Descent and Distribution," § 91.

##### § 538. Acts which constitute one executor de son tort.

(a) Defendant, after his debtor's death, took possession of 50 cows covered by bills of sale, absolute on their face, executed during the debtor's lifetime. Upon bill filed by another creditor of deceased to set aside the bills of sale as fraudulent, and for general relief, the court decided that there was no sufficient evidence to countervail the presumption of the bona fides of the consideration of the sale, but found the description in the bills insufficient to pass title; and in sub-

sequent proceedings defendant was treated as executor de son tort, and his debt postponed to those of other creditors. *Held*, that defendant's averment that he took possession in good faith and under color of title will not relieve him from liability as executor de son tort, as the bill filed against him gave him sufficient notice that his title was disputed.—*Baumgartner v. Haas* 68 Md. 32, 11 Atl. 588.

(b) The owner of freehold and leasehold property died intestate in 1810, leaving a widow and three children. The widow received the rents and profits, educated her children, and in 1816 married again, settling her proportion of the estate for life, with the remainder to the three children. In 1821 she settled her final administration account, and passed the leasehold title to her children. In 1831 all the parties interested united to sell a portion of the estate; the purchase money going to one of the children, who released his interest in the residue to the other two. In 1842 one of the children admitted in writing the receipt of certain sums of money during the three previous years, stating that "in 1839 it was agreed I should receive a part of the rent money out of my father's estate." In that writing she claimed a small balance due, and offered to pay her proportion of the taxes. *Held*, that the widow, having received and distributed the rents of the property up to 1839, with the consent and acquiescence of the children, could not be regarded as an intruder into, or a voluntary trustee over, the estate.—*Sindall v. Campbell*, 7 Gill 66.

(c) The taking of goods of an intestate by a stranger, and using or selling them, or in any way intermeddling with them, will make him an executor de son tort, and chargeable with the debts of the deceased, so far as assets come to his hands.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate; in 15 L. R. A. 491, on necessity for administration in devolution of decedent's personalty; in 40 L. R. A. 45, on assets passing to administrator de bonis non.] *Glenn v. Smith*, 2 G. & J. 493, 20 Am. Dec. 452.

(d) One who holds a property under a conveyance or deed of gift void against the creditors of a deceased grantor may be treated by those creditors as an executor de son tort of the grantor.—*Dorsey v. Smithson*, 6 H. & J. 61. [Cited and annotated in 50 L. R. A. (N. S.) 322, on right of personal representative to avoid conveyance by decedent in fraud of creditors.]

**§ 539. Operation and effect of unauthorized acts.**

*Cross-Reference.*

See ante, § 488.

**§ 540. Liabilities to rightful executor or administrator.**

(a) Any person taking possession of the personal property of an intestate's estate, without consent of the administrator or any deed from him, will be considered in equity as a trustee, accountable to the administrator, no matter how long he may have had possession before the administration was granted.—*Hagthorp v. Hook*, 1 G. & J. 270. [Cited and annotated, see supra, § 538.]

**§ 541. Liabilities to creditors.**

(a) At law the executor de son tort is required to pay the assets to other creditors, though nothing would be left to pay his own claim.—*Baumgartner v. Haas*, 68 Md. 32, 11 Atl. 588.

(b) An executor de son tort, as against creditors, is justified in paying debts of the deceased, and, if sued by them, he may plead plene administravit, and will be allowed all payments of just debts in due course of administration, though he cannot retain any of the goods of the deceased in satisfaction of his own debts.—*Glenn v. Smith*, 2 G. & J. 493, 20 Am. Dec. 452.

**§ 542.** (Omitted from the classification used herein.)

**§ 543. Effect of subsequent administration by executor de son tort.**

**§ 544. Actions.**

*Cross-Reference.*

Misjoinder of causes of action, see "Actions," § 38.

(a) A suit by creditors of an estate to order an executor de son tort to account, and bring the proceeds into court for distribution among them, postponing such executor's

claims to theirs, is not a suit to enforce a penalty, against which equity may relieve, but simply to recover a just debt.—*Baumgartner v. Haas*, 68 Md. 32, 11 Atl. 588.

(b) A. bought on credit from an executor de son tort chattels belonging to the estate of the deceased. Held, that A. could defend an action by the vendor for the price by showing that he had paid a part thereof to the legally appointed administrator on demand, and had given his note to the administrator for the balance.—*Rockwell v. Young*, 60 Md. 563. [Cited and annotated in 22 L. R. A. (N. S.) 455, on right of next of kin to maintain action in interest of estate.]

(c) Where there is no formal prayer in a bill for an accounting against persons in possession of property of a decedent's estate, yet, if the facts charged show that defendant has rendered himself liable as an executor de son tort, the plaintiff will be entitled to an accounting under the prayer for general relief.—*Bentley v. Cowman*, 6 G. & J. 152.

(d) In trover by a rightful executor against one de son tort for the goods of the deceased, the defendant cannot plead payment of the debts to the value, or that he has given goods in satisfaction of debts; but, under the general issue, he may give in evidence such payments, and they will be recouped in damages, if they be such as the plaintiff would have been bound to make in the due course of administration.—*Glenn v. Smith*, 2 G. & J. 493, 20 Am. Dec. 452.

(e) An executor de son tort, being summoned, appeared to an action of debt brought against deceased, confessed the action, and admitted the debt was due the plaintiff. An auditor was thereupon appointed to ascertain the sum for which the judgment should be rendered, according to act 1798, c. 101, subc. 8, § 9. This appointment of auditor was afterwards stricken out by the County Court, and a judgment was rendered, on the confession above mentioned, for the debt and costs de bonis testatoris; si non, de bonis propriis as to costs. This judgment was reversed by the Court of Appeals as erroneous.—*Norfolk v. Gantt*, 2 H. & J. 435.

**EXECUTORS DE SON TORT.\****Cross-References.*

See "Executors and Administrators," §§ 538-544.

**EXECUTORY CONTRACTS.\****Cross-References.*

In general, see "Contracts."

Agreements for leases in general, see "Landlord and Tenant," § 22.

Agreements for mining leases, see "Mines and Minerals," § 57.

Agreements to assign patents for inventions, see "Patents," § 195.

As constituting accord and satisfaction, see "Accord and Satisfaction," § 19.

Assignment, see "Assignments," §§ 18, 19. Distinguished from conveyances, see "Deeds," § 6.

For release of claims, see "Release," § 5.

For sale of land, as color of title, see "Adverse Possession," § 72.

Hostile character of possession of vendee under executory contract, see "Adverse Possession," § 63.

Maritime contracts, see "Admiralty," § 10.

Of sale, see "Sales," §§ 61, 197, 198, 206-214; "Vendor and Purchaser," § 53.

Possession by purchaser under executory contract, as adverse, see "Adverse Possession," § 62.

Possession of vendee under executory contract as possession of his vendor for purpose of tacking, see "Adverse Possession," § 43.

Remedy by suit in rem against vessel for violation of executory contract, see "Admiralty," § 28.

To form partnership, see "Partnership," § 21.

**EXECUTORY DEVICES.\****Cross-References.*

Construction of wills, see "Wills," § 625.

Property subject to sale, see "Vendor and Purchaser," § 7.

**EXECUTORY ESTATES.***Cross-References.*

See "Remainders"; "Reversions"; "Wills," §§ 628-638.

**EXECUTORY PROCESS.\****Cross-Reference.*

See "Mortgages," § 499.

**EXECUTORY REMAINDERS.\****Cross-References.*

Creation, see "Deeds," § 133; "Wills," §§ 628-638.

Requisites and validity, see "Remainders," § 4.

**EXECUTORY TRUSTS.\****Cross-Reference.*

See "Trusts," § 144.

**EXEMPLARY DAMAGES.\****Cross-Reference.*

See "Damages," §§ 7-94.

**EXEMPLIFICATIONS.\****Cross-References.*

As evidence, see "Criminal Law," § 430; "Evidence," §§ 338-349.

**EXEMPTIONS.\****Scope-Note.*

[INCLUDES exemption from liability to seizure and sale, under legal process for payment of debts, of property of debtors, more particularly of personal property; constitutional and statutory provisions for such exemption; nature, grounds and extent thereof in general; who are entitled to benefit of such exemptions; what articles, amount or value, are exempt; against what liabilities exemption is allowed; waiver or loss of right to exemption; and protection and enforcement of the right.

[EXCLUDES exemption from forced sale of real property as homestead (see "Homestead"); exemption of property of decedents from administration, and allowances therefrom to widow or family of decedent (see "Executors and Administrators"); and exemption from taxation (see "Taxation").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Nature and Extent.****(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.**

- § 1. Nature of right.
- § 2. What law governs.
- § 3. Constitutional and statutory provisions.
- § 4. Construction of exemption laws in general.
- § 5. Retroactive operation.
- § 6. — Liabilities and liens existing before exemption law.

\*Annotation: Words and Phrases, same title.

**I. Nature and Extent—Continued.****(A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL—Continued.**

- § 7. — Liabilities existing before acquisition of right of exemption.
- § 8. Effect of change or repeal of exemption.
- § 9. Intent in acquisition of property.
- § 10. Nature and extent of right created.
- § 11. Effect of ownership of other property.
- § 12. Exemption of personal property instead of homestead.
- § 13. Duration and termination.

**(B) PERSONS ENTITLED.**

- § 14. Debtors of defendants.
- § 15. Family relation in general.
- § 16. Head of family and members thereof.
- § 17. Householders.
- § 18. Housekeepers.
- § 19. Married women.
- § 20. Children.
- § 21. Unmarried persons.
- § 22. Particular occupations.
- § 23. Persons in military or naval service.
- § 24. Aged or infirm persons.
- § 25. Citizenship.
- § 26. Residence.
- § 27. — Domicile in general.
- § 28. — Residing with family.
- § 29. — Absence or removal.
- § 30. Surviving husband, wife, children, or next of kin.

**(C) PROPERTY AND RIGHTS EXEMPT.**

- § 31. General exemptions of personal property.
- § 32. Property within general exemption.
- § 33. — Nature in general.
- § 34. — Money.
- § 35. — Rights of action in general.
- § 36. Amount of exemption and value of property.
- § 37. Specific exemptions in general.
- § 39. Food and provisions.
- § 40. Wearing apparel and material therefor.
- § 41. Arms and military equipments.
- § 42. Household goods.
- § 43. Domestic animals and food therefor.
- § 44. Vehicles and teams.
- § 45. Tools and implements of trade.
- § 46. Materials and stock in trade.
- § 47. Professional books and instruments.
- § 48. Earnings, wages, or salaries.
- § 49. Pension money.
- § 50. Life insurance.
- § 51. Burial lot.

**I. Nature and Extent—Continued.****(C) PROPERTY AND RIGHTS EXEMPT—Continued.**

- § 52. Property in lieu of specific exemptions.
- § 53. Proceeds of exempt property.
- § 54. — In general.
- § 55. — Voluntary sale, exchange, or mortgage.
- § 56. — Involuntary conversion.
- § 57. — Proceeds of insurance.
- § 58. — Property purchased with exempt money.
- § 59. Ownership or possession of property in general.
- § 60. Property of tenants in common.
- § 61. Partnership property.

**(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.**

- § 62. Exceptions from exemptions in general.
- § 63. Statutory provisions.
- § 64. Exception of pre-existing liabilities and liens.
- § 65. Purchase price and lien therefor.
- § 66. Liens on property when acquired.
- § 67. Liens after acquisition of property.
- § 68. Necessaries in general.
- § 69. Board and lodging.
- § 70. Rent.
- § 71. Wages and materials.
- § 72. Liabilities incurred in fiduciary capacity.
- § 73. Liabilities fraudulently incurred.
- § 74. Liabilities for torts.
- § 75. Liabilities as surety.
- § 76. Judgments.
- § 77. Debts to government.
- § 78. Proceedings for enforcement of claims.

**II. Transfer or Incumbrance of Exempt Property.**

- § 79. Power to transfer or incumber in general.
- § 80. Statutory provisions.
- § 81. Sale or exchange.
- § 82. Assignment.
- § 83. Gift.
- § 84. Mortgage.
- § 85. Pledge.
- § 86. Consent of husband or wife.
- § 87. Order of court.
- § 88. Rights of purchasers as to exemption.

**III. Waiver or Forfeiture.**

- § 89. Power to waive.
- § 90. Statutory provisions.
- § 91. Persons authorized to waive.
- § 92. Contracts waiving prospective exemption.
- § 93. Acts or omissions constituting waiver in general.
- § 94. Mortgage or pledge as waiver.

**III. Waiver or Forfeiture—Continued.**

- § 95. Consent to levy and sale.
- § 96. Revocation of waiver.
- § 97. Operation and effect of waiver.
- § 98. — In general.
- § 99. — As to other creditors.
- § 100. Estoppel to claim exemption.
- § 101. Forfeiture.
- § 102. — In general.
- § 103. — Denial of ownership.
- § 104. — Fraudulent conveyance or concealment.

**IV. Protection and Enforcement of Rights.**

- § 105. Establishment of right of exemption in general.
- § 106. Statutory provisions.
- § 107. Process or other proceedings as against which exemption may be allowed.
- § 108. — In general.
- § 109. — Levy of attachment or execution.
- § 110. — Garnishment.
- § 111. — Proceedings supplementary to execution.
- § 112. — Foreclosure proceedings.
- § 113. — Set-off and counterclaim.
- § 114. Duties of officer making levy.
- § 115. Necessity for claim.
- § 116. — In general.
- § 117. — Property specifically exempted.
- § 118. Persons who may make claim.
- § 119. Time for making claim.
- § 120. Form and requisites of claim.
- § 121. — In general.
- § 122. — Affidavit.
- § 123. — Inventory or schedule.
- § 124. Presentation and filing of claim.
- § 125. Appraisement.
- § 126. Selection.
- § 127. Contest and determination of claim.
- § 128. Allotment or setting apart.
- § 129. Surrender of other property.
- § 130. Successive exemptions.
- § 131. Denial or infringement of rights.
- § 132. — In general.
- § 133. — Levy on or sale of exempt property.
- § 134. — Evasion of exemption law.
- § 135. Motions and other summary remedies.
- § 136. Nature and form of action.
- § 137. — In general.
- § 138. — Replevin.
- § 139. — Actions for damages.



**IV. Protection and Enforcement of Rights—Continued.**

- § 140. — Injunction in general.
- § 141. — Injunction against proceedings in another state.
- § 142. Defenses.
- § 143. — In general.
- § 144. — Set-off of debt or judgment of creditor.
- § 145. Jurisdiction.
- § 146. Parties.
- § 147. Pleading.
- § 148. Evidence.
- § 149. Damages or penalty.
- § 150. Trial.
- § 151. Judgment and enforcement thereof.
- § 152. Review.
- § 153. Costs.

*Cross-References.*

See "Homestead."

Allowance to surviving wife, husband, or children, from estate of decedent, see "Executors and Administrators," §§ 173-201.

Constitutional provisions as to exemptions as self-executing, see "Constitutional Law," § 33.

Construction of exemption laws by state courts as binding in federal courts, see "Courts," § 366.

Contracts exempting from liability for negligence, see "Contracts," § 114.

Effect of appearance in garnishment proceedings to claim exemption, see "Garnishment," § 74.

Exemptions affected by election to take under will or under statute, see "Wills," § 782.

Exemptions as assets of estate, see "Executors and Administrators," § 53.

Exemptions of subtenant from claim of landlord, see "Landlord and Tenant," § 80.

Exempt property as subject of fraudulent conveyance, see "Fraudulent Conveyances," §§ 38, 39, 51.

From appropriation for public use, see "Eminent Domain," § 52; "Highways," § 46.

From arrest, see "Arrest," § 9.

From assessment for public improvements, see "Levees," § 24; "Municipal Corporations," § 434.

From laws prohibiting carrying of weapons, see "Weapons," § 11.

From license tax, see "Hawkers and Peddlers," § 4; "Licenses," § 19; "Telegraphs and Telephones," § 30.

From payment of water charges, see "Waters and Water Courses," § 203.

From prosecution, see "Criminal Law," §§ 42, 330.

From requirement of security on appeal or other proceeding for review, see "Appeal and Error," § 374.

From service as juror, see "Grand Jury," § 6; "Jury," §§ 55, 56.

From service of process, see "Process," §§ 112-126.

From service of writ of error, see "Appeal and Error," § 401.

From taxation, see "Highways," §§ 126, 136; "Internal Revenue," § 8; "Municipal Corporations," § 967; "Schools and School Districts," § 102; "Taxation," §§ 191-251.

From tolls, see "Turnpikes and Toll Roads," § 40.

Joinder of causes of action for protection of exemptions, see "Action," § 50.

Judgment against garnishee for exempt property or rights, see "Garnishment," § 235.

Laws impairing constitutional rights, see "Constitutional Law," §§ 99, 100, 180, 205, 208, 249.

Liability of exempt property to mechanics' liens, see "Mechanics' Liens," § 14.

Mandamus to protect exemption rights, see "Mandamus," §§ 3, 36, 73.

Marshaling assets as against exempt property, see "Marshaling Assets and Securities," § 3.

Of bankrupt, see "Bankruptcy," §§ 395-400.

Of rights in public lands, see "Public Lands," § 140.

Of shipowner, from liability for loss of or injury to cargo, see "Shipping," §§ 134, 136-138, 141.

Of voters from necessity of registration, see "Elections," § 97.

Of ward's homestead, see "Guardian and Ward," § 79.

On assignment for benefit of creditors, see "Assignments for Benefit of Creditors," §§ 97, 182, 358.

Pension money, subject to assessment for municipal improvement, see "Municipal Corporations," § 434.

Property or funds devoted to charitable purposes, see "Charities," § 45.

Protection of exemption rights in proceedings before justices of the peace, see "Justices of the Peace," §§ 29, 51, 86, 87, 146, 173.

Protection of official salaries from garnishment on grounds of public policy, see "Garnishment," § 63.  
 Resisting levy on exempt property, see "Obstructing Justice," § 3.  
 Right of garnishee to set up defendant's exemption right as defense to garnishment proceedings, see "Garnishment," § 131.  
 Right to equitable lien on exempt property on failure of owner to execute mortgage, see "Liens," § 7.

## I. NATURE AND EXTENT.

### (A) NATURE, CREATION, DURATION, AND EFFECT IN GENERAL.

#### § 1. Nature of right.

#### § 2. What law governs.

##### *Cross-Reference.*

State laws as rules of decision in federal courts, see "Courts," § 359.

#### § 3. Constitutional and statutory provisions.

##### *Cross-References.*

Class legislation, see "Constitutional Law," § 208.

Constitutional provisions as self-executing, see "Constitutional Law," § 33.

(a) Act 1894, p. 409, c. 295, § 143l (Code 1904, art. 23, § 217), providing that the money or other benefit to be paid by fraternal beneficiary associations shall not be liable to attachment by trustee, garnishee, or other process, and shall not be taken or applied by any legal or equitable process or by operation of law to pay any debt or liability of a certificate holder, beneficiary, etc., does not violate Const. art. 3, § 44, providing for the passage of laws protecting from execution a reasonable amount of the property of the debtor not exceeding \$500 in value, such limitation relating to the exemption of property from execution, and not being applicable to cases of exemption from attachment of money or other benefits payable under a certificate issued by a fraternal association.—*Himmel v. Eichengreen*, 107 Md. 610, 69 Atl. 511; *Fried & Himmel v. Supreme Conclave, I. O. H.*, Id. (See Code 1911, art. 23, § 236; Id. [vol. 3], art. 23, § 244E.)

#### § 4. Construction of exemption laws in general.

##### *Cross-Reference.*

Construction by state courts as authority in federal courts, see "Courts," § 366.

State laws as rules of decision in federal courts, see "Courts," § 359.

Subrogation to rights of mortgagee of exempt property, see "Subrogation," § 23.

Waiver of exemptions as affecting creditors' suits, see "Creditors' Suits," § 19.

Waiver of exemptions of personalty by purchaser as waiver of lien on land by vendor, see "Vendor and Purchaser," § 266.

Waiver of forfeiture of exemptions by insolvent, see "Insolvency," §§ 61, 147.

#### §§ 5-7. Retroactive operation.

##### *Cross-Reference.*

Impairing constitutional rights, see "Constitutional Law," §§ 99, 100, 180.

#### § 8. Effect of change or repeal of exemption.

##### *Cross-Reference.*

Statute of exemption as contract between state and judgment debtor, see "Constitutional Law," § 121.

(a) Act 1861, c. 7, exempts property to the extent of \$100. Act 1870, c. 195, repeals the sixth section of the former act and restricts its benefits to actual bona fide residents of the state, which act went into effect April 14, 1870. Property of a nonresident, being incapable of division, so as to set apart a portion of it without loss to the parties concerned, was sold on the 1st of February, 1870. *Held*, that the right of the parties to the property as thus sold and \$100 of the proceeds became fixed on the sale on the 1st of February, and was so far vested that it was not affected by the repealing act of 1870.—*Bramble v. State*, 41 Md. 435. (See Code, art. 83, §§ 8-10, 13.) [Cited and annotated in 25 L. R. A. (N. S.) 190, on application to existing judgments of statute abolishing or diminishing exemptions.]

#### §§ 9-13. (See Analysis.)

### (B) PERSONS ENTITLED.

##### *Cross-References.*

Bankrupts, see "Bankruptcy," § 395.

Exemptions of subtenant from claim of landlord, see "Landlord and Tenant," § 80.

#### § 14. Debtors of defendants.

##### *Annotation.*

Right of debtor to assign exemptions, or delegate to another the right to select exempt property.—30 L. R. A. (N. S.) 982, note.

#### § 15. Family relation in general.

##### *Annotation.*

What constitutes a "family" under exemption laws.—4 L. R. A. (N. S.) 365, note.

§§ 16-21. (See Analysis.)

§ 22. Particular occupations.

*Cross-Reference.*

Persons entitled to exemption of wages, see post, § 48.

*Annotation.*

Engaging in other business as effecting exemption of farmer from involuntary proceedings in bankruptcy.—20 L. R. A. (N. S.) 148, note.

§§ 23-25. (See Analysis.)

§§ 26-29. Residence.

*Annotation.*

Right of nonresident debtor to benefit of local exemption law.—L. R. A. 1915A, 396, note.

What is nonresidence for the purpose of debtor's exemptions.—L. R. A. 1915A, 421, note.

When does nonresidence of person intending to leave permanently begin.—1 L. R. A. (N. S.) 778, note.

(a) Act 1894, p. 409, c. 295, § 143l (Code 1904, art. 23, § 217), providing that the money or other benefit to be paid by a fraternal beneficiary association shall not be liable to attachment by trustee or garnishee or other process, etc., to pay any debt or liability of a certificate holder or of any beneficiary, etc., includes nonresident as well as resident debtors.—*Himmel v. Eichen-green*, 107 Md. 610, 69 Atl. 511; *Fried & Himmel v. Supreme Conclave, I. O. H.*, Id. (See Code 1911, art. 23, § 236; Id. [vol. 3], art. 23, § 244E.)

§ 30. Surviving husband, wife, children, or next of kin.

*Cross-References.*

Election to take under will or under statute, see "Wills," § 782.

Exemptions as assets of estate, see "Executors and Administrators," § 53.

*Annotation.*

Widow's right to exemption out of personal assets of estate of deceased husband, who was a nonresident.—11 L. R. A. (N. S.) 361, note.

(C) PROPERTY AND RIGHTS EXEMPT.

*Cross-References.*

Exempt property as subject of fraudulent conveyances, see "Fraudulent Conveyances," §§ 38, 39, 51.

Property of bankrupt, see "Bankruptcy," § 396.

State laws as rules of decision in federal courts, see "Courts," § 359.

§ 31. General exemptions of personal property.

§§ 32-35. Property within general exemption.

(a) Act 1861, c. 7, § 3 (Code 1888, art. 83, § 10), relating to exemptions, and providing that in certain instances the debtor shall be entitled to an exemption of \$100 as the proceeds of property in money in lieu of the property, is not exclusive, and money may be allowed in other proper cases.—*Fowler v. State*, 99 Md. 594, 58 Atl. 444; *Fowler v. Gray*, Id. (See Code 1911, art. 83, § 10.)

(b) The latter part of act 1861, c. 7, § 3, does not mean that the debtor's right to claim \$100 out of the proceeds of sale made by the officer, shall be confined to cases in which the officer has levied on a single parcel of land, or a single article of personal property. Such a construction would practically defeat the object of the law, but it is to be construed as meaning that where he has levied on a single piece of property, being all the property of the debtor, the officer shall not sell the same, unless it shall bring more than \$100.—*Muhr v. Pinover*, 67 Md. 480, 10 Atl. 289. (See Code, art. 83, § 10.)

§§ 36-41. (See Analysis.)

§ 42. Household goods.

*Cross-Reference.*

Identification of act amended relating to exemption of household goods, see "Statutes," § 138.

*Annotation.*

Exemption of piano from seizure under execution.—44 L. R. A. (N. S.) 77, note.

§ 43. Domestic animals and food therefor.

*Cross-Reference.*

Work animals, see post, § 44.

§ 44. Vehicles and teams.

*Annotation.*

Exemption of automobile from seizure for debt.—49 L. R. A. (N. S.) 691, note.

Purpose for which horses are used as affecting exemption under statute specifically exempting horses.—3 L. R. A. (N. S.) 693, note.

§ 45. Tools and implements of trade.

*Annotation.*

Exemption of safe from execution.—46 L. R. A. (N. S.) 287, note.

Exemption of seat on stock exchange.—27 L. R. A. (N. S.) 615, note.

§§ 46, 47. (See Analysis.)

## § 48. Earnings, wages, or salaries.

### Cross-Reference.

Protection of official salaries from garnishment on grounds of public policy, see "Garnishment," § 63.

### Annotation.

Exemption of officer's salary from claims of his creditors.—54 L. R. A. 566, note. Laborers whose earnings are exempt from attachment or garnishment.—18 L. R. A. 309, note.

Exemption of debtor's wages after payment by employer.—18 L. R. A. 586, note.

(a) A debtor employed by a garnishee as a salesman at \$30 per week held a "laborer or employee" within Code, art. 9, § 33, exempting \$100 and wages not actually due from levy.—*Wilmer v. Mann*, 121 Md. 239, 88 Atl. 222.

(b) Under Code 1904, art. 9, § 33, providing that wages or hire not actually due shall not be attachable, and that \$100 of such wages shall always be exempt from attachment by any process whatever, an attaching creditor was not entitled to a judgment against the garnishee for any amount, where the only wages due from the garnishee to the debtor was \$13.—*Wilmer v. Epstein*, 116 Md. 140, 81 Atl. 379. (See Code 1911, art. 9, § 33.)

(c) Act 1874, c. 5, increasing the amount of exemptions from attachment allowed wages for personal services to the sum of \$100, must be construed with Code 1860, art. 10, § 36, which it repeals, and which provided that no attachment could affect the salary or wages of the debtor not actually due at the date of the attachment, and exempted the sum of \$10 of such salary or wages as might be due at the date of the attachment from process; and act 1874 does not confer the right to attach wages not actually due at the date of the attachment.—*Shryock v. Baltimore & O. R. Co.*, 56 Md. 519. (See Code 1911, art. 9, § 33.)

(d) Under act 1874, c. 45, providing that wages in the hands of an employer, not actually due at the date of the garnishment, shall not be garnished unless the debt on which the garnishment is issued shall exceed \$100, and exempting \$100 from garnishment, wages in excess of \$100, due or accruing before the trial, are subject to garnishment on a debt in excess of \$100.—*First*

*Nat. Bank v. Weckler*, 52 Md. 30. (See Code, art. 9, § 33.)

(e) Act 1874, c. 45, increasing the amount of wages exempt, and providing that it should not be construed to apply to any existing debt, does not render wages not yet due subject to garnishment.—*House v. Baltimore & O. R. Co.*, 48 Md. 130. (See Code, art. 9, § 33.)

(f) Act 1852, c. 340, and act 1854, c. 3, embodied in Code 1860, art. 10, § 36, provided that wages actually due and to become due, to the amount of \$10, should be exempt from garnishment. Act 1874, c. 45, increased the amount of exemption, and provided that its provisions should not apply to any existing debt. Held, that a creditor holding an existing debt was not thereby authorized to issue a garnishment and bind the wages of an employee earned by him between the time of garnishment and trial.—*House v. Baltimore & O. R. Co.*, 48 Md. 130. (See Code 1911, art. 9, § 33.)

(g) Where an insurance agent deposited in a bank funds belonging to the company, along with funds of his own, the latter are not "wages," within the meaning of Code 1860, art. 10, § 36, exempting wages from attachment.—*First Nat. Bank v. Jagers*, 31 Md. 38. (See Code 1911, art. 9, § 33.)

(h) Where defendant agreed, for consideration of 5 per cent. of the costs, to superintend the erection of a certain warehouse for other parties to the contract, he was an "employee," and the 5 per cent. compensation was wages or hire, within act 1854, c. 23, which exempts "the wages or hire of a laborer or other employee in the hands of his employers."—*Moore v. Heaney*, 14 Md. 558. (See Code, art. 9, § 33.) [Cited and annotated in 18 L. R. A. 309, as to who are entitled to preference as laborers, employees, or servants.]

## § 49. Pension money.

### Cross-References.

Bounties, see ante, § 34.

Property purchased with pension money, see post, § 58.

Assessment for municipal improvement, see "Municipal Corporations," § 434.

### Annotation.

How far pension money is exempt in another form.—19 L. R. A. 35, note.

**§ 50. Life insurance.***Cross-References.*

Of unmarried person, see ante, § 21.  
 Property purchased with proceeds, see post, § 58.  
 As property subject to garnishment, see "Garnishment," § 34.  
 Invested in homestead, see "Homestead," § 29.

*Annotation.*

Life insurance policy exempt under state laws as assets of bankrupt.—26 L. R. A. (N. S.) 454, note.  
 Are paid-up or endowment policies within statutes exempting life insurance policies.—25 L. R. A. (N. S.) 722, note.  
 Does exemption of proceeds of insurance extend to property purchased therewith.—24 L. R. A. (N. S.) 1018, note.  
 Right of creditors to reach option of insured to receive cash surrender value.—16 L. R. A. (N. S.) 316, note.  
 Does a statute exempting money "due, or to become due," or "to be paid," or employing similar expressions, protect money after it has been paid.—5 L. R. A. (N. S.) 472, note.  
 Right of creditors in endowment or ton-tine policies of insurance.—4 L. R. A. (N. S.) 456, note.  
 Exempt character of proceeds of insurance.—19 L. R. A. 34, note.

**§ 51. Burial lot.****§ 52. Property in lieu of specific exemptions.**

(a) Under act 1861, c. 7, providing that \$100 worth of property of the defendant shall be exempt from execution, and that the defendant shall have the right of selection of the same, a defendant is entitled to claim an equivalent of the exemption in money only where there is but one piece of property, which cannot be divided.—*State v. Boulden*, 57 Md. 314. (See Code, art. 83, §§ 8, 9.)

**§ 53. Proceeds of exempt property.****§ 54.— In general.***Annotation.*

Crops grown on homestead, or proceeds thereof, as exempt.—32 L. R. A. (N. S.) 577, note.  
 How far proceeds of exempt property retain exempt character.—19 L. R. A. 33, note.

**§ 55.— Voluntary sale, exchange, or mortgage.***Annotation.*

As to exemption in case of mortgage, sale, or transfer.—19 L. R. A. 39, note.

**§ 56.— Involuntary conversion.**

(a) On an execution sale by a sheriff of an equity of redemption in two tracts of land covered by three mortgages, two of them for \$1,000 each and the other for \$1,100, a judgment debtor was entitled to his exemption in money, notwithstanding act 1861, c. 7, § 3 (Code 1888, art. 83, § 10), providing that if property of the defendant, real or personal, cannot be divided so as to set aside a portion valued at \$100 without loss, then the whole shall be sold and the defendant shall have \$100 in money, and that this section shall only apply where a single parcel of land or a single article of personal property is levied on.—*Fowler v. State*, 99 Md. 594, 58 Atl. 444; *Fowler v. Gray*, Id. (See Code 1911, art. 83, § 10.)

(b) Act 1861, c. 7, provides that property to the amount of \$100 shall be "exempt from execution." Held, that such exemption attaches to the surplus proceeds of a foreclosure sale as against existing judgment creditors.—*Darby v. Rouse*, 75 Md. 26, 22 Atl. 1110. (See Code, art. 83, § 8.)

**§ 57.— Proceeds of insurance.***Annotation.*

Exemption of proceeds of life insurance after loss from beneficiary's debts.—L. R. A. 1915A, 1201, note.  
 Exemption as to proceeds of insurance.—19 L. R. A. 34, note.

**§ 58.— Property purchased with exempt money.***Annotation.*

Does exemption of proceeds of insurance extend to property purchased therewith.—24 L. R. A. (N. S.) 1018, note.  
 Exemption of property purchased with pension money.—19 L. R. A. 34, note.

**§§ 59-61. (See Analysis.)****(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.***Cross-References.*

Liability of exempt property to mechanics' liens, see "Mechanics' Liens," § 14.  
 Property of bankrupt, see "Bankruptcy," § 398.

**§§ 62-78. (See Analysis.)****II. TRANSFER OR INCUMBRANCE OF EXEMPT PROPERTY.***Cross-References.*

Marshaling assets as against incumbered exempt property, see "Marshaling Assets and Securities," § 3.

Transfers of bankrupt's exempt property, see "Bankruptcy," § 398.  
Validity as to creditors, see "Fraudulent Conveyances," § 51.

§§ 79-88. (See Analysis.)

### III. WAIVER OR FORFEITURE.

#### Cross-References.

By bankrupt, see "Bankruptcy," § 399.  
By insolvent, see "Insolvency," § 147.  
Waiver of exemptions on personalty by purchaser as waiver of lien on land by vendor, see "Vendor and Purchaser," § 266.

§§ 89-92. (See Analysis.)

#### § 93. Acts or omissions constituting waiver in general.

(a) Failure to assert a right of exemption at the time and in the manner prescribed by the statute which confers such right is a waiver of the privilege.—*State v. Boulden*, 57 Md. 314.

§§ 94-96. (See Analysis.)

#### §§ 97-99. Operation and effect of waiver.

#### Cross-References.

As to assignee in insolvency, see "Insolvency," § 61.  
As to creditors' suit, see "Creditors' Suit," § 19.

#### § 100. Estoppel to claim exemption.

(a) A defendant who has conveyed land to his wife prior to the levy of the execution cannot claim exemption out of the proceeds of its sale.—*Miles v. State*, 73 Md. 398, 21 Atl. 51.

#### §§ 101-104. Forfeiture.

(a) Where a debtor at the time of levy denies ownership of property, he cannot later claim it as exempt.—*Miles v. State*, 73 Md. 398, 21 Atl. 51.

### IV. PROTECTION AND ENFORCEMENT OF RIGHTS.

#### Cross-References.

Effect of appearance in garnishment proceedings to claim exemption, see "Garnishment," § 74.  
In bankruptcy proceedings, see "Bankruptcy," § 400.  
Joinder of causes of action, see "Action," § 50.  
Mandamus to compel setting aside of exemptions, see "Mandamus," § 73.

Protection of exemption rights in proceedings before justices of the peace, see "Justices of the Peace," §§ 51, 86, 87, 135, 146, 173.  
Resisting levy, see "Obstructing Justice," § 3.

#### § 105. Establishment of right of exemption in general.

#### Cross-Reference.

Contest and determination of claims, see post, § 127.

#### § 106. Statutory provisions.

#### §§ 107-113. Process or other proceedings as against which exemption may be allowed.

#### Cross-Reference.

See ante, § 2.

#### Annotation.

Set-off and counterclaim against exempt claim.—42 L. R. A. (N. S.) 575, note.

§§ 114-130. (See Analysis.)

#### §§ 131-134. Denial or infringement of rights.

#### Cross-Reference.

Judgment against garnishee for exempt property or rights, see "Garnishment," § 235.

#### Annotation.

A debtor's right of action against his creditor for collecting debt in another jurisdiction in evasion of exemption laws of their domicile.—47 L. R. A. (N. S.) 689, note.

#### § 135. Motions and other summary remedies.

#### §§ 136-141. Nature and form of action.

#### Cross-Reference.

See "Mandamus," § 3.

#### Annotation.

Injunction against suit in another state to evade local exemption laws.—15 L. R. A. (N. S.) 1008, note.

Injunction against repeated garnishment of exempt wages.—10 L. R. A. (N. S.) 983, note.

Injunction to protect in case of execution sale.—30 L. R. A. 99, note.

(a) Where a citizen of Maryland presents an attachment against another citizen of Maryland, both at the time being in West Virginia, and garnishes a railroad company, which at the time was indebted to defendant for wages which were exempt under the laws of Maryland, the action will be enjoined at the suit of defendant.—*Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448. [Cited and anno-

tated in 15 L. R. A. (N. S.) 1009, on injunction against suit in other state to evade local exemption laws.]

### §§ 142-144. Defenses.

(a) A sheriff, who has sold land under execution and received the purchase price, cannot plead as a defense to an action to recover \$100 of the proceeds of the sale as exempt, as provided by act 1861, c. 7, that plaintiff had no legal estate in the property sold.—*Bramble v. State*, 41 Md. 435. (See Code, art. 83, §§ 8-10.) [Cited and annotated in 25 L. R. A. (N. S.) 190, on application to existing judgments of statute abolishing or diminishing exemptions.]

### § 145. Jurisdiction.

#### *Annotation.*

Jurisdiction of courts to enjoin execution sales in protection of exemption.—30 L. R. A. 132, note.

### §§ 146-153. (See Analysis.)

## EXERCITOR MARIS.

#### *Cross-Reference.*

See "Shipping," §§ 22, 41.

## EXHAUST FANS.

#### *Cross-Reference.*

Liability of master for injuries to servant caused by unguarded exhaust fan, see "Master and Servant," § 153.

## EXHIBITIONS.\*

#### *Cross-References.*

In general, see "Theaters and Shows." Agricultural fairs, see "Agriculture," § 5. Of dangerous weapon, see "Weapons," § 14.

## EXHIBITS.\*

#### *Cross-References.*

Annexed to commission or order to take testimony, see "Depositions," § 47. Annexed to depositions, see "Depositions," § 68. Annexed to or filed with pleadings, see "Equity," § 152; "Pleading," § 307. As part of record on appeal, see "Appeal and Error," § 518. Bill or note annexed to or filed with pleading in action thereon, see "Bills and Notes," § 488. Costs allowed for printing exhibits, see "Costs," § 190. Demonstrative evidence, see "Criminal Law," § 404; "Evidence," §§ 188-199. Documentary evidence in general, see "Criminal Law," §§ 429-447; "Evidence," §§ 325-383. Failure to file note sued on as ground of abatement, see "Abatement and Revival," § 32.

Incorporation into bill of exceptions, see "Exceptions, Bill of," §§ 21-23.

Incorporation into case or statement on appeal, see "Appeal and Error," § 562.

Omission of exhibits from record as affecting review, see "Appeal and Error," § 695.

On application for rehearing in appellate court, see "Appeal and Error," § 833.

Prejudicial effect of rulings on motion for exhibits, see "Appeal and Error," § 1039.

Presumptions in absence from record of exhibits sued on, see "Appeal and Error," § 908.

To pleadings, objections first raised on appeal, see "Appeal and Error," § 192.

Use by counsel in argument to jury, see "Criminal Law," § 715; "Trial," § 116.

Withdrawal from evidence, harmless error, see "Appeal and Error," § 1047.

## EXHUMATION.

#### *Cross-Reference.*

Of body of person killed, for purpose of examination on trial for homicide, see "Homicide," § 261.

## EX OFFICIO.

#### *Cross-Reference.*

Powers and duties of officers, see "Officers," §§ 90-122.

## EXONERATION.\*

#### *Cross-Reference.*

Of bail, see "Bail," §§ 18, 22-24, 74, 78-80.

## EX PARTE PROCEEDINGS.

#### *Cross-References.*

See "Motions."

Allowance of counsel fees incurred in will contest, see "Wills," § 416.

Appealability of ex parte orders, see "Appeal and Error," § 128.

Application for security for costs, see "Costs," §§ 114, 117.

Dismissal of action or nonsuit, see "Dismissal and Nonsuit," § 33.

For appointment of receiver in general, see "Receivers," § 35.

For appointment of receiver of railroad company, see "Railroads," § 206.

For extension of time for settlement of bills of exception, see "Exceptions, Bill of," § 40.

For issuance of execution, see "Execution," § 70.

For leave to sue as poor person, see "Costs," § 133.

For probate of wills, see "Wills," § 313.

In admiralty, see "Admiralty," § 90.

In bankruptcy, see "Bankruptcy," §§ 36-49.

In insolvency, see "Insolvency," §§ 18-22.

Intervention of parties, see "Parties," § 44.

Marshaling liens, see "Mechanics' Liens," § 308.

Record on appeal in cause heard ex parte, see "Admiralty," § 115.

\*Annotation: Words and Phrases, same title.

Review by United States Circuit Court of Appeals of ex parte orders or decrees appointing receivers, see "Courts," § 407.

Review of decisions, see "Appeal and Error," § 128.

Taking depositions, see "Depositions," § 22.

### EXPATRIATION.\*

#### Cross-References.

See "Citizens," § 13.

Naturalization of aliens, see "Aliens," §§ 60-72.

### EXPECTANCY.\*

#### Cross-References.

Assignability, see "Assignments," § 8.

Estates in real property subject to dower, see "Dower," § 18.

Of life, evidence, see "Damages," § 167.

Of life evidence in action for wrongful discharge, see "Master and Servant," § 40.

Of life tables as evidence, see "Evidence," § 364.

Rights of expectant heirs, see "Descent and Distribution," § 68.

### EXPENDITURES.\*

#### Cross-References.

See "Costs."

By agent, see "Principal and Agent," § 85.

By assignee for benefit of creditors, see "Assignments for Benefit of Creditors," §§ 256, 257.

By cestui que trust for benefit of trust estate, see "Trusts," § 338.

By contractors, see "Contracts," § 233.

By executor or administrator in general, see "Executors and Administrators," §§ 109-111.

By executor or administrator, as credit on account, see "Executors and Administrators," §§ 479-487.

By grantee on property transferred in fraud of creditors, see "Fraudulent Conveyances," §§ 178, 183.

By guardian, see "Guardian and Ward," § 58.

By insured, liabilities of insurer, see "Insurance," §§ 488, 489, 506, 513.

By tenant in common, see "Tenancy in Common," § 32.

By trustee, as credit in account, see "Trusts," §§ 312, 313.

By trustee in bankruptcy, see "Bankruptcy," § 272.

By trustee in general, see "Trusts," §§ 225-227.

For taking care of impounded animals, see "Animals," § 95.

Illegal expenditures by candidates for election to office, see "Elections," §§ 231, 317.

Liability of owners of horse in hands of third person for expenditures after refusal to receive it back, see "Animals," § 27.

Of principal of trust estate, see "Trusts," § 276.

Permitting expenditures as ground of estoppel in pais, see "Estoppel," § 93.

Survival of action for expenditures for treatment of personal injuries, see "Abatement and Revival," § 54.

### EXPENSES.\*

#### Cross-References.

See "Costs."

Allowance for expenses incurred by sheriff or constable, see "Sheriffs and Constables," §§ 61-63, 66.

Allowance for expenses incurred by United States marshal, see "United States Marshals," §§ 19-21.

Allowance for expenses incurred or paid by witnesses, see "Witnesses," § 29.

Allowance for expenses of divorce proceedings, see "Divorce," §§ 220-229.

As preferred claims in bankruptcy, see "Bankruptcy," § 347.

Award for, in bastardy proceedings, see "Bastards," § 78.

Deduction of funeral expenses and expenses of action from amount of damages distributed, see "Death," § 101.

Element of damages for wrongful attachment, see "Attachment," § 376.

Element of damages in action on attachment bond, see "Attachment," § 351.

Element of damages in general, see "Damages," §§ 42-46; "Death," § 84.

Family expenses, liabilities of husband or wife, see "Husband and Wife," § 19.

Illegal expenditures by candidates for election to office, see "Elections," §§ 231, 317.

In actions or defenses by stockholders in behalf of corporation, see "Corporations," § 214.

Liability of partners for firm expenses, see "Partnership," § 87.

Mutual rights, duties and liabilities of cotenants as to expenses in respect to property, see "Tenancy in Common," § 32.

Of abolitions of grade crossings, see "Railroads," § 99.

Of administration of estate of decedent, see "Executors and Administrators," §§ 109-111.

Of administration of estate of ward, see "Guardian and Ward," § 58.

Of agent, see "Principal and Agent," § 85.

Of board of health, see "Health," § 5.

Of broker, reimbursement by principal, see "Brokers," § 72.

Of burial, see "Dead Bodies," § 6.

Of constructing railroad crossings, see "Railroads," §§ 91, 94, 97.

Of coroner's inquest, see "Coroners," § 21.

Of counties, see "Counties," §§ 131-140.

Of district and prosecuting attorneys, see "District and Prosecuting Attorneys," § 5.

Of examination of bankrupt or others in bankruptcy proceedings, see "Bankruptcy," § 239.

Of highway proceedings, and liability therefor, see "Highways," §§ 61, 77.

Of interstate commerce commission, see "Commerce," § 84.

Of judicial sales in general, see "Judicial Sales," § 63.

\*Annotation: Words and Phrases, same title.



Of maintenance of militia, see "Militia," § 4.  
 Of mortgage foreclosure and sale, see "Mortgages," § 582.  
 Of municipal corporations, see "Municipal Corporations," §§ 256-264.  
 Of pledgee in respect to pledged property, see "Pledges," § 27.  
 Of proceedings for taking private property for public use, see "Eminent Domain," § 265.  
 Of public improvements, apportionment, see "Municipal Corporations," §§ 465-474.  
 Of public improvements, mode and means of defraying, see "Municipal Corporations," § 288.  
 Of public improvements, provisions for defraying in ordinance, resolution or order for improvement, see "Municipal Corporations," § 306.  
 Of sale as part of price, see "Sales," § 187.  
 Of school districts, see "Schools and School Districts," § 87.  
 Of school officers, see "Schools and School Districts," § 54.  
 Of states, see "States," § 111.  
 Of tax sale, see "Taxation," § 691.  
 Of towns, see "Towns," § 43.  
 Recovery for expenses incurred incident to implied contract for services, see "Work and Labor," § 3½.  
 Reimbursement of expenses of partner, see "Partnership," § 84.  
 Reimbursement of in joint adventure, see "Joint Adventures," § 4.  
 Rights and liabilities for expenses, as between vendor and purchaser of land, see "Vendor and Purchaser," § 202.

#### EXPERIMENTS.\*

##### *Cross-References.*

As anticipation of invention, see "Patents," § 53.  
 As infringement of patent, see "Patents," § 254.  
 By jurors during deliberations, see "Criminal Law," § 861; "Trial," § 310.  
 Competency of evidence, see "Criminal Law," § 388; "Evidence," § 150.

Examination of expert witnesses as to experiments and results thereof, see "Criminal Law," §§ 478, 488; "Evidence," § 557.  
 In court, see "Criminal Law," § 650; "Evidence," § 199; "Trial," § 27.

#### EXPERTS.\*

##### *Cross-References.*

Compensation as witnesses, see "Witnesses," § 28.  
 Competency of witnesses as to race, see "Aliens," § 32.  
 Harmless error in cross-examination, see "Appeal and Error," § 1048.  
 Liability for negligence, see "Negligence," § 1.  
 Opinion of expert as affecting master's liability for defects in appliances, see "Master and Servant," § 103.  
 Review of decision of trial court in competency of expert, see "Appeal and Error," § 992.

#### EXPERT TESTIMONY.\*

##### *Cross-References.*

See "Criminal Law," §§ 469-481, 483-491, 494; "Evidence," §§ 505-567, 570-574.  
 Objections first raised on appeal, see "Appeal and Error," § 204.  
 Review, necessity of specific objections in lower court, see "Appeal and Error," § 231.

#### EXPIRATION.\*

##### *Cross-References.*

Of term of copyright, see "Copyrights," § 33.  
 Of term of lease, see "Landlord and Tenant," § 93.  
 Of term of office as ground for abatement of mandamus proceeding, see "Mandamus," § 19.  
 Of term of office as ground for dismissal of appeal in action to try title to office, see "Appeal and Error," § 781.  
 Of term of office as ground for refusal of mandamus, see "Mandamus," § 16.  
 Of term of patent, see "Patents," §§ 131, 132.

## EXPLOSIVES.\*

### *Scope-Note.*

[INCLUDES regulation of manufacture, dealing in, and use of explosive substances, and liabilities for injuries therefrom caused by negligence.

[EXCLUDES powers of municipalities (see "Municipal Corporations"); transportation of articles dangerous to other goods or to passengers (see "Carriers"; "Shipping"); use of explosives constituting a nuisance (see "Nuisance"), or for purposes of malicious injury to property (see "Malicious Mischief"), or in firearms (see "Weapons"); steam (see "Steam"); and gas (see "Gas").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

- § 1. Power to make regulations.
- § 2. Statutory and municipal regulation in general.

\*Annotation: Words and Phrases, same title.

- § 3. Regulations of manufacture, storage, and sale.
- § 4. Violations of regulations.
- § 5. Criminal prosecutions.
- § 6. Injuries from accidental explosions.
- § 7. — In general.
- § 8. — Illegal or negligent manufacture, storage, or keeping.
- § 9. — Illegal or negligent sale.
- § 10. — Illegal or negligent use.
- § 11. Injuries from discharge of fireworks.
- § 12. Injuries from blasting.

#### *Cross-References.*

See "Gas."

As constituting nuisance, see "Nuisance," § 3.

As materials protected by mechanics' lien law, see "Mechanics' Liens," § 47.

Constitutionality of act prohibiting storage of explosive oils within limits of city, deprivation of property without due process of law, see "Constitutional Law," § 296.

Constitutionality of ordinance prohibiting explosion of firecrackers without consent of mayor, delegation of legislative power, see "Constitutional Law," § 63.

Construction of pleading against pleader, see "Pleading," § 37.

Custom of dealers in gasoline to make no representations as to its character as affecting responsibility for damages from explosion, see "Customs and Usages," § 8.

Expert testimony as to character of explosive substance, see "Evidence," § 519.

#### **§ 1. Power to make regulations.**

#### **§ 2. Statutory and municipal regulation in general.**

##### *Cross-References.*

See post, § 3.

Repeal of ordinance, see "Municipal Corporations," § § 115, 116.

##### *Annotation.*

Municipal regulation of explosives, as a nuisance.—38 L. R. A. 306, note.

#### **§ 3. Regulations of manufacture, storage, and sale.**

##### *Annotation.*

Regulating, keeping or storing of explosives.—41 L. R. A. (N. S.) 460, note.

#### **§ 4. Violations of regulations.**

##### *Annotation.*

Violating ordinance as to explosives as ground for private action.—5 L. R. A. (N. S.) 261; 48 L. R. A. (N. S.) 876, notes.

#### **§ 5. Criminal prosecutions.**

##### *Cross-Reference.*

Excessive fines, see "Criminal Law," § 1214.

#### **§ § 6-10. Injuries from accidental explosions.**

Explosion cause of loss, within insurance policy, see "Insurance," § 422.

Fishing with explosives, see "Fish," § 15.

Forfeiture of gunpowder illegally kept, see "Forfeitures," § 5.

Gas from gas well, see "Mines and Minerals," § 118.

Inspection, see "Inspection."

Keeping or use of articles prohibited in insurance policy, see "Insurance," § 326.

Lien for explosives used in construction of railroad, see "Railroads," § 159.

Power of municipal corporations under delegation of power to legislate for general welfare, see "Municipal Corporations," § 595.

Prohibition against carriage of explosives on passenger trains, see "Carriers," § 25.

Use of for purpose of malicious injury, see "Malicious Mischief," § 9.

#### *Cross-References.*

Acts in emergencies, see "Negligence," § 12.

Grounds of action for death, see "Death," § 14.

Injuries caused by explosion of gas in sewer, see "Municipal Corporations," § 832.

Injuries caused by explosion on leased premises, see "Landlord and Tenant," § 170.

Injuries caused by explosives left in street, see "Municipal Corporations," § 800.

Injuries caused by explosives stored in freight depot, see "Railroads," § 274.

Injuries from explosion of gas, see "Gas," § § 16-20.

Injuries from explosion of steam, see "Steam," § 6.

Injuries from explosives left in highway, see "Highways," § 192.

Injuries to adjacent property caused by explosion of substances carried in cars, see "Railroads," § 222.

Injuries to passenger caused by explosion, see "Carriers," § 316.

Injuries to pedestrian near track from explosion of railroad torpedoes, see "Railroads," § 364.

Injuries to persons near track caused by explosion of substances in cars, see "Railroads," § 400.

Injuries to servant, see "Master and Servant," §§ 107, 129, 285.  
 Joint and several liability, see "Negligence," § 15.  
 Liability of master for malicious acts of servant, see "Master and Servant," § 306.  
 Liability of servant, see "Master and Servant," § 310.  
 Mental suffering as element of damage, see "Damages," §§ 50, 52.  
 Right of action by husband or wife or both, see "Husband and Wife," § 209.  
 Things attractive to children, see "Negligence," § 23.

*Illegal or negligent sale.*

Custom and usage as affecting liability, see "Customs and Usages," § 8.  
 Imputed negligence, see "Negligence," § 96.  
 Negative contributory negligence, see "Negligence," § 113.

*Annotation.*

Employer's liability for explosion from gas escaping through negligence of independent contractor.—65 L. R. A. 852, note.  
 Liability for negligence in the manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives.—29 L. R. A. 718, note.

**§ 11. Injuries from discharge of fireworks.**

*Cross-References.*

See "Master and Servant," § 301; "Nuisance," § 63; "Trespass," § 2.  
 Sale of fireworks, see ante, § 9.  
 As abateable nuisance, see "Nuisance," § 65.  
 Discharge without license as affording cause of action, see "Action," § 5.  
 Duty of city to enforce ordinances, see "Municipal Corporations," § 735.  
 Injury to trespasser, see "Negligence," § 33.  
 Liability of city for act of person discharging fireworks under its authority, see "Municipal Corporations," § 748.  
 Liability of city for acts of wrongdoers, see "Municipal Corporations," § 740.  
 Liability of city for injuries caused by permitting discharge of fireworks in street, see "Municipal Corporations," § 762.  
 Municipal regulations, powers of city in general, see "Municipal Corporations," § 595.  
 Repeal of ordinance, see "Municipal Corporations," § 115.

*Annotation.*

Municipal liability for failure to prevent fireworks on street.—23 L. R. A. (N. S.) 643; 42 L. R. A. (N. S.) 863, notes.  
 Liability for injuries caused by discharge of fireworks.—16 L. R. A. 395, note.

**§ 12. Injuries from blasting.**

*Cross-References.*

See "Nuisance," § 3; "Trespass," § 1.  
 Defenses in general, see "Torts," § 16.

Injuries caused by blasting in highway, see "Highways," § 172.  
 Injuries to adjoining lands, see "Adjoining Landowners," § 8.  
 Injuries to licensee, see "Negligence," § 32.  
 Injuries to servant, see "Master and Servant," § 118.  
 Liability of person working in street under license granted by city, see "Municipal Corporations," § 809.  
 Limitation of actions, see "Limitation of Actions," § 55.  
 Measure of damages, see "Damages," § 111.  
 Mental suffering as element of damage, see "Damages," § 50.  
 Trespass or case, see "Action," § 30.  
 Work of independent contractor, see "Master and Servant," §§ 315, 318, 319.

*Annotation.*

Municipal liability for failure to prevent blasting.—42 L. R. A. (N. S.) 864, note.  
 Liability for injury to person or property from concussion caused by blasting.—12 L. R. A. (N. S.) 389; 27 L. R. A. (N. S.) 425, notes.

(a) In an action for physical injuries alleged to have resulted from fright from blasting near plaintiff's residence, where plaintiff was 30 years old, in sound health, and free from any nervous disorder or tendency before the blasting began, which shattered the roof, walls, and windows of the house by night and day, and caused her constant fright and she afterwards was afflicted with nervous prostration, in the absence of evidence of any other cause therefor, the question whether the fright was the proximate cause of the nervous condition was for the jury.—*Green v. T. A. Shoemaker & Co.*, 111 Md. 69, 73 Atl. 688. [Cited and annotated in 22 L. R. A. (N. S.) 1074, on recovery for physical injury from fright; in 34 L. R. A. (N. S.) 216, on liability, in absence of negligence, for damages to realty from substances thrown in blasting; in 34 L. R. A. (N. S.) 560, on right of one in possession to maintain action for nuisance without proving title.]

(b) Where the evidence shows that the value of property injured by blasting has been diminished for the purposes of renting and occupation and that the plaintiff's servants, through fear, etc., were prevented, to the plaintiff's injury, from performing labor for which they had been employed, and that damage subsequently resulted to the property by means of water which passed through a hole in the roof, which was caused by one

of the explosions, the damages so occasioned were consequential damages and as such recoverable in case.—*Scott v. Bay*, 3 Md. 431. [Cited and annotated in 17 L. R. A. 220, on injuries to land and buildings from blasting; in 37 L. R. A. 784, on power of equity to protect personal rights; in 34 L. R. A. (N. S.) 212, 213, on liability, in absence of negligence, for damages to realty from substances thrown in blasting.]

(c) It is a rule of common law that a man should so use his own property as not to hurt or injure another, and hence if one works his quarries in such a manner as to prove a nuisance to his neighbor he must answer in damages, and this is true even if proper precautions were used in working the quarries.—*Scott v. Bay*, 3 Md. 431. [Cited and annotated, see *supra*.]

### EXPORTS.\*

#### Cross-References.

See "Customs Duties."  
Combination to control, see "Monopolies," § 15.  
Imposition of duties as regulation of commerce, see "Commerce," § 77.

### EXPOSITIONS.

#### Cross-References.

Power of city to appropriate money for benefit of, see "Municipal Corporations," § 861.  
Power to levy tax for aid of expositions, see "Taxation," § 38.

### EX POST FACTO LAWS.

#### Cross-Reference.

Constitutional restrictions, see "Constitutional Law," §§ 197-203.

### EXPOSURE.\*

#### Cross-References.

Causing death as homicide, see "Homicide," § 5.  
Of infants, see "Infants," §§ 12-20.  
Of person, see "Obscenity," § 3.  
To danger by person injured as contributory negligence, see "Negligence," §§ 65-101.  
To danger by person insured in accident insurance policy, see "Insurance," § 461.

### EXPOSURE FOR SALE.

#### Cross-Reference.

Selling and exposing for sale as distinct acts, see "Action," § 38.

### EXPRESS COMPANIES.\*

#### Cross-References.

See "Carriers."  
Applicability of statutes regulating carriers, see "Carriers," § 5.

Delay in transportation of goods, see "Carriers," §§ 97, 98, 104-106.

Duties as warehousemen, see "Carriers," §§ 140, 143, 145, 146.

Duties of company in making delivery, see "Carriers," §§ 82, 83, 86.

Embezzlement by agents of, see "Embezzlement," § 14.

Liability for causing death, see "Death," § 33.

Liability for misdelivery of goods, see "Carriers," § 93.

Liability of companies and property to taxation, see "Taxation," § 142.

License and privilege taxes in general, see "Carriers," § 8; "Licenses," §§ 6, 7, 11.

Licenses and privilege taxes as regulation of commerce, see "Commerce," § 69.

Limitation of liability, see "Carriers," §§ 147-168.

Mandamus to compel reception of packages for transportation, see "Mandamus," § 133.

Mode of assessment for taxation, see "Taxation," § 388.

Necessity of giving notice to consignee of arrival of goods, see "Carriers," § 85.

Right to charge shipper with cost of revenue stamp, see "Internal Revenue," § 27.

To whom delivery of goods may be made, see "Carriers," § 82.

Vested right to conduct business under existing laws and exemption from future legislative control, see "Constitutional Law," § 101.

### EXPRESS CONDITIONS.\*

#### Cross-References.

In contracts, see "Contracts," §§ 218-227.  
In deeds, see "Deeds," §§ 144-168.  
In wills, see "Wills," §§ 639-667.

### EXPRESS CONSIDERATION.

#### Cross-References.

In contracts, see "Contracts," §§ 47-91.  
In deeds, see "Deeds," §§ 14-19.

### EXPRESS CONTRACTS.\*

#### Cross-Reference.

See "Contracts."

### EXPRESS COVENANTS.\*

#### Cross-Reference.

See "Covenants."

### EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.\*

#### Cross-References.

See "Statutes," § 195; "Vendor and Purchaser," § 236.  
Construction of corporate charters, see "Corporations," § 372.

### EXPRESS MALICE.\*

#### Cross-References.

Element of crime, see "Criminal Law," §§ 19-25; "Assault and Battery," § 49; "Homicide," § 12.

\*Annotation: Words and Phrases, same title.

Element of false imprisonment, see "False Imprisonment," § 4.  
 Element of malicious prosecution, see "Malicious Prosecution," § 28.

### **EXPRESSMEN**

#### *Cross-Reference.*

As carriers, see "Carriers," § 4.

### **EXPRESS MESSENGERS.\***

#### *Cross-Reference.*

As passengers, see "Carriers," § 241.

### **EXPRESS TRUSTS.\***

#### *Cross-Reference.*

See "Trusts," §§ 1-111.

### **EXPRESS WAGONS.\***

#### *Cross-Reference.*

License fees on, see "Licenses," § 7.

### **EXPRESS WARRANTY.\***

#### *Cross-References.*

In contract of sale of goods, see "Sales," §§ 259-262.  
 In conveyance of land, see "Covenants."  
 In insurance policy, see "Insurance," §§ 263-268.

### **EXPROPRIATION.\***

#### *Cross-Reference.*

See "Eminent Domain."

### **EXPULSION.\***

#### *Cross-References.*

Of Chinese and other aliens, see "Aliens," §§ 18-38.  
 Of foreign corporation from state, see "Corporations," § 651.  
 Of members of beneficial association, see "Beneficial Associations," § 10.  
 Of members of clubs, see "Clubs," §§ 4, 5, 7.  
 Of members of corporations in general, see "Corporations," § 173.  
 Of members of exchange, see "Exchanges," § 5.  
 Of members of mutual benefit insurance association, see "Insurance," § 747.  
 Of members of religious societies, see "Religious Societies," § 7.  
 Of members of unincorporated association, see "Associations," § 10.  
 Of passenger, see "Carriers," §§ 350-386.  
 Of passenger, nature and form of action by passenger against carrier for wrongful expulsion from train, see "Action," § 27.  
 Of pupil, see "Schools and School Districts," §§ 8, 177.  
 Of tenant, see "Landlord and Tenant," §§ 171-180, 275-278.

### **EXTENDED INSURANCE.\***

#### *Cross-Reference.*

See "Insurance," § 367.

### **EXTENSION.**

#### *Cross-References.*

Of agency, see "Principal and Agent," § 2.  
 Of city limits, see "Municipal Corporations," § 29.  
 Of corporate existence, see "Banks and Banking," § 30; "Corporations," § 37.  
 Of lease, see "Landlord and Tenant," §§ 82-92.  
 Of lease as within statute of frauds, see "Frauds, Statute of," § 58.  
 Of lease of mine, see "Mines and Minerals," §§ 65, 75.  
 Of levees, see "Levees," § 17.  
 Of line railroad, see "Railroads," § 52.  
 Of mortgage to other debts or liabilities, see "Chattel Mortgages," § 114; "Mortgages," § 121.  
 Of mortgage to other property, see "Chattel Mortgages," § 126; "Mortgages," § 132.  
 Of receivership, see "Receivers," § 52.  
 Of street railroad franchise, see "Street Railroads," § 28.  
 Of term of copyright, see "Copyright," § 33.  
 Of term of court, see "Courts," § 66.  
 Of term of partnership, see "Partnership," § 361.  
 Of time as consideration for mortgage, see "Mortgages," § 25.  
 Of time for appearance, see "Appearance," § 4.  
 Of time for application for rehearing in appellate court, see "Appeal and Error," § 833.  
 Of time for filing certificate of evidence, see "Appeal and Error," § 574.  
 Of time for filing motion for new trial, see "Criminal Law," § 951; "New Trial," § 118.  
 Of time for filing record on appeal or other proceeding for review, see "Appeal and Error," § 624; "Criminal Law," § 1106.  
 Of time for filing referee's report, see "Reference," § 79.  
 Of time for filing undertaking on appeal, see "Appeal and Error," § 387.  
 Of time for giving security for costs, see "Costs," § 119.  
 Of time for making and filing or service of case or statement, see "Appeal and Error," § 564.  
 Of time for making election under will, see "Wills," § 790.  
 Of time for payment affecting priority of mortgage securing obligation, see "Mortgages," § 178.  
 Of time for payment as affecting limitations, see "Limitation of Actions," §§ 46, 47.  
 Of time for payment, as usury, see "Usury," § 65.  
 Of time for payment of bill or note, see "Bills and Notes," §§ 137, 139, 140.  
 Of time for payment of insurance premium or assessment, see "Insurance," §§ 357, 358.

\*Annotation: Words and Phrases, same title.

Of time for payment of mortgage debt as affecting right to foreclose, see "Mortgages," § 393.  
 Of time for payment of mortgage debt as discharge of mortgage, see "Mortgages," § 306.  
 Of time for payment or other performance as discharge of guarantor, see "Guaranty," §§ 56, 57.  
 Of time for payment or other performance as discharge of surety, see "Principal and Surety," §§ 104-108.  
 Of time for payment or performance as consideration for new contract, see "Contracts," §§ 70-73.  
 Of time for performance of contracts in general, see "Contracts," § 242.  
 Of time for presentation, allowance, and filing of bills of exceptions, see "Criminal Law," § 1092; "Exceptions, Bill of," § 40.  
 Of time for presentation of claims against decedent's estate, see "Executors and Administrators," § 225.  
 Of time for report of viewers in highway proceedings, see "Highways," § 41.  
 Of time for settlement of case or statement of facts, see "Appeal and Error," § 567.  
 Of time for taking appeal or other proceeding for review, see "Appeal and Error," §§ 353, 354; "Criminal Law," § 1069.  
 Of time for taking deposition, see "Depositions," § 55.  
 Of time to grantee of mortgaged property as discharging mortgagor, see "Mortgages," § 283.  
 Of time to plead, affecting time for removal of cause to federal court, see "Removal of Causes," § 79.  
 Of time to plead as affecting right to default judgment, see "Judgment," § 103.  
 Of usurious loan, see "Usury," § 65.  
 Pleading extension of time in action on negotiable instrument, see "Bills and Notes," § 483.

### EXTENT.\*

#### *Cross-References.*

Against tax collectors, see "Taxation," § 566.  
 Return of extent, see "Execution," § 346.

### EXTERNAL INJURIES.

#### *Cross-Reference.*

Risks and causes of loss within accident insurance policy, see "Insurance," §§ 455, 456.

### EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.

#### *Cross-Reference.*

See "Insurance," § 455.

### EXTINGUISHMENT.

#### *Cross-References.*

Adverse possession as extinguishing original title, see "Adverse Possession," § 106.  
 Of agister's lien, see "Animals," § 26.  
 Of attachment levy or lien, see "Attachment," § 184.  
 Of debt by novation, see "Novation."  
 Of easement, see "Easements," § 29.  
 Of execution levy or lien, see "Execution," § 146.  
 Of existing liens by sale of vessel, on proceedings in rem, see "Admiralty," § 100.  
 Of fires in field or woods, see "Fires," § 8.  
 Of ground rent, see "Ground Rents," §§ 8, 9.  
 Of insurable interest, see "Insurance," § 123.  
 Of laborer's lien, see "Master and Servant," § 82.  
 Of liability or of interest in suit to remove disqualification as witness, see "Witnesses," §§ 112, 113.  
 Of license in respect to real property, see "Licenses," § 56.  
 Of lien of factor, see "Factors," § 47.  
 Of liens in general, see "Liens," § 16.  
 Of mortgage, see "Chattel Mortgages," §§ 235-248; "Mortgages," §§ 298-319.  
 Of original liability by alteration invalidating instrument, see "Alteration of Instruments," § 23.  
 Of power, see "Powers," § 15.  
 Of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 32.

## EXTORTION.\*

### *Scope-Note.*

[INCLUDES obtaining or attempting to obtain from another, under color of official or other right, money or other property, more particularly by the taking or claiming, by a public officer, of illegal or excessive fees or compensation for official services, and acts of oppression or other injuries to person, property, or rights, committed by such officer under color of official authority; nature and elements of the crime of extortion under color of office or right, oppression, etc.; nature and extent of criminal responsibility therefor; and prosecution and punishment of such acts as public offenses.

[EXCLUDES obtaining money or other property by threats (see "Threats");

\*Annotation: Words and Phrases, same title.

false personation of officer or other person exercising special authority (see "*False Personation*"); and civil liabilities of officers receiving illegal or excessive fees (see "*Officers*").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

- § 1. Nature of offense in general.
- § 2. Statutory provisions.
- § 3. Elements of offenses.
- § 4. — In general.
- § 5. — Intent.
- § 6. — Color of office or authority.
- § 7. — Duress or exaction.
- § 8. — Money or property extorted.
- § 9. Defenses.
- § 10. Persons liable.
- § 11. Penalties and actions therefor.
- § 12. Indictment or information.
- § 13. — Requisites and sufficiency.
- § 14. — Issues, proof, and variance.
- § 15. Evidence.
- § 16. Trial.
- § 17. Appeal and error.
- § 18. Sentence and punishment.

### *Cross-References.*

See "False Personation"; "Threats."  
Application and operation of common law, see "Criminal Law," § 9.  
Civil liabilities of officers receiving illegal or excessive fees, see "Officers," § 98.  
Conspiracy to extort money, see "Conspiracy," § 31.  
Recovery of money obtained by threats, see "Money Received," § 8.  
Subject and title of act relating to extortion, see "Statutes," § 118.

### *Evidence.*

Acts and declarations of conspirators and co-defendants, see "Criminal Law," § 423.  
Documentary evidence, see "Criminal Law," § 434.  
Other offenses, see "Criminal Law," §§ 369, 372.

### *Trial.*

Argument of counsel, see "Criminal Law," § 722.  
Instructions as to burden of proof, see "Criminal Law," § 782.  
Striking out evidence, see "Criminal Law," § 696.

### *Annotation.*

Extortion as affected by right, or belief in right, to property sought to be secured.—40 L. R. A. (N. S.) 801, note.  
Instigation to offense of extortion as a defense to prosecution.—30 L. R. A. (N. S.) 953, note.

Liability of officer who uses criminal process to collect a debt.—24 L. R. A. (N. S.) 301, note.  
Efforts to collect debt as extortion.—18 L. R. A. (N. S.) 77, note.

### **EXTRA ALLOWANCE.\***

#### *Cross-References.*

Additional to commissions of executor or administrator, see "Executors and Administrators," § 497.  
Additional to commissions of trustee, see "Trusts," § 317.

Additional to costs in general, see "Costs," §§ 164-168.

### **EXTRA COMPENSATION.\***

#### *Cross-References.*

For alterations and extra work by party to contract, see "Contracts," § 232.  
To contractor for public work, see "Municipal Corporations," § 360.

\*Annotation: Words and Phrases, same title.

## EXTRADITION.\*

*Scope-Note.*

[INCLUDES delivery, by one country or state to another, of persons charged with the commission of crime within the jurisdiction of such other country or state, either as matter of comity or under provisions of treaties, constitutions, or other compacts; nature and scope of the remedy in general; constitutional treaty, and statutory provisions relating thereto; in what cases, and as to what persons, and for what offenses extradition is allowed; jurisdiction over and proceedings to obtain extradition; issuance, requisites, and validity of demands, requisitions, warrants, etc.; arrest and delivery of persons accused; their rights and liabilities after extradition; review of proceedings; and costs and expenses of such proceedings.

[EXCLUDES delivery by one state to another of fugitives from service (see "Slaves").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. International.**

- § 1. Nature, grounds, and scope of remedy.
- § 2. Treaties.
- § 3. Statutory provisions.
- § 4. Authority and duty to demand or deliver persons accused.
- § 5. Offenses ground for extradition.
- § 6. Persons subject to extradition.
- § 7. Proceedings for extradition from foreign country.
- § 8. Proceedings for extradition to foreign country.
- § 9. — In general.
- § 10. — Preliminary demand and executive warrant.
- § 11. — Complaint.
- § 12. — Warrant for arrest.
- § 13. — Arrest and bail.
- § 14. — Examination and determination.
- § 15. — Commitment for extradition.
- § 16. — Warrant for delivery.
- § 17. — Review of proceedings.
- § 18. Costs and expenses.
- § 19. Rights and liabilities of accused after extradition.
- § 20. Rights of persons illegally brought within jurisdiction.

**II. Interstate.**

- § 21. Nature, grounds, and scope of remedy.
- § 22. Constitutional and statutory provisions.
- § 23. Authority and duty to demand or deliver persons accused.
- § 24. — In general.
- § 25. — From or to the territories.
- § 26. — From or to the District of Columbia.
- § 27. Offenses ground for extradition.
- § 28. Persons subject to extradition.
- § 28½. — In general.
- § 29. — Persons charged with crime.

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\*Annotation: Words and Phrases, same title.



**II. Interstate—Continued.**

- § 30. — Fugitives from justice.
- § 31. — Persons in custody on charge of other crime.
- § 32. Indictment or affidavit charging offense.
- § 34. Requisition and accompanying documents.
- § 35. Application for arrest and proceedings thereon.
- § 36. Warrant for arrest and delivery.
- § 37. Arrest and bail.
- § 38. Agents to receive delivery.
- § 39. Examination, determination, and review of proceedings.
- § 40. Costs and expenses.
- § 41. Rights and liabilities of accused after extradition.
- § 42. Rights of persons illegally brought within jurisdiction.

*Cross-References.*

Arrest and bail, see "False Imprisonment," § 7.  
 Concurrent and conflicting jurisdiction of state and federal courts, see "Courts," § 495.  
 Constitutionality of act conferring power on federal courts to appoint extradition commissioners, see "Constitutional Law," § 61.  
 Construction of extradition laws by United States courts as binding on state courts, see "Courts," § 97.  
 Grounds for discharge on habeas corpus, see "Habeas Corpus," § 30.  
 Removal to another United States district for trial, see "Criminal Law," § 242.  
 Review by habeas corpus, conclusions of return to writ, see "Habeas Corpus," § 79.

Review by habeas corpus, demurrer to return to writ, see "Habeas Corpus," § 84.  
 Review by habeas corpus, determination of issues, see "Habeas Corpus," § 103.  
 Review by habeas corpus, effect of writ as bar to subsequent extradition proceedings, see "Habeas Corpus," § 69.  
 Review by habeas corpus of proceedings in general, see "Habeas Corpus," §§ 19, 30, 92, 113.  
 Review by habeas corpus, right to remedy in general, see "Habeas Corpus," §§ 13, 19.  
 Review by habeas corpus, scope of inquiry, see "Habeas Corpus," §§ 92, 96.  
 Review by habeas corpus, sufficiency of petition, see "Habeas Corpus," § 54.  
 Review by habeas corpus, sufficiency of return, see "Habeas Corpus," §§ 76, 77.

*Annotation.*

Who are fugitives subject to extradition.—28 L. R. A. 289; 51 L. R. A. (N. S.) 668, notes.  
 Right to try prisoner extradited from sister state for crime other than that for which he was surrendered.—14 L. R. A. 128; 19 L. R. A. 206; 47 L. R. A. (N. S.) 807, notes.  
 Insanity as a ground for refusing extradition.—46 L. R. A. (N. S.) 397, note.  
 Extradition of person who is under confinement in state asylum.—24 L. R. A. (N. S.) 799, note.

Right, in reviewing extradition proceedings, to be heard upon merits of the charge against accused.—21 L. R. A. (N. S.) 939, note.  
 What papers necessary to obtain surrender of fugitives from another state.—28 L. R. A. 801, note.  
 Effect upon prisoner's rights of necessity of amendment of charge upon which he was extradited.—25 L. R. A. 593, note.  
 Abduction or wrongful bringing of criminal into jurisdiction as a defense to prosecution.—15 L. R. A. 177, note.

**EXTRA DOTAL PROPERTY.\****Cross-Reference.*

See "Husband and Wife," §§ 110-133½.

**EXTRA HAZARDOUS.\****Cross-Reference.*

See "Insurance," §§ 402-467.

**EXTRA JUDICIAL.***Cross-References.*

Admissions and declarations, see "Criminal Law," §§ 405-421; "Evidence," §§ 200-205, 212-324.  
 Judgments and opinions, see "Appeal and Error," §§ 1097, 1195; "Courts," § 92.  
 Oath, see "Oaths"; "Perjury," §§ 7, 8.

**EXTRALATERAL RIGHTS.***Cross-Reference.*

Under vein or lode location of mining claim, see "Mines and Minerals," § 31.

**EXTRAORDINARY CARE AND DILIGENCE.\****Cross-References.*

See "Carriers," §§ 107, 108, 280-322; "Electricity," §§ 12-16; "Explosives."

**EXTRAORDINARY MOTIONS.***Cross-Reference.*

See "Motions."

\*Annotation: Words and Phrases, same title.

**EXTRAORDINARY REMEDIES.\****Cross-References.*

See "Habeas Corpus"; "Injunction"; "Mandamus"; "Ne Exeat"; "Prohibition"; "Quo Warranto"; "Specific Performance."

**EXTRAORDINARY RISKS.\****Cross-Reference.*

Assumption by servant, see "Master and Servant," § 203.

**EXTRATERRITORIAL.***Cross-References.*

Authority of officer to take acknowledgment, see "Acknowledgment," § 17.  
Improvements and works by municipality, see "Municipal Corporations," § 277.  
Jurisdiction of courts, see "Courts," § 29.  
Operation of statutes, see "Courts," § 8.

**EXTRA WORK.***Cross-References.*

Compensation for alterations and extra work by party to contract, see "Contracts," § 232.  
Performance by contractor for public improvements, see "Municipal Corporations," § 360.

**EXTREME CRUELTY.***Cross-References.*

Element of homicide, see "Homicide," §§ 7-83.  
Ground for divorce, see "Divorce," § 27.

**EXTRINSIC EVIDENCE.\****Cross-References.*

In general, see "Criminal Law," § 447;  
"Evidence," §§ 384-469.  
To aid construction of statute, see "Statutes," § 221.  
To aid construction of trust, see "Trusts," § 119.  
To aid construction of will, see "Wills," §§ 486-490.  
To reform instrument, see "Reformation of Instruments," § 44.  
To show contract of sale to be a chattel mortgage, see "Chattel Mortgages," § 38.  
To show that absolute deed is intended as mortgage, see "Mortgages," § 37.

**FABRICATED EVIDENCE.***Cross-References.*

See "Forgery."  
Presumptions, see "Criminal Law," § 351;  
"Evidence," § 79.

**FABRICS.\****Cross-Reference.*

Subject to duty, see "Customs Duties," §§ 32-35, 37, 39-45.

**FACE.\****Cross-References.*

Amount due on note, see "Bills and Notes," § 124.

Collateral attack on judgment void on its face, see "Judgment," § 485.

Deductions from face value of obligation as usury, see "Usury," §§ 1-88.

Discounting municipal warrants, see "Municipal Corporations," § 900.

Discounting obligations by banks, see "Banks and Banking," § 178.

Necessity of pleading all provisions on face of policy, see "Insurance," § 645.

Of note as affected by marginal memoranda, see "Bills and Notes," § 133.

Right to confront witnesses, see "Criminal Law," § 662; "Trial," § 38.

Sale of municipal bonds at less than par, see "Municipal Corporations," § 921.

Value of benefit certificate, see "Insurance," § 791.

Value of tax certificate, see "Taxation," § 742.

Variance between allegations in pleading and face of policy, see "Insurance," § 631.

**FACILITIES.\****Cross-References.*

Duty of carrier to furnish to other carriers, see "Carriers," §§ 15, 20, 33.

Duty of carrier to furnish to shippers, see "Carriers," §§ 40, 44.

Duty of railroad companies as to equipment of road, see "Railroads," §§ 225-229.

**FAC SIMILE.***Cross-Reference.*

Signature, see "Signatures," § 2.

**FACT.\****Cross-References.*

Accessories after the fact, see "Criminal Law," §§ 75-77.

Accessories before the fact, see "Criminal Law," §§ 69-73, 81.

Conflicting presumptions of fact, see "Criminal Law," § 325; "Evidence," § 88.

Evidence of matters of fact or conclusions, see "Criminal Law," § 448; "Evidence," § 471.

False pretense by representations as to past, existing or future facts, see "False Pretenses," § 7.

Findings of fact, see "Trial," §§ 346-366, 388-405.

Ignorance or mistake of fact, defense to criminal prosecution, see "Criminal Law," § 33.

Judicial notice of facts, see "Criminal Law," § 304; "Evidence," §§ 1-52.

Matters of fact distinguished from matters of law, see "Fraud," § 10.

Matters of fact distinguished from matters of opinion, see "Fraud," § 11.

Mistake of fact, ground for recovery of payments in general, see "Payment," § 85.

Mistake of fact, ground for recovery of taxes paid, see "Taxation," § 540.

Mistake of fact, ground for relief in equity, see "Equity," § 8; "Reformation of Instruments," § 17.

\*Annotation: Words and Phrases, same title.

Necessity of finding of facts, see "Appeal and Error," §§ 1095, 1122.  
 Pleading matters of fact or conclusions, see "Indictment and Information," § 63; "Pleading," §§ 8, 157.  
 Presumptions as to continuance of fact, see "Evidence," § 67.  
 Presumptions as to knowledge of fact, see "Evidence," § 66.  
 Presumptions of fact, operation and effect, see "Evidence," § 87.  
 Questions of law and fact, province of court and jury, see "Criminal Law," §§ 734-749; "Trial," §§ 134-149.  
 Rebuttal of presumptions of fact, see "Evidence," § 89.

Review of questions of fact, see "Appeal and Error," §§ 842, 895, 987-1024, 1093-1095.

### FACTORIES.\*

#### *Cross-References.*

See "Manufactures."

Criminal responsibility for interference with factory inspector, see "Health," § 37.

License taxes as on tobacco factories, see "Licenses," § 1.

### FACTORIZING PROCESS.\*

#### *Cross-Reference.*

See "Garnishment."

## FACTORS.\*

### *Scope-Note.*

[INCLUDES the regulation and conduct of the business of receiving and selling goods consigned or otherwise intrusted to factors, commission merchants, etc., for sale; rights, powers, duties, and liabilities of persons engaged in such business and the principals or consignors, as between themselves and as to others, arising from such consignments, etc., and incidental transactions, such as advances, pledges, etc., especially as affected by their possession or control of the goods or of evidences of title.

[EXCLUDES agency in general, and on particular occasions only, not in the course of the agent's ordinary business (see "*Principal and Agent*"); and sales of goods through brokers not having possession or control of the property (see "*Brokers*").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

- § 1. Who are factors.
- § 2. Licenses and taxes.
- § 3. Penalties for violations of regulations.
- § 4. Offenses by factors.
- § 5. Appointment or employment.
- § 6. Duration, termination, or revocation of agency.
- § 7. Duties and liabilities of principal in general.
- § 8. Authority conferred in general.
- § 9. Delegation of authority.
- § 10. Duties to principal in general.
- § 11. — Nature of factor's obligation.
- § 12. — Skill and care required.
- § 13. — Instructions of principal.
- § 14. — Information to principal.
- § 15. Control and care of goods.
- § 16. Insurance of goods.
- § 17. Obligation to make advances.
- § 18. Title to goods.
- § 19. Power to pledge.
- § 20. Powers, duties, and liabilities as to sale.
- § 21. — Authority and duty in general.
- § 22. — Effect of instructions by principal.

\*Annotation: Words and Phrases, same title.

- § 23. — Effect of advances by factor.
- § 24. — Place, time, and manner of sale.
- § 25. — Price.
- § 26. — Credit to buyer.
- § 27. — Collection of price.
- § 28. — Assumption by factor of liability for price.
- § 29. Del credere agency.
- § 30. Guaranty by factor of sale, price, or collection.
- § 31. Duties and liabilities as to proceeds.
- § 32. Keeping and rendering accounts.
- § 33. Failure to sell.
- § 34. Individual interest of factor.
- § 35. Factor acting for parties adversely interested.
- § 36. Insolvency of factor.
- § 37. Fraud of factor.
- § 38. Conversion by factor.
- § 39. Repudiation or ratification of acts of factor.
- § 40. Liabilities of factor representing several principals.
- § 41. Liabilities of factor to true owner other than principal.
- § 42. Actions for proceeds of goods or for accounting.
- § 43. Actions for negligence or wrongful acts of factor.
- § 44. Commission or other compensation for services.
- § 45. Reimbursement of advances, expenses, or losses.
- § 46. Actions for compensation.
- § 47. Lien.
- § 48. Rights, powers, and liabilities as to third persons.
- § 49. — Representation of principal in general.
- § 50. — Loss of or injury to goods.
- § 51. — Contracts in general.
- § 52. — Pledge of goods.
- § 53. — Sale of goods.
- § 54. — Warranties.
- § 55. — Proceeds of goods.
- § 56. — Unauthorized and wrongful acts of factor.
- § 57. — Repudiation or ratification of acts of factor.
- § 58. Protection, under factors' acts, of persons dealing with factor.
- § 59. — In general.
- § 60. — Factors or agents within statutes.
- § 61. — Possession of goods or of evidence of title.
- § 62. — Pledges.
- § 63. — Purchasers.
- § 64. Right of principal to follow goods or proceeds thereof.
- § 65. Rights of creditors of principal and factor.
- § 66. Actions by or against principals or factors.

#### *Cross-References.*

See "Brokers"; "Principal and Agent."

Advances by factors, limitation of action to recovery, see "Limitation of Actions," § 53.

Application by bank of funds of consignor

to debt of factor, see "Banks and Banking," § 134.

Assignments for benefit of creditors, effect as conveying consigned goods, see "Assignments for Benefit of Creditors," § 176.

Assignments for benefit of creditors, enforcement of factor's claim for advances against consigned goods of assignor, see "Assignments for Benefit of Creditors," § 312.

Assignments for benefit of creditors, enforcement of factor's lien by assignee, see "Assignments for Benefit of Creditors," § 180.

Assignments for benefit of creditors, right of priority in distribution of estate, see "Assignments for Benefit of Creditors," § 310.

Attachment by creditors of factor, see "Attachment," § 63.

Commissions of factor making advances as usury, see "Usury," § 58.

Compromise between parties affecting relation, see "Compromise and Settlement," § 15.

Custom as affected by contract, see "Customs and Usages," § 14.

Custom as affected by knowledge of principal, see "Customs and Usages," § 12.

Custom as affecting relations between factor and consignor, see "Customs and Usages," § 7.

Custom as affecting right to commissions, see "Customs and Usages," §§ 12, 17.

Delegation of power to regulate business, see "Constitutional Law," § 62.

Embezzlement by factor, see "Embezzlement," §§ 16, 39, 47.

Execution against factor, see "Execution," § 54.

Guaranty of factor or agent del credere, requirements of statute of frauds, see "Frauds, Statute of," § 29.

Liability of factor to principal as constituting debt created in fiduciary capacity affected by factor's discharge in bankruptcy, see "Bankruptcy," § 426.

Liability of goods consigned to or in possession of factors to taxation, see "Taxation," § 85.

License taxes in general, see "Licenses."

Lien of factor, right to lien based on acquisition of property on Sunday, see "Sunday," § 11.

Misappropriation of proceeds of property sold by factor under power of sale in mortgage, see "Chattel Mortgages," § 265.

Parol or extrinsic evidence to vary or contradict contract of employment, see "Evidence," § 398.

Regulations as class legislation, see "Constitutional Law," § 208.

Requirement of license as regulation of commerce, see "Commerce," § 65.

Rights of trustee in bankruptcy in property held by bankrupt factor, see "Bankruptcy," § 140.

Sale of goods for recoupment of advances made to insolvent consignor, see "Assignments for Benefit of Creditors," § 312.

Title to and disposition of bank deposits, see "Banks and Banking," § 130.

Value of consigned property, evidence in action for proceeds thereof, see "Evidence," § 113.

## § 1. Who are factors.

### Cross-Reference.

Within meaning of factor's acts, see post, § 60.

## § 2. Licenses and taxes.

### Cross-References.

Power of municipality to impose license taxes, see "Licenses," § 5.

Requirement of license as regulation of commerce, see "Commerce," § 65.

## § 3. Penalties for violations of regulations.

## § 4. Offenses by factors.

### Cross-Reference.

Embezzlement, see "Embezzlement," §§ 16, 39, 47.

## § 5. Appointment or employment.

### Cross-Reference.

Waiver by factor of breach of contract by principal, see "Contracts," § 316.

### Annotation.

Consignments by foreign corporation to factors, as doing business within state.—18 L. R. A. (N. S.) 138, note.

(a) Where goods are delivered by one party to another to sell for the party delivering them, it creates the relation of agency, and the factor or agent is liable to

pay, not a price, but to account for the proceeds of the goods when sold.—*McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666.

(b) Where goods were charged to the consignees when delivered, with the understanding that they were to account for them at the price thus charged when sold, and, if not sold, that they were to remain in their hands, subject to the order of the shippers, it would not make such consignees the owners of the goods, but they were factors.—*Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468. [Cited and annotated in 52 L. R. A. 343, on when insurable interest must exist under fire policies.]

## §§ 6-9. (See Analysis.)

## §§ 10-14. Duties to principal in general.

### Cross-Reference.

Actions for negligence or wrongful acts, see post, § 43.

(a) Where a consignment is made upon an express agreement, the factor is not bound to follow subsequent instructions inconsistent with such agreement.—*B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 106 Md. 587, 68 Atl. 351.

(b) Instructions to a factor must be clear and distinct in order to render the factor liable for a departure therefrom.—*B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 106 Md. 587, 68 Atl. 351.

#### § 15. Control and care of goods.

#### § 16. Insurance of goods.

(a) In an action against a factor for the value of machinery destroyed by fire while in his possession, evidence examined, and held not to show a custom imposing upon the factor the duty to keep the stock insured for his principal's benefit.—*B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 106 Md. 587, 68 Atl. 351.

(b) It is not the duty of a factor to insure the goods of his principal, unless so instructed, or unless there is a usage of trade or some understanding with the principal to that effect.—*B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 106 Md. 587, 68 Atl. 351.

#### § 17. Obligation to make advances.

##### *Cross-References.*

Effect of advances on right of factor to sell, see post, § 23.

Reimbursement of advances, see post, § 45.

#### § 18. Title to goods.

##### *Annotation.*

When title passes under consignment of goods for sale, with provision in effect that consignee purchase balance of consignment.—39 L. R. A. (N. S.) 620, note.

(a) Where goods have been placed in the hands of a factor for sale, the principal is entitled to return of the goods, on demand before sale, and on payment to the factor of advances, with interest, and necessary expenses.—*McGaw v. Hanway*, 120 Md. 197, 87 Atl. 666.

(b) In cases of a special agreement between a consignor and a factor, to whom he is indebted for advances, that goods shall be shipped by the former to the latter to pay such advances, the delivery of the goods to the carrier, consigned to the factor, vests the title thereto in the factor.—*Ruhl v. Corner*, 63 Md. 179.

(c) Consignees who bona fide advance money on the credit of consignments made to

them upon bills of lading acquire an interest in the property, and are purchasers for value.—*Hall v. Hinks*, 21 Md. 406. [Cited and annotated in 13 L. R. A. (N. S.) 703, on right of purchasers of, or creditors levying on, goods sold for cash, delivered without payment; in 25 L. R. A. (N. S.) 792, on right of one leaving chattels in another's possession as against latter's vendees or creditors.]

#### § 19. Power to pledge.

##### *Cross-Reference.*

Rights and liabilities as to third persons, see post, §§ 52, 62.

#### § 20. Powers, duties, and liabilities as to sale.

##### *Cross-Reference.*

Rights and liabilities as to third persons, see post, §§ 53, 59-63.

#### § 21.— Authority and duty in general.

##### *Cross-Reference.*

Sale to enforce lien, see post, § 47.

(a) Where goods are consigned according to specific instructions, and no advances have been made or liabilities incurred by the assignee, the right of the consignor to direct and control the sale cannot be questioned.—*Capron v. Adams*, 28 Md. 529.

#### § 22.— Effect of instructions by principal.

##### *Cross-Reference.*

Effect of advances, see post, § 23.

#### § 23.— Effect of advances by factor.

##### *Cross-Reference.*

See post, § 47.

(a) Where the sale and management of a consignment of goods are left entirely to the discretion of the consignee, and large advances have been made upon it, the consignee has the right, in the absence of any agreement to the contrary, to sell in the exercise of a sound discretion, and in such mode as the usages of the trade require.—*Capron v. Adams*, 28 Md. 529.

(b) A factor who receives goods on consignment, without any limit as to time, mode, or rate of sale, and makes advances or incurs liabilities on account of the goods consigned, thereby acquires a special prop-

erty in them, and a right to sell, according to the usual course of his duty, so much thereof as may be necessary to reimburse such advances or meet such liabilities; and the consignor has no right, by any order given after the advances have been made or liabilities incurred, to control this right of sale, except so far as relates to the surplus of the goods not necessary for the reimbursement of such advances or liabilities, unless he stands ready, and offers to reimburse the advances or liabilities.—*Whitney v. Wyman*, 24 Md. 131.

#### § 24.— Place, time, and manner of sale.

(a) Where a consignment is made without restrictions, and the consignees are authorized to deal with it as their own, the consignor is not entitled to notice from them of its depreciated value before selling it.—*Adams v. Capron*, 21 Md. 186.

#### § 25.— Price.

#### § 26.— Credit to buyer.

#### § 27.— Collection of price.

##### Annotation.

Who must bear loss where merchandise broker receives purchase price and fails to pay over same to seller.—8 L. R. A. (N. S.) 474, note.

(a) Factors cannot be permitted to discharge a debt due to their principals by agreeing to take in payment that which is worthless and void.—*Sangston v. Maitland*, 11 G. & J. 286. [Cited and annotated in 33 L. R. A. 634, on effect on liability of obligors of void renewal or substituted contract.]

(b) Where a foreign fruit merchant sends goods to his consignee, with instructions to dispose of them to the best advantage, and the consignee sends them to auction for sale, and the auctioneer makes way with them and with the money, and fails, the consignee is not answerable.—*Jackson v. Union Bank*, 6 H. & J. 146. [Cited and annotated in 52 L. R. A. (N. S.) 618, 621, 645, on liability of bank taking paper for collection for correspondent's default; in 21 L. R. A. 442, 445, on banking customs.]

#### § 28.— Assumption by factor of liability for price.

#### § 29. Del credere agency.

##### Cross-References.

Commissions, see post, § 44.

Guaranty of factor del credere, requirements of statute of frauds, see "Frauds, Statute of," § 29.

(a) In an action to recover for certain machinery consigned to defendants and destroyed by fire, evidence held to show that defendants were del credere agents of the plaintiff for the sale of the machinery.—*B. F. Sturtevant Co. v. Cumberland Dugan & Co.*, 106 Md. 587, 68 Atl. 351.

(b) Where del credere agents shipped their principal's goods to factors, who sold them to a merchant having no knowledge of the factorship or of the agency, and the factors subsequently failed before payment of the price, the agents could recover the price from the merchant in an action in their own names.—*Miller v. Lea*, 35 Md. 396, 6 Am. Dec. 417.

(c) A factor, acting under a del credere commission, collected the proceeds of a bill of goods sold by his principal, deposited the money to his own account, and purchased a draft payable to his own order, which he specially indorsed, without excluding recourse, and transmitted to his principal. The draft included, not only the money collected by the agent, but also a balance due from himself to his principal. The draft was afterwards dishonored. Held, that the agent was bound, not only for the collection of the money, but for the safe transmission thereof to his principal.—*Lewis v. Brehme*, 33 Md. 412. [Cited and annotated in 29 L. R. A. 314, on necessity for new consideration to support waiver of lack of notice of dishonor, or subsequent promise by indorser; in 28 L. R. A. (N. S.) 531, on admissibility of parol evidence, as between immediate parties, that unrestricted indorsement was merely to transfer title.]

#### § 30. Guaranty by factor of sale, price, or collection.

#### § 31. Duties and liabilities as to proceeds.

##### Cross-References.

See post, § 43.

Liability of factor to principal as constituting debt created in fiduciary capacity

affected by factor's discharge in bankruptcy, see "Bankruptcy," § 426.

(a) Where a commission merchant fails to remit the proceeds in his hands of the sale of a portion of the goods sold according to the terms of his contract, the seller is not liable to the commission merchant for failure to consign the balance, though the latter had to buy at an advanced price to fill the contract with the purchaser, and though he should be considered as the seller's agent in making such contract.—*Curtis v. Gibney*, 59 Md. 131. [Cited and annotated in 30 L. R. A. 63, on right to rescind or abandon contract for other party's default.]

### § 32. Keeping and rendering accounts.

#### Cross-Reference.

Criminal prosecution for failure to render true statement of sales, see ante, § 4.

#### Annotation.

Stated accounts of factors.—27 L. R. A. 821, note.

(a) It is the duty of a factor to keep books, in which shall be correctly entered the transactions on account of his principal; and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith.—*Keighler v. Savage Mfg. Co.*, 12 Md. 383. [Cited and annotated in 30 L. R. A. 239, on injunction against judgments by confession; in 13 L. R. A. (N. S.) 580, on relief from judgment suffered in reliance on unkept promise.]

(b) A principal is entitled to a full knowledge of the collateral securities in the hands of his factor, of what has been received from them, and a detailed statement of their condition.—*Keighler v. Savage Mfg. Co.*, 12 Md. 383. [Cited and annotated, see supra.]

(c) It is unreasonable for a principal to demand of his factor the names of purchasers of goods, the accounts of which have been long settled. Such a demand should be made, if at all, at the time of such settlements, and cannot be made afterwards, unless fraud is charged upon the factor.—*Keighler v. Savage Mfg. Co.*, 12 Md. 383. [Cited and annotated, see supra.]

### § 33. Failure to sell.

### § 34. Individual interest of factor.

(a) A factor cannot make a valid purchase of the goods left with him for sale, unless

the principal is informed of the purchase and of every fact and circumstance relating thereto within the knowledge of the agent.—*Keighler v. Savage Mfg. Co.*, 12 Md. 383. [Cited and annotated, see supra, § 32.]

### § 35. Factor acting for parties adversely interested.

### § 36. Insolvency of factor.

#### Cross-References.

Effect of consignee's assignment for benefit of creditors as conveying consigned goods, see "Assignments for Benefit of Creditors," § 176.

Enforcement of factor's claim for advances against consigned goods of assignor, see "Assignments for Benefit of Creditors," § 312.

Enforcement of factor's lien by assignee, see "Assignments for Benefit of Creditors," § 180.

Right of priority in distribution of assigned estate, see "Assignments for Benefit of Creditors," § 310.

### §§ 37-41. (See Analysis.)

### § 42. Actions for proceeds of goods or for accounting.

#### Cross-References.

Actions by or against third persons, see post, § 66.

Evidence of value of property in action for proceeds of goods consigned to factor, see "Evidence," § 113.

(a) A contract which recited a sale of certain machines to defendant, but which provided for payment in notes of responsible farmers to whom the machines might be sold, which were to be guaranteed by defendant, was to be in force until a certain time and if all of its provisions had been complied with by both parties it should then cease. The evident intention was that the defendant was to sell the machines on commission and guarantee the sales made. In an action to recover for certain machines delivered to plaintiff under the contract, one count alleged that defendant sold one of the machines to T. and guaranteed the note he received from T.; that said note remained unpaid for three months after it was due, and defendant refused to redeem it as provided in the agreement, though plaintiff had required him to do so; that all of the provisions of the agreement had not been complied with at the date specified for termina-



tion, but that the sale of the machine had been made to T. prior thereto, but defendant had failed to settle for it, though it was alleged that he afterward indorsed and delivered T.'s note to plaintiff. *Held*, that the count sufficiently set forth a breach of the agreement.—*Lee v. Strickland*, 62 Md. 158.

(b) A factor acting under a *del credere* commission collected the proceeds of a bill of goods sold by his principal, deposited the money to his own account, and purchased a draft payable to his own order, which he specially indorsed, and transmitted to his principal. The draft included not only the money collected by the agent, but also a balance due from himself to his principal. *Held*, that, though the indorsement imported *prima facie* liability on the part of the agent, he was entitled to show as a matter of defense that it was not the intention that he should be personally charged thereby.—*Lewis v. Brehms*, 33 Md. 412. [Cited and annotated in 29 L. R. A. 314, on necessity for new consideration to support waiver of lack of dishonor, or subsequent promise by indorser; in 28 L. R. A. (N. S.) 531, on admissibility of parol evidence, as between immediate parties, that unrestricted indorsement was merely to transfer title.]

(c) A consignee will not be presumed to have negligently and fraudulently violated his duty, without proof.—*Gaither v. Myrick*, 9 Md. 118.

### § 43. Actions for negligence or wrongful acts of factor.

#### Cross-References.

Actions for proceeds of goods or for accounting, see ante, § 42.

Form and language of verdict in general, see "Trial," § 327.

#### Annotation.

Effect of fact that one is entitled to commissions out of fund on his prosecution for embezzlement for retaining entire fund.—13 L. R. A. (N. S.) 511, note.

### § 44. Commission or other compensation for services.

#### Cross-References.

Lien for compensation, see post, § 47.

Commissions of factor making advances, as usury, see "Usury," § 58.

Effect of custom, see "Customs and Usages," §§ 12, 17.

### § 45. Reimbursement of advances, expenses, or losses.

#### Cross-References.

Lien for advances, expenses, or losses, see post, § 47.

Enforcement of claim for advances against consigned goods assigned by consignor for benefit of creditors, see "Assignments for Benefit of Creditors," § 312.

Limitations of action to recover, see "Limitation of Actions," §§ 24, 53.

#### Annotation.

Set-off in case of bankruptcy.—55 L. R. A. 44, 51, 60, note.

(a) B., a commission merchant, telegraphed to A., a grain dealer: "Say lowest net to you twenty thousand. Delivering next thirty days. Answer promptly." A. replied: "I don't think I have more than 10,000 bus. 4-rowed barley. Should want 87 net." On the next day, November 9th, B. telegraphed to A.: "Have sold the ten thousand four-rowed to net you 87. See letter about shipping." The letter said: "Sold your 10,000 to net you your price, 87c., which we consider a good sale. Now, when you ship this barley, would like you to \* \* \* draw 5-day drafts on us," etc. A. shipped part of the barley, and drew a sight draft on B. for the amount shipped, less freight, and at the same time drew on him for a balance due on a previous account. B. did not pay either of the drafts, because A., as he said, "left no margin whatever." B. made no remittance afterwards, and for that reason A. sent no more barley. On November 9th B. had sold to C. 10,000 bushels of barley at 90 cents per bushel, on a credit of four months. The price of barley advancing, B. had to buy at the advanced price to fill the contract, and claimed the right to charge this purchase to A. *Held*, that, as A. was entitled to draw at sight on B. for the previous account, B.'s failure to remit at all excused A. from making any further delivery, and therefore A. was not chargeable with the purchase made by B. to fulfill the contract with C., even if B. should be considered as A.'s agent in making that contract.—*Curtis v. Gibney*, 59 Md. 131. [Cited and annotated in 30 L. R. A. 63, on right to rescind or abandon contract for other party's default.]

(b) Where the owner of goods consigned them for sale to one H., and advances on

the consignment were made by C. to the consignor on an undertaking of the latter to refund any excess of the advances over the net sales of the consignments, and the advances were made by draft of C. upon H., and were paid by the latter on agreement of C. to refund the amounts of any overdraft, and the net sales were insufficient to cover the drafts, where the consignee performed his duty with care and skill, he could be reimbursed to the amount of the advances, either against the consignor or C.—*Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

(c) Defendant consigned goods for sale to a certain firm, and advances on the consignments were made by plaintiffs on an undertaking by defendant to refund any excess of the advances over the net proceeds of the sales of the goods. The advances were made by plaintiffs' drafts on the consignees, which were paid by the latter on an undertaking of plaintiffs to refund the amount overdrawn. The net proceeds of sales proved insufficient to cover the advances. *Held*, that due care and diligence on the part of the consignees were essential to entitle plaintiffs to recover the deficiency from defendants, and an instruction which authorized the jury to find for plaintiffs on a certain hypothesis, without regard to the conduct of the consignees, was error.—*Adams v. Capron*, 21 Md. 186, 83 Am. Dec. 566.

(d) The plaintiff, the consignee of a larger parcel in a mixed cargo of wheat, sold the whole on the 13th, and settled with the defendant, the consignee of the smaller parcel, on the 18th of October, though he had not then received the money from the purchaser. The name of the purchaser was not disclosed to the defendant until the 24th or 25th of the same month, when the plaintiff demanded of the defendant a return of the money, stating that the purchaser had failed, and an unsuccessful attempt had been made to attach the wheat in New York. It was proved that sales of grain in Baltimore are made for cash on delivery, though the money is not always paid at the time, some delay being incident to delivery, but still that the delivery does not bar the right to demand cash. *Held*, that the plaintiff was not en-

titled to recover, because he had not exercised proper care and diligence in collecting the proceeds of sale.—*Ewalt v. Harding*, 16 Md. 160.

(e) Where goods are shipped to a consignee in a foreign country, and he pays the then customary duties, and makes up his accounts accordingly, and transmits them to consignor, and the intendant of the foreign country by an order dated prior to the arrival of the goods, but not made public until some time after, directed vessels entering the port to pay an additional duty, and the consignee was compelled to do so after the settlement of his accounts, he was entitled to recover the same from his consignor.—*Drake v. Hudson*, 7 H. & J. 399.

#### § 46. Actions for compensation.

##### *Cross-Reference.*

Actions for advances, expenses, or losses, see ante, § 45.

#### § 47. Lien.

##### *Cross-References.*

Compromise between factor and consignor affecting factor's relation to goods, see "Compromise and Settlement," § 15.

Enforcement by consignee's assignee for creditors, see "Assignments for Benefit of Creditors," § 180.

Right to lien based on acquisition of property on Sunday, see "Sunday," § 11.

Sale of goods for recoupment of advances made to insolvent consignor making assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 312.

##### *Annotation.*

Right of customer who has advanced purchase money to factor to preference in case of insolvency before making of purchase.—42 L. R. A. (N. S.) 95, note.

To what extent advances by a factor create a debt against the principal.—5 L. R. A. (N. S.) 1147, note.

(a) The factor's act (Code 1888, art. 2, § 1), provides that any person intrusted, for the purpose of consignment or sale, with any goods, and who shall have shipped or consigned the same in his own name, and any person in whose name any goods shall be shipped or consigned by any other person, shall be taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon for any money, etc., advanced for the use of the person in whose name such goods,

etc., shall be shipped or consigned. *Held*, that neither under the statute, nor at common law, may one to whom goods are delivered merely to deliver to a purchaser have a factor's lien, though the purchaser refuses to accept them.—*Rowland v. Dolby & Statton*, 100 Md. 272, 59 Atl. 666. (See Code 1911, art. 2, § 1.)

(b) A factor who has deprived himself of possession by placing the goods in a warehouse and delivering the receipt to his principal has no lien.—*Rowland v. Dolby & Statton*, 100 Md. 272, 59 Atl. 666.

(c) The lien of a factor for advances made in behalf of a consignor attaches to any goods belonging to the latter received by the factor for sale; but it does not attach to goods consigned to the factor, but sold to another person by the consignor during transit, even though they may come into the possession of the factor.—*Ruhl v. Corner*, 63 Md. 179.

(d) When the possession of the factor comes to him subsequently to his debt, and could have had no influence in creating the debt, his claim of lien must be subordinate to the true state of the ownership, whether known to him or not.—*Barry v. Boninger*, 46 Md. 59.

(e) If a factor be made garnishee of his principal, his right of lien will depend upon the balance, on the settlement between them, and not on the fact that at any given time prior or subsequent to the laying of the attachment the garnishee had received funds of the defendant.—*Baltimore & O. R. Co. v. Wheeler*, 18 Md. 372. [Cited and annotated in 28 L. R. A. 600, on liability of carriers to garnishment; in 59 L. R. A. 377, on garnishment of unliquidated claims.]

(f) Where a factor indorses bills for his principal, such liability, with a reasonable apprehension of danger, gives him, as factor, a lien on a bill then in his hands belonging to the principal, and indorsed to him for collection, to meet the event of his indorsements; and the fact that the factor receives a commission on his indorsements does not in any way affect the general question as to his lien as factor.—*Hodgson v. Payson*, 3 H. & J. 339.

## § 48. Rights, powers, and liabilities as to third persons.

### Cross-References.

Attachment by creditors of factor, see "Attachment," § 63.

Execution against factor, see "Execution," § 54.

## § 49.— Representation of principal in general.

(a) The acceptance by a purchaser of a bill of parcels sold to him by a commission merchant is a sufficient recognition by him of the authority of the commission merchant to sign his name.—*Batturs v. Sellers*, 5 H. & J. 116, 9 Am. Dec. 492.

## § 50.— Loss of or injury to goods.

### Annotation.

Right of factor to whom goods are consigned to maintain action against carrier.—26 L. R. A. (N. S.) 437; 36 L. R. A. (N. S.) 72, notes.

## § 51.— Contracts in general.

## § 52.— Pledge of goods.

### Cross-References.

Action against pledgee by principal, see post, § 66.

Authority conferred by principal, see ante, § 19.

Under factor's acts, see post, § 62.

## § 53.— Sale of goods.

### Cross-References.

Authority conferred by principal, see ante, §§ 21-28.

Sale to enforce lien, see ante, § 47.

Under factor's acts, see post, § 63.

(a) A member of a firm selling pianos on commission took a piano to his home, and, after keeping it a few months, became financially embarrassed, and sold it to an innocent purchaser for cash, and his principal brought replevin. *Held*, that the sale was legal, and the purchaser entitled to the piano.—*Dias v. Chickering*, 64 Md. 348, 1 Atl. 709, 54 Am. Rep. 770.

## § 54.— Warranties.

## § 55.— Proceeds of goods.

## § 56.— Unauthorized and wrongful acts of factor.

### Cross-Reference.

Effect of misappropriation of proceeds of property sold by factors under power of sale in chattel mortgage, see "Chattel Mortgages," § 265.

**§ 57.—Repudiation or ratification of acts of factor.**

*Cross-Reference.*

Effect as between principal and factor, see ante, § 39.

**§§ 58-63. Protection, under factors' acts, of persons dealing with factor.**

(a) Code 1860, art. 3, § 4, providing that any person may contract with a factor intrusted with any goods for the purchase thereof, and may receive from, and pay for the same to, such agent, if such contract and payment is made in the usual course of business, is applicable only to merchantable transactions, and does not apply where one was intrusted with a ring to procure a match therefor, or, failing in that, to get an offer for it.—*Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332. (See Code 1911, art. 2, § 4.) [Cited and annotated in 25 L. R. A. (N. S.) 773, on right of one leaving chattels in another's possession as against latter's vendees or creditors.]

**§ 64. Right of principal to follow goods or proceeds thereof.**

*Cross-Reference.*

Right of priority in distribution of insolvent's estate, see "Assignments for Benefit of Creditors," § 310.

**§ 65. Rights of creditors of principal and factor.**

*Cross-Reference.*

Rights of factor's trustee in bankruptcy, see "Bankruptcy," § 140.

*Annotation.*

Reservation of title in bailments for sale, as against creditors of bailor and bailee.—22 L. R. A. 850, note.

**§ 66. Actions by or against principals or factors.**

*Cross-Reference.*

-Waiver of tort and suit on contract, see "Action," § 28.

**FACULTY.\***

*Cross-Reference.*

Of college or university, see "Colleges and Universities," § 8.

**FAILURE.\***

*Cross-References.*

See "Bankruptcy"; "Insolvency."

**FAILURE OF CONSIDERATION.\***

*Cross-References.*

Of bill or note, see "Bills and Notes," § 97.  
Of contract in general, see "Contracts," § 83.

Of contract of suretyship, see "Principal and Surety," § 37.

Of deed, see "Deeds," § 19.

Of guaranty, see "Guaranty," § 17.

**FAILURE OF EVIDENCE.**

*Cross-Reference.*

See "Trial," §§ 150, 159, 167-170.

**FAILURE OF ISSUE.\***

*Cross-Reference.*

See "Wills," § 545.

**FAILURE OF TITLE.**

*Cross-References.*

As breach of condition in deed, see "Deeds," §§ 159-165.

As breach of covenant, see "Covenants," §§ 92-103.

As defense to action for price of land, see "Vendor and Purchaser," §§ 307, 308.

Ground for recovery of purchase money of land paid, see "Vendor and Purchaser," § 334.

Ground of action for damages by purchaser of land, see "Vendor and Purchaser," § 343.

**FAIR CRITICISM.\***

*Cross-Reference.*

See "Libel and Slander," §§ 34-51.

**FAIR GROUNDS.\***

*Cross-Reference.*

Construction of words in statute prohibiting certain sales within mile of fair ground, see "Agriculture," § 5.

**FAIRS.\***

*Cross-Reference.*

See "Agriculture," §§ 4, 5.

**FAIR USE.\***

*Cross-Reference.*

Of copyrighted work, see "Copyrights."

**FAITH AND CREDIT.**

*Cross-Reference.*

Given to foreign judgment, see "Judgment," §§ 813-832.

**FALSE CERTIFICATE.\***

*Cross-Reference.*

Of citizenship as including both forged certificate and those false in recitals, see "Aliens," § 72.

\*Annotation: Words and Phrases, same title.

## FALSE IMPRISONMENT.\*

*Scope-Note.*

[INCLUDES restraint of the person of another, without sufficient authority, not merely incident to a malicious prosecution; justification or excuse for such restraint; and liabilities and remedies therefor, civil or criminal.

[EXCLUDES right to make arrest (see "*Arrest*") ; and remedy by writ of habeas corpus (see "*Habeas Corpus*").

[For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Civil Liability.****(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.**

- § 1. Nature and elements of false imprisonment.
- § 2. — In general.
- § 3. — False imprisonment and malicious prosecution distinguished.
- § 4. — Intent and malice.
- § 5. — Act or means of arrest or detention.
- § 6. — Extent of restraint.
- § 7. — Illegality of arrest.
- § 8. — Illegality of detention after arrest.
- § 9. Defenses.
- § 10. — In general.
- § 11. — Exercise of authority or duty.
- § 12. — Judicial process.
- § 13. — Probable cause.
- § 14. — Advice of counsel.
- § 15. Persons liable.

**(B) ACTIONS.**

- § 16. Nature and form of remedy.
- § 17. Jurisdiction and venue.
- § 18. Time to sue and limitations.
- § 19. Parties.
- § 20. Pleading.
- § 21. Evidence.
- § 22. — Presumptions and burden of proof.
- § 23. — Admissibility in general.
- § 24. — Intent and malice.
- § 25. — Character and condition of parties.
- § 26. — Justification.
- § 27. — Nature and circumstances of act.
- § 28. — Extent of injury.
- § 29. — Aggravation of damages.
- § 30. — Mitigation of damages.
- § 31. — Weight and sufficiency.
- § 32. Damages.
- § 33. — Measure in general.

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\*Annotation: Words and Phrases, same title.

**I. Civil Liability—Continued.****(B) ACTIONS—Continued.**

- § 34. — Elements of compensation.
- § 35. — Exemplary.
- § 36. — Amount awarded.
- § 37. Trial.
- § 38. — Conduct in general.
- § 39. — Questions for jury.
- § 40. — Instructions.
- § 41. — Verdict and findings.
- § 42. Judgment and review.

**II. Criminal Responsibility.**

- § 43. Offenses.
- § 44. Prosecution and punishment.

*Cross-References.*

See "Kidnapping"; "Malicious Prosecution."

Element of damage in action for deceit, see "Fraud," § 60.

**I. CIVIL LIABILITY.***Cross-References.*

Implied repeal of statute by constitutional amendment, see "Constitutional Law," § 24.

Liability of city for unauthorized acts of officers, see "Municipal Corporations," § 753.

Liability of corporations in general, see "Corporations," §§ 488-498.

Liability of municipality, see "Municipal Corporations," § 723.

Liability of tax assessor for arrest incident to enforcement of void assessment, see "Taxation," § 323.

Reimbursement of municipal officer of expenses incurred in defending action for false imprisonment, see "Municipal Corporations," § 163.

Rights of finder of lost goods as against third persons claiming right of custody thereof, see "Finding Lost Goods," § 7.

Trespass to the person by procuring arrest, see "Trespass," § 4.

What law governs, see "Torts," § 2.

**(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.****§ 1. Nature and elements of false imprisonment.***Cross-References.*

Defenses, see post, §§ 9-14.

Persons liable, see post, § 15.

**§ 2.— In general.**

(a) False imprisonment is a wrong akin to that of assault and battery, and consists of imposing by force or threats unlawful restraint on a person's freedom of locomotion. It is the unlawful detention of a person

against his will.—*New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502.

**§ 3.— False imprisonment and malicious prosecution distinguished.***Cross-Reference.*

Pleading, see post, § 20.

(a) There is a distinction between an action for false imprisonment and one for malicious prosecution. The former is a suit for trespass, and the latter an action on the case. The first can be maintained only when the arrest is made without legal process; and the latter, when the process of the law has been perverted and improperly used without probable cause and for a malicious purpose.—*Lewin v. Uzuber*, 65 Md. 341, 4 Atl. 285.

(b) In both false imprisonment and malicious prosecution the injured party can recover damages for the wrong done him, but he must proceed in a different way against different parties. In malicious prosecution the officer issuing the process, or making the arrest under it, incurs no responsibility, the whole responsibility being upon the party procuring it. In false imprisonment, the arresting officer and the party inducing the arrest, and the magistrate assuming to issue the unauthorized warrant, are all liable as joint trespassers.—*Lewin v. Uzuber*, 65 Md. 341, 4 Atl. 285.

For cases in other jurisdictions, see same title and section number in Key Number Digests, and cross-references therein.

(c) Different allegations must be made in the two actions. In false imprisonment, malice and want of probable cause must be alleged; while in malicious prosecution, neither is a necessary averment, but probable cause may go in mitigation of damages, though not in bar of the action.—*Lewin v. Uzuber*, 65 Md. 341, 4 Atl. 285.

#### § 4.— Intent and malice.

##### Cross-References.

Evidence, see post, §§ 24, 31.

Instructions, see post, § 40.

Questions for jury, see post, § 39.

(a) In order to recover for false imprisonment, some improper or sinister motive on defendant's part must be shown.—*Roth v. Shupp*, 94 Md. 55, 50 Atl. 430. [Cited and annotated in 44 L. R. A. (N. S.) 173, on liability of judicial officer to civil action for acts of judicial nature.]

#### § 5.— Act or means of arrest or detention.

##### Cross-References.

Extent of restraint, see post, § 6.

Questions for jury, see post, § 39.

##### Annotation.

Words as affecting false imprisonment, where plaintiff did not accompany the person using them.—7 L. R. A. (N. S.) 576, note.

(a) Any deprivation of the liberty of another without his consent, whether by violence, threats, or otherwise, constitutes an imprisonment, within the meaning of the law.—*Bernheimer Bros. v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

#### § 6.— Extent of restraint.

##### Cross-Reference.

See ante, § 5.

#### § 7.— Illegality of arrest.

##### Cross-References.

Evidence, see post, § 26.

Instructions, see post, § 40.

Persons liable, see post, § 15.

Pleading, see post, § 20.

Questions for jury, see post, § 39.

Debts discharged as affecting liability for false imprisonment, see "Bankruptcy," § 435.

Dependent on jurisdiction of crime committed by Indian, see "Indians," § 38.

Validity of body execution from justice's court, see "Justices of the Peace," § 135.

##### Annotation.

Liability of judicial officer for issuing warrant of arrest.—14 L. R. A. 142; 44 L. R. A. (N. S.) 172, notes.

Detention of one as witness as false imprisonment.—39 L. R. A. (N. S.) 503, note.

Liability of justice of the peace to action for false imprisonment on commitment of witness for contempt.—1 L. R. A. (N. S.) 1143, note.

Liability of an officer making arrest.—51 L. R. A. 193; 42 L. R. A. (N. S.) 69, note.

(a) Under Code 1888, art. 35, § 13 (Code 1904, art. 35, § 14), giving magistrates alone power to commit a witness, the act of a sheriff, at the instance or a railroad conductor, in holding plaintiff to testify against another as a witness, and taking cash bail from him to secure his appearance, constituted false imprisonment.—*New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502. (See Code 1911, art. 35, § 14.)

(b) A plea of justification by a deputy sheriff to an action for false arrest and imprisonment is not demurrable for not averring that plaintiff's arrest for a felony was made under authority of a warrant, as an officer who has reasonable grounds to believe that a felony has been committed is not required to have a warrant to arrest the one suspected.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated in 10 L. R. A. (N. S.) 303, on burden of proof as to authority for arrest in action for false imprisonment.]

(c) In an action for false imprisonment against a party who charged plaintiff with forcibly entering and detaining certain premises, the court instructed that if the jury found that the justice went on the premises, and from evidence there taken determined that plaintiff was guilty of detaining the premises, and that on the next day the warrant was issued, and under it plaintiff was brought before him, and fined, and that plaintiff refused to pay the fine or enter into a recognizance, and in default thereof was committed, then plaintiff could not recover, although such justice declined to give any further hearing, provided the justice acted in good faith, and believed and determined that he was legally authorized to so act. *Held*, that such instruction was proper, as under such facts the justice acquired full jurisdiction, and, further, plaintiff had a remedy by appeal from the justice's judg-

ment.—*Roth v. Shupp*, 94 Md. 55, 50 Atl. 430. [Cited and annotated in 44 L. R. A. (N. S.) 173, on liability of judicial officer to civil action for acts of judicial nature.]

(d) Where a railway conductor, being unable to eject several passengers guilty of disorderly conduct on his train, telegraphs to the station ahead for a police officer, who immediately on the arrival of the train arrested one of such passengers on the conductor's complaint, the arrest is lawful, though without a warrant, and a charge which makes the right of arrest depend on the fact of plaintiff's having been charged by the conductor with being disorderly, instead of as being disorderly in fact, is properly refused.—*Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688. [Cited and annotated in 40 L. R. A. (N. S.) 1023, 1053, on liability of carrier for willful torts of servants to passengers.]

#### § 8.—Illegality of detention after arrest.

##### Cross-References.

Evidence, see post, § 31.

Instructions, see post, § 40.

Pleading, see post, § 20.

Questions for jury, see post, § 39.

(a) Under Balto. City Charter, §§ 630, 631, 757, 760, requiring police officers to carry persons arrested immediately before the nearest police justice, whose sittings are from 9 a. m. until 12 m., and from 2 p. m. until 4 p. m., and declaring that no police officer shall release any person confined for felony or misdemeanor, plaintiff, who was arrested and brought to the police station about 1:15 p. m., and was carried before the magistrate between 3 and 5 the same afternoon, who committed him for a further hearing, was not detained an unreasonable time by the officers, and they were not liable for false imprisonment.—*Brish v. Carter*, 98 Md. 445, 57 Atl. 210. (See Balto. City Rev. Charter, §§ 630, 631, 757, 760.) [Cited and annotated in 42 L. R. A. (N. S.) 71, 75, on liability of officer for making arrest.]

(b) Though an arrest by peace officers without a warrant may be legal, they will be guilty of false imprisonment if they delay an unreasonable length of time in taking the prisoner before a magistrate.—*Brish v. Carter*, 98 Md. 445, 57 Atl. 210. [Cited and annotated, see supra.]

(c) To justify handcuffing a prisoner arrested for felony, it is not necessary that he should be a notoriously bad character, nor that he should be unruly and attempt to escape.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated, see supra, § 7.]

(d) Where a person arrested by a constable voluntarily remains in his custody to prevent the publicity of an examination, the constable is not guilty of false imprisonment for failure to take him before a magistrate within a reasonable time.—*Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. [Cited and annotated in 51 L. R. A. 203, 217, on liability of officer for making arrest; in 51 L. R. A. 471, on partnership liability for torts; in 3 L. R. A. (N. S.) 222, on liability for partner's act in causing false imprisonment.]

(e) Where an officer arresting a person for violating an ordinance, instead of taking him before a justice of the peace to be dealt with according to the statute authorizing the ordinance, and providing for collection of the penalty by suit, or, failing in that, by commitment, puts him to the alternative of paying a certain sum as the penalty, or of going to jail, he is liable for false imprisonment to the extent that he so holds him in custody.—*Twilley v. Perkins*, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 39 Am. St. Rep. 408. [Cited and annotated in 51 L. R. A. 218, on liability of officer for making arrest.]

(f) Where one legally arrested for a violation of an ordinance pays to the officer the penalty prescribed for such violation, rather than be taken before a justice for trial, he has no cause of action against such officer for assault and battery or false imprisonment.—*Twilley v. Perkins*, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 39 Am. St. Rep. 408. [Cited and annotated, see supra.]

#### §§ 9-14. Defenses.

##### Cross-Reference.

Persons liable, see post, § 15.

Probable cause.

Affecting criminal responsibility, see post, § 43.

Affecting legality of arrest in general, see ante, § 7.

Evidence, see post, §§ 22, 26.

Questions for jury, see post, § 39.



## § 15. Persons liable.

### Cross-References.

See ante, § 3; post, §§ 23, 38.  
 Evidence, see post, § 31.  
 Instructions, see post, § 40.  
 Questions for jury, see post, § 39.  
 Liability of police commissioners, see "Municipal Corporations," § 181.  
 Liability of sureties of officer, see "Sheriffs and Constables," § 157.

### Annotation.

Liability of principal for false arrest or false imprisonment by agent authorized to collect a debt.—51 L. R. A. (N. S.) 471, note.

Liability for assisting in unlawful arrest or subsequent detention.—14 L. R. A. (N. S.) 1123, note.

(a) Where a carrier's conductor, acting in the course of his employment, ordered plaintiff's arrest as a witness against another passenger, the carrier was liable for false imprisonment.—*New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502.

(b) A partner in an ordinary mercantile business has no implied power to bind his co-partner by his acts in arresting and searching one suspected of stealing goods in the partnership store, so as to make the co-partner liable with him for false imprisonment.—*Bernheimer Bros. v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

(c) An agent or employee about an ordinary business has no implied authority to arrest and search customers, suspected of stealing, in the store of his principal, so as to make the principal liable for false imprisonment.—*Bernheimer Bros. v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

(d) A board of county commissioners is not liable for the tortious act of a road supervisor in procuring an arrest for failure to work on roads, where it neither authorized nor ratified his act.—*Carter v. Worcester County Com'rs*, 94 Md. 621, 51 Atl. 830.

(e) Where a justice, on the advice of an attorney in an action, refuses to permit a defendant a further hearing, but fines him, in default of the payment of which the defendant is committed, such attorney will not be liable for the imprisonment, where he

acted in good faith and made no attempt to do wrong to the parties.—*Roth v. Shupp*, 94 Md. 55, 50 Atl. 430. [Cited and annotated in 44 L. R. A. (N. S.) 173, on liability of judicial officer to civil action for acts of judicial nature.]

(f) A turnpike company is not liable for false arrest and malicious prosecution of an individual on a charge of defrauding such company of tolls, preferred by a gate keeper, where it appears that such gate keeper was not expressly authorized to cause the arrest, and that the company had not adopted or ratified such act.—*Baltimore & Y. Turnpike Road v. Green*, 86 Md. 161, 37 Atl. 642.

(g) A servant instructed to admit in a church only such persons as have tickets cannot, by directing police officers to arrest one who seeks to enter without a ticket make his master liable for a false arrest made pursuant thereto, as he would not be acting within the apparent scope of his employment.—*Barabasz v. Kabat*, 86 Md. 23, 37 Atl. 720.

(h) The members of a partnership are not liable for the act of one partner in the name of the firm, in directing an unlawful arrest or false imprisonment.—*Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. [Cited and annotated in 51 L. R. A. 203, 217, on liability of officer for making arrest; in 51 L. R. A. 471, on partnership liability for torts; in 3 L. R. A. (N. S.) 222, on liability for partner's act in causing false imprisonment.]

(i) Code 1888, art. 23, §§ 288, 289, provide that the Governor may, upon the request and nomination of a corporation owning any railroad, steamboat, etc., appoint and commission, and remove at pleasure, one or more persons to be policemen, "for the protection of the property of said corporation, \* \* \* and for the preservation of peace and good order on their premises." Section 290 provides that such appointee shall take the oath prescribed by Const. art. 1, § 4, and that, in the county or city where such property is situated, he shall have all the authority of a constable at common law, and of a policeman of Baltimore. By § 292 the corporation is required to pay his compensation. *Held*, one so appointed is a state officer, and in making an arrest he acts in pur-

suance of his powers and duties as such, and therefore the corporation is not liable for a wrongful arrest, though made at the request of one of its officers.—*Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. (See Code 1911, art. 23, §§ 406-408, 410.) [Cited and annotated in 14 L. R. A. 793, on master's liability for false arrest, imprisonment, or malicious prosecution by servant; in 37 L. R. A. 40, on which of two or more is master of person conceded to be servant of one; in 4 L. R. A. (N. S.) 284, on liability for arrest or false imprisonment by servant employed as detective, policeman, or watchman; in 23 L. R. A. (N. S.) 290, 293, on liability of employer for acts of special police officer appointed by public authority.]

(j) An action for false imprisonment lies against a corporation aggregate.—*Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311. [Cited and annotated in 51 L. R. A. (N. S.) 471, on liability for malicious prosecution, arrest, or imprisonment by agent authorized to collect rent; in 14 L. R. A. 795, on master's liability for false arrest, imprisonment, or malicious prosecution by servant.]

#### (B) ACTIONS.

##### Cross-References.

Abatement by pendency of action for malicious prosecution, see "Abatement and Revival," § 8.

Conditions precedent to actions against justices of the peace, see "Justices of the Peace," § 28.

Election of other remedy, see "Election of Remedies," § 3.

Joinder of causes of action, see "Action," §§ 38-60.

#### § 16. Nature and form of remedy.

##### Cross-Reference.

Trespass or case, see ante, § 3; "Action," § 30.

#### § 17. Jurisdiction and venue.

##### Cross-References.

Action against railroad company, see "Railroads," § 22.

Jurisdiction of courts of inferior or limited jurisdiction, see "Courts," § 11.

Jurisdiction of federal court of action by Indian as involving questions arising under laws and treaties of United States, see "Courts," § 284.

Jurisdiction of municipal court, see "Courts," § 188.

Venue of action against officer, see "Venue," § 11.

#### § 18. Time to sue and limitations.

##### Cross-Reference.

Nature of action as affecting limitations, see "Limitation of Actions," § 55.

#### § 19. Parties.

##### Cross-Reference.

Persons liable, see ante, § 15.

#### § 20. Pleading.

##### Cross-References.

See ante, § 7.

Admissions in pleadings, see "Pleading," § 127.

Amendment changing cause of action, see "Pleading," § 237.

Construction of justice's records relating to issuance of body execution, see "Justices of the Peace," § 138.

Cure by amendment, see "Pleading," § 252.

Cure by subsequent pleadings, see "Pleading," § 403.

Election between causes of action, see "Pleading," § 369.

Pleading damages, see "Damages," §§ 141-162.

(a) In an action for false arrest and imprisonment, one of the defendants pleaded that at the time of the arrest he was a deputy sheriff, and had been informed and had reasonable cause to believe that plaintiff had committed an assault on a named female, and consequently arrested him and brought him before a magistrate. *Held*, not to sufficiently set out the facts relied on as a justification.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated in 10 L. R. A. (N. S.) 303, on burden of proof as to authority for arrest in action for false imprisonment.]

(b) Evidence of justification would not be admissible under the general issue.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated, see supra.]

(c) In a suit for false imprisonment, the defendant pleaded that he was sheriff, and arrested the plaintiff by virtue of process. The plaintiff replied that he tendered a bail piece to defendant, which he refused to accept. *Held*, on demurrer, that the replication was faulty.—*Yingling v. Hoppe*, 9 Gill 310.

#### § 21. Evidence.

##### Cross-Reference.

Res gestæ, see "Evidence," §§ 118-128.

## § 22.—Presumptions and burden of proof.

### Annotation.

Burden of proof as to authority for arrest in action for false imprisonment.—10 L. R. A. (N. S.) 303, note.

(a) A deputy sheriff pleading justification for an arrest without a warrant in an action for false arrest and imprisonment has the burden of proving the defense.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated, see supra, § 20.]

## § 23.—Admissibility in general.

### Cross-Reference.

Nature and circumstances of act, see post, § 27.

(a) In an action against a carrier for false arrest and imprisonment by defendant's night officer, defendant's ticket agent at the place where the arrest was made was asked if he knew whether the officer ever made an arrest of any person prior to the time when he arrested plaintiff, acting as an officer of defendant, and within the scope of his employment as such officer. Defendant objected to the question, but the court overruled the objection on the ground that the testimony would not be admitted with reference to the merits of the case, but only to show that defendant had knowledge of the fact that such an act was within the scope of the officer's duty, and the witness answered he had known the officer to make arrests before. Held, that in the absence of an offer to show that the previous arrest was made under similar circumstances and had been ratified or approved by defendant, admission of the evidence was error.—*Philadelphia, B. & W. R. Co. v. Crawford*, 112 Md. 508, 77 Atl. 278. (See *Philadelphia, B. & W. Co. v. Green*, 110 Md. 32, 71 Atl. 986.)

## § 24.—Intent and malice.

## § 25.—Character and condition of parties.

### Annotation.

Evidence of character in action for false imprisonment.—14 L. R. A. (N. S.) 755, note.

## § 26.—Justification.

### Cross-Reference.

Instructions, see post, § 40.

(a) In an action against a sheriff for false imprisonment in removing the plaintiff from

the city to the county jail, it appeared that plaintiff was arrested by the city authorities and confined in the city jail, to await the action of the authorities of K. county; that the warrant of commitment was afterwards, by an indorsement of the justice, transferred to the authorities of B. county; and that defendant thereupon removed the plaintiff to the county jail. Held, that a conversation between the clerk of the city jail and the sheriff, at the time the latter received the plaintiff, but out of plaintiff's presence and hearing, a letter from the warden of the city jail to the state's attorney for B. county, and a letter from the state's attorney for K. county to the warden of the city jail, all bearing upon the transfer, were admissible in evidence on the question of probable cause, as tending to show that the sheriff was acting in the discharge of his official duty under the directions of the state's attorneys for the two counties.—*Blake v. Burke*, 42 Md. 45.

(b) In an action against a sheriff for false imprisonment, it appeared that plaintiff was arrested in the city of B. and imprisoned in the city jail, the warrant of commitment showing that he was held to await the action of the authorities of K. county. The commitment was afterwards indorsed by the justice, "Transferred to B. county authorities," and thereunder defendant, as sheriff of B. county, removed plaintiff from the city to the county jail. Held, that the warrant of commitment, together with its indorsement, was admissible in evidence to show that the plaintiff was legally in defendant's custody.—*Blake v. Burke*, 42 Md. 45.

## § 27.—Nature and circumstances of act.

### Cross-Reference.

See ante, § 23.

(a) In an action by a passenger for false imprisonment, the evidence having shown that at the instance of defendant's conductor he was arrested, and taken from the train at night in a strange town, he could further show that he was taken to jail, where he deposited security for his appearance as a witness against another passenger.—*New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502.

### § 28.—Extent of injury.

#### Cross-References.

See ante, § 23.

Domestic relations of plaintiff, see "Damages," § 170.

Pecuniary condition of defendant, see "Damages," § 181.

### § 29.—Aggravation of damages.

### § 30.—Mitigation of damages.

#### Cross-Reference.

Instructions, see post, § 40.

#### Annotation.

Probable cause of suspicion as mitigating damages for false imprisonment.—45 L. R. A. (N. S.) 64, note.

### § 31.—Weight and sufficiency.

(a) Where, in an action for the false arrest and imprisonment of plaintiff, charged with stealing goods from the store of defendant partners, it appeared that plaintiff was detained and searched by direction of one of the partners, evidence that after the release of plaintiff her husband complained to the other partner of the treatment accorded to the plaintiff, and that such other partner, after making inquiry as to the facts, ordered plaintiff's husband out of the store, was insufficient to prove a concurrence in or ratification by him of the alleged wrongful acts of his co-partner and the employee acting under the latter's direction.—*Bernheimer Bros. v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

(b) Where, in an action for false imprisonment against a board of county commissioners because of plaintiff's arrest under a statute making it a misdemeanor to fail to do road duty, which statute had not gone into effect, it appeared that plaintiff had been arrested on a warrant issued at the instance of the road supervisor, no action of the board relative to the arrest was shown, and the supervisor stated he had no instructions to arrest plaintiff, but acted under the blank notices, report, and printed law furnished him by the clerk of the board, the evidence did not show defendants connected with the imprisonment.—*Carter v. Worcester County Com'rs*, 94 Md. 621, 51 Atl. 830.

(c) In an action for malicious arrest for perjury, the fact that the defendant had dismissed the charge of perjury against the

plaintiff held not in itself to be sufficient evidence to prove that he had not probable cause for instituting the prosecution before the magistrate.—*Flickinger v. Wagner*, 46 Md. 580. [Cited and annotated in 64 L. R. A. 481, 483, on acquittal or discharge as evidence of want of probable cause; in 3 L. R. A. (N. S.) 929, on discharge of accused by examining magistrate as evidence of want of probable cause; in 23 L. R. A. (N. S.) 392, on right of one to testify as to his intent.]

### § 32. Damages.

#### Cross-References.

Instructions, see post, § 40.

Questions for jury, see post, § 39.

Mental suffering from injury to the person of another, see "Damages," § 51.

Speculative damages, see "Damages," § 37.

### § 33.—Measure in general.

(a) In an action against a carrier by a passenger for false arrest and imprisonment, an instruction that, if the jury found for plaintiff, they should take into consideration, in assessing damages, the nature of the force applied to plaintiff, his sense of indignity and humiliation, and award him such sum as under all the circumstances of the case the jury may deem a fair and reasonable compensation therefor, correctly states the measure of damages.—*Philadelphia, B. & W. R. Co. v. Crawford*, 112 Md. 508, 77 Atl. 278.

### § 34.—Elements of compensation.

#### Cross-References.

Instructions, see post, § 40.

Questions for jury, see post, § 39.

#### Annotation.

Condition of place of imprisonment and treatment while in custody as elements of damages in action of malicious prosecution or false imprisonment.—33 L. R. A. (N. S.) 291, note.

Release upon defendant's own recognizance or on bail as affecting damages recoverable in action for false imprisonment.—22 L. R. A. (N. S.) 1196, note.

### § 35.—Exemplary.

#### Cross-Reference.

Instructions, see post, § 40.

(a) In an action for the arrest and false imprisonment of plaintiff, charged with

stealing goods while in defendants' store, an instruction authorizing the awarding of such damages as would not only compensate plaintiff for the wrong and indignity sustained by her in consequence of defendants' wrongful acts, but also exemplary or punitive damages, following an instruction that any deprivation of the liberty of another without his consent constituted an imprisonment within the meaning of the law, was erroneous, in not requiring a finding, as a condition of awarding punitive damages, that the alleged wrongs to plaintiff were inflicted maliciously or wantonly, or with circumstances of contumely and indignity.—*Bernheimer Bros. v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

### § 36.—Amount awarded.

#### Cross-References.

Instructions, see post, § 40.

Arrest caused by carrier's employees, see "Carriers," § 319.

### § 37. Trial.

### § 38.—Conduct in general.

### § 39.—Questions for-jury.

(a) Evidence held to require the submission of a question of false arrest and imprisonment of plaintiff to the jury.—*New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502.

(b) In an action against a railroad for false arrest and imprisonment, whether the person making the arrest was acting in the exercise of his powers as a special police officer, or within the scope of his duty as an employee of the railroad, held, under the evidence, to be a question for the jury.—*Baltimore, C. & A. Ry. Co. v. Twilley*, 106 Md. 445, 67 Atl. 265.

(c) What constitutes reasonable grounds for an arrest by a peace officer is for the court, while the facts on which it is based are for the jury.—*Briah v. Carter*, 98 Md. 445, 57 Atl. 210. [Cited and annotated in 42 L. R. A. (N. S.) 71, 75, on liability of officer for making arrest.]

(d) It is for the court to determine whether the facts justified an officer in making an arrest for a felony without a warrant.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated in 10 L. R. A. (N. S.)

303, on burden of proof as to authority for arrest in action for false imprisonment.]

(e) Whether certain facts afford reasonable grounds of suspicion, so as to justify an arrest by a constable without a warrant, is for the court.—*Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089. [Cited and annotated in 51 L. R. A. 203, 217, on liability of officer for making arrest; in 51 L. R. A. 471, on partnership liability for torts; in 3 L. R. A. (N. S.) 222, on liability for partner's act in causing false imprisonment.]

(f) In an action against a bank for false imprisonment, the officer making the arrest said he had no orders from defendant, but was told by his superior to go with defendant's collector to plaintiff's place of business, and see that no violence was committed. Defendant's collector said the cashier gave him a draft to present, told him not to have any trouble with plaintiff, and that an officer would go along to protect him. The cashier swore he gave no orders to arrest plaintiff; Apprehending the collector might be assaulted by plaintiff, he had requested an officer to protect him. The officer arrested plaintiff at the request of the collector. Held, not to authorize an instruction leaving it to the jury to determine whether defendant or its cashier had authorized the arrest.—*National Bank of Commerce v. Baker*, 77 Md. 462, 26 Atl. 867. [Cited and annotated in 27 L. R. A. 196, on civil liability for wrongful or negligent act of servant or agent towards one not sustaining contractual relation.]

### § 40.—Instructions.

#### Cross-References.

See ante, § 7.

Assumption of facts by judge, see "Trial," § 191.

Instructions as to mode of estimating damages, see "Damages," § 216.

Submission of matters of law, see "Trial," § 199.

(a) False imprisonment of a passenger constitutes "personal injury," so that, in an action for imprisonment, a prayer, directing that it was the carrier's duty to use all reasonable care to protect plaintiff from personal injury and insult, was not abstract.—*New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502.

(b) While plaintiff and a companion were on ground in the control of defendant carrier, and were intending to take passage on its train, they met a policeman, and after some words between the policeman and plaintiff's companion the policeman took his companion into custody, and B., who was defendant's night officer, approaching at that time arrested plaintiff. In an action for such arrest defendant requested an instruction that if the jury find at the time B. came up to where the policeman was engaging in an altercation with plaintiff and his companion, they were on a city street, and that plaintiff's companion was taken into custody while on said street, and that plaintiff undertook to escape arrest or to go for assistance, or for any other purpose, and was taken into custody by B. at the request of the policeman after plaintiff had gone from grounds controlled by defendant, the defendant would not be responsible for the act of B., although he was an employee of defendant. The court refused the request, and instructed that if the jury find from the evidence that at the time B. first undertook to arrest plaintiff he was in the public highway, and that the actual arrest was made by him on the grounds controlled by defendant in the course of the pursuit of plaintiff begun by B. on the public highway, and not in the course of the performance of his duty as an employee of defendant, the jury should find for defendant. *Held*, that the requested instruction was defective in not requiring the jury to find that plaintiff had entered defendant's property for the purpose of escaping arrest, or had been arrested in a pursuit begun outside of the property, and in not requiring the jury to find that the person who arrested plaintiff's companion was a public officer; and there was no error in substituting the instruction given for the one requested.—*Philadelphia, B. & W. R. Co. v. Crawford*, 112 Md. 508, 77 Atl. 278.

(c) In an action against a carrier for false arrest and imprisonment, in which there was evidence tending to prove that plaintiff while on defendant's station grounds for the purpose of taking passage on a train was arrested by defendant's night officer, an instruction that, if plaintiff was on one of the approaches to defendant's station with the

intention of taking passage on one of defendant's trains, he was then a passenger and defendant was bound to exercise all reasonable care to protect him from insult, injury, and abuse, and if plaintiff, while behaving in an orderly manner, was, without reasonable cause, imprisoned by defendant's officer acting within the scope of his employment, the verdict should be for plaintiff, was proper.—*Philadelphia, B. & W. R. Co. v. Crawford*, 112 Md. 508, 77 Atl. 278.

(d) In an action for arrest and false imprisonment, an instruction requiring the jury to find, as a prerequisite to plaintiff's recovery, her arrest by an employee in defendants' store, and her detention and search by him in the presence and by the direction of one of defendant partners, as the agent and servant of the defendants, and within the scope of his authority, and in charge of the department of the store from which she was charged with stealing certain goods, but failing to mention the other partner, or requiring a concurrence in or ratification by him of the act complained of, or instructing as to what state of facts would justify the conclusion that such employee acted within the scope of his authority as agent of defendants in his conduct towards plaintiff, was error.—*Bernheimer Bros v. Becker*, 102 Md. 250, 62 Atl. 526, 3 L. R. A. (N. S.) 221, 111 Am. St. Rep. 356.

(e) Defendant, a deputy sheriff, in an action for false arrest and imprisonment, proved as a justification for arresting plaintiff without a warrant that his belief that a felony had been committed was founded on positive information direct from the victim, and that his suspicion that plaintiff was the guilty party was founded on facts stated by the victim. *Held*, that the court properly rejected a prayer that would have enabled the jury to find that the arrest was founded on a suspicion engendered in defendant's mind by suspicion in the victim's mind.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated in 10 L. R. A. (N. S.) 303, on burden of proof as to authority for arrest in action for false imprisonment.]

(f) Where plaintiff's prayers in an action for false arrest made no discrimination between the liability of the defendants—one being an officer, and the other a private per-

son assisting him—the trial court was justified in rejecting them.—*Edger v. Burke*, 96 Md. 715, 54 Atl. 986. [Cited and annotated, see supra.]

(g) A requested charge in an action for false imprisonment, requiring the jury to find what was a void warrant, judgment, or commitment, which was not applied to any of the facts of the case, may be properly rejected.—*Roth v. Shupp*, 94 Md. 55, 50 Atl. 430. [Cited and annotated in 44 L. R. A. (N. S.) 173, on liability of judicial officer to civil action for acts of judicial nature.]

#### § 41.—Verdict and findings.

##### *Cross-Reference.*

Verdict on several counts or issues, see "Trial," § 330.

#### § 42. Judgment and review.

##### *Cross-References.*

Discharge of liability by discharge of bankruptcy, see "Bankruptcy," § 424.  
Effect of judgment as bar of action for continued imprisonment, see "Judgment," § 606.

### II. CRIMINAL RESPONSIBILITY.

##### *Cross-Reference.*

Jurisdiction, see "Criminal Law," § 95.

#### § 43. Offenses.

#### § 44. Prosecution and punishment.

### FALSE ISSUE.

##### *Cross-Reference.*

Pleading contributory negligence of servant, see "Master and Servant," § 262.

## FALSE PERSONATION.

### *Scope-Note.*

[INCLUDES deception by assuming and acting in the character of another person, or by assuming to be a public officer, or a person having any special authority or privilege, and acting in such assumed capacity; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES false personation as an element in other offenses (see "*False Pretenses*"; "*Forgery*"; "*Larceny*").

[For complete list of matters excluded, see cross-references, post.]

### *Analysis.*

- § 1. Nature of offenses in general.
- § 2. Elements of offenses.
- § 3. Indictment or information.
- § 4. — Requisites and sufficiency in general.
- § 5. — Issues, proof, and variance.
- § 6. Evidence.

### *Cross-References.*

Conflicting presumptions, see "Criminal Law," § 325.

Duplicity, see "Indictment and Information," § 125.

Larceny by false personations, see "Larceny," § 14.

Obtaining money or property by falsely personating officer or another person, see "False Pretenses," § 19.

Other offenses, see "Criminal Law," § 369.

Relevancy of evidence, see "Criminal Law," § 338.

Robbery by false personation, see "Robbery," §§ 7, 23.

State laws as rules of decision in federal courts, see "Courts," § 359.

### FALSE PLEADING.\*

##### *Cross-Reference.*

See "Pleading," §§ 25, 362.

\*Annotation: Words and Phrases, same title.









